THE ANTI-DUMPING LAW AND PRACTICE OF CHINA

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MASTER OF PHILOSOPHY

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DECLARATION

I declare that the dissertation entitled **"THE ANTI-DUMPING LAW AND PRACTICE OF CHINA"** submitted by me in partial fulfillment of the requirements for the award of the degree of **MASTER OF PHILOSOPHY** of Jawaharlal Nehru University is my own work. The dissertation has not been submitted for any other degree of this University or any other university.

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CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

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ABBREVIATION

ADA	Anti-Dumping Agreement (WTO)
ADR	Anti-Dumping Regulations (China)
ADASR	Anti-Dumping and Anti-Subsidy Regulations (China)
BOFT	Bureau of Fair Trade for Imports & Exports (China)
CFL-i	Integrated Electronic Compact Fluorescent Lamps
DDA	Doha Development Agenda
DOC	Department of Commerce (the U.S.)
DSM	Dispute Settlement Mechanism
DSU	Disputes Settlement Understanding
EC	European Community
ELC	European Lighting Companies Federation
EU	European Union
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
IBII	Investigation Bureau of Industry Injury (China)
IIDC	Injury Investigation and Determination Committee (China)
ITO	International Trade Organization
ME	Market Economy
MES	Market Economy Status
MET	Market Economy Treatment
MFN	Most Favoured Nation
MNEs	Multinational Enterprises
MOFCOM	Ministry of Commerce (China)
MOFTEC	Ministry of Foreign Trade and Economic Cooperation (China)
MTNs	Multinational Trade Negotiations
NIEs	Newly-Industrializing Economies
NME	Non-market Economy

NPC	National People's Congress (China)
SETC	State Economic and Trade Commission (China)
SOEs	State Owned Enterprises
U.S.	United States
WTO	World Trade Organization

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CHAPTER I

INTRODUCTION

CHAPTER I

INTRODUCTION

This chapter provides an exposition of the context and rationale of the study. Moreover, the importance, scope, research problems, hypotheses, methodology and an outline of the structure of the study have been provided.

I.1 The Concept and Rationale of Dumping

Dumping is defined in the Oxford Dictionary as "sale of goods in foreign market at low price". The popular definition of dumping embraces any sales by a producer or merchant at low prices to dispose of surplus. As a technical term, dumping in the law of international trade is quite different from the layperson's understanding. In the language and law of international trade, the definition of dumping is more limited and technical.

Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) defines dumping as offering a product for sale in export markets at lesser price below its normal value, i.e. at less than the price at which the product in question is sold when destined for consumption in the exporting country.

According to the definition in the Agreement on Implementation of Article VI of GATT 1994 (WTO Anti-Dumping Agreement or WTO ADA), dumping occurs if a product is sold for export at a price below its normal value, i.e. when "the export price of a product exported from one country to another is less than the comparable price for the like product when destined for consumption in the exporting country".[1] The difference between the export price and normal value is "the margin of dumping".

Neither Article VI of the GATT nor the WTO ADA prohibits dumping *per se*. Dumping is condemned only if it causes or threatens to cause material injury to a domestic industry in the importing country or materially retards the establishment of a domestic industry.

However, the concept of dumping is far more complex and encompasses a variety of

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[1] Article 2, WTO ADA.

factors, including the obligation of the investigating authorities to conduct a fair comparison while assessing the price discrimination. Anti-dumping provisions enable the governments to take defensive actions against unfair trade practices of an exporting country. But the authorities need to be cautious because if the defensive measure exceeds their purpose and intent, it would become a protectionist device in its own right. The dividing line between what is fair and unfair and to distinguish as to what is defensive or protectionist retaliation in the importing countries is not easy (Varshney 2007: 3). As a result, economists, legal professionals, and practitioners have long questioned the rationale of anti-dumping measures. The rationale of anti-dumping measures has become one of the most controversial issues in the international arena.

The supporters of anti-dumping measures allege that dumping distorts the domestic market and causes them financial loss and argue for the protection of home industry against unfair competition. This is obliviously influenced by Jacob Viner, the American economist who first developed the rationale for anti-dumping legislation. Viner defined dumping as "price discrimination between national markets" (Viner 1923: 3). In the world's first book on "dumping", Viner has classified dumping into ten types and three categories according to motive and continuity respectively (Viner 1923: 23-24). Specifically, the three categories include sporadic dumping, intermittent dumping, and continuous dumping (Viner 1923: 23). Viner argued that, as a commercial activity, dumping could take place as a result of many different reasons, such as seasonal sales or predatory pricing (Viner 1923: 26). He regarded anti-dumping duty as a means to protect the feeble industries of the importing country, suggesting that where the enterprises which had demonstrated good performance and could withstand foreign competition faced by the unfair and temporary competition from imported products, the importing country had the right to offer some protection measures (Viner 1923: 146).

Moreover, the supporters of anti-dumping measures stressed that, in the long run, dumping will necessarily end in raising prices of the products and as a result, the interests of consumers in the importing country will be affected. The basis of such theory is the assumption that the purpose of dumping is to bring about market monopoly of the exporting enterprises which may force the enterprises of the importing country to be shut down. Such assumption, however, does not take into

account the market restraints of the importing country. Indeed, it is based on a subjective assumption that, once closure of the enterprises of an importing country occurs, they cannot divert their resources to other sectors and compete with foreign enterprises (Guiguo Wang 2005: 742). Practice shows that, in the United States which has the longest history of anti-dumping, there has never been a case in which foreign dumped imports have led to the closure of an enterprise (Baier 1965: 409).

However, the exponents of free trade want to ignore dumping either as one of effects of the free cross-border trade in which plus points outweigh the small negative effects, or support it on the ground that consumers are benefited by getting goods at the cheapest possible price (Sheela Rai 2004: 3). Moreover, some argue that the current anti-dumping laws are based on a number of faulty premises. Therefore, the potential for abuse of anti-dumping measures is great and growing and the anti-dumping laws will become the biggest weapon of protectionists as tariffs and quotas fade away. Some even advocate to outright repeal the anti-dumping laws by the WTO, but it seems to be unlikely in the near future (Yoon 1999: 215).

Although academics have, as usual, different views on the effect of dumping, most of them support the imposition of anti-dumping measures should be confined to temporary dumping. However, anti-dumping practices show that almost no country imposes anti-dumping duties based on the temporary nature of dumping. On the contrary, most of anti-dumping measures are applied on the lasting dumping instead of temporary dumping. The reason is that only when dumping is persistent will it pose a pressure on the enterprises of the importing country. Moreover, the application of anti-dumping measures is, in most cases, based on the injury suffered by domestic industry. Unless dumping has persisted for a certain period of time, it is difficult to prove the causal link between the dumping of imports and the injury to domestic industry (Guiguo Wang 2005: 743).

I.2 The Importance of the Study

According to the WTO Statistics on Anti-Dumping, the People's Republic of China (hereinafter referred as "China") has regularly emerged as a prime victim of anti-dumping action since 1995. From 1979 to the end of 2006, 536 anti-dumping cases have been initiated against Chinese exports. As a result, the cost of

anti-dumping activities against Chinese exports is quite high. Statistics from China's Ministry of Commerce (MOFCOM) show that, between January 1979 and September 2004, more than 4,000 Chinese products were affected by anti-dumping measures, involving an estimated trade value of US$19.1 billion (Xinhua News Net 2004). As the trend continues to rise, anti-dumping measures against China have posed a potentially serious threat to the growth of its export. China shares the concern about fairness in the application of anti-dumping measures, all the more since it is particularly exposed in this regard (Magarinos et al. 2002: 181). It is urgent to analyze the major factors contributing to China's position as the number one target of anti-dumping investigations over the past few years and explore the approaches to defend it against anti-dumping investigations initiated by its trade partners.

Moreover, statistics from the MOFCOM show that since 1997 to the end of 2006, China totaling launched 47 anti-dumping investigations against other countries. After it obtained access to the WTO in 2001, China has exposed itself to challenge from other Members concerning its compliance with obligations under the ADA. The proposed examination on account of WTO consistency of China's main dumping-related provisions will help China to further improve its anti-dumping legal system and practice and make them consistent with the WTO rules.

Based on the above-mentioned, it seems to be necessary and significant to undertake a study of the anti-dumping law, particularly from the perspective of China.

I.3 The Scope of the Study

Given the wide coverage of dumping research, the emphasis of the present study would only be laid in the context of China's practice of international law on anti-dumping, such as China's legal and institutional framework on anti-dumping, China's practice on anti-dumping measures and WTO consistency of China's legal system on anti-dumping. Several typical Chinese cases would be scrutinized for the evaluation of China's practice on anti-dumping.

The international legal framework on anti-dumping would be briefly reviewed. The legislation and practices of other countries/organization on anti-dumping, such as the United States, the European Union would not be involved in the proposed work in

greater detail, although their references will be made when necessary.

I.4 The Research Problems and Issues of the Study

The research problems and issues of the study would focus on the following aspects:

First, to scrutinize the provisions of the ADA and identify its inherent weakness and loopholes.

Secondly, to scrutinize and analyze the WTO consistency of China's legal system on anti-dumping.

Thirdly, to comparatively analyze China's policy to anti-dumping before and after its accession to the WTO in 2001 and accordingly to identify areas as to which of the China's anti-dumping laws need further improvement to be consistent with WTO rules.

Fourthly, to scrutinize the reasons and causes of the anti-dumping measures against China by developed countries as well as some developing countries.

Fifthly, to make suggestions and provide corresponding countermeasures in response to the anti-dumping measures against China.

I.5 Hypotheses

The study is based on the following hypotheses:

First, existing international legal regime on dumping has some inherent weakness and loopholes and would be inadequate to effectively prevent WTO Members from the use and abuse of the anti-dumping instrument. ADA should be further clarified and improved in the future WTO negotiations.

Secondly, WTO consistency of China's legal system on anti-dumping is crucial to sustain the interests of other Members as well as the stability and growth of world economy. WTO consistency cannot be achieved without understanding the inherent weakness and loopholes in ADA. Other Members' experiences would also be used for reference to suggest improvement in the Chinese system on anti-dumping.

Thirdly, feasible countermeasures are necessary against the abuse of anti-dumping measures.

I.6 The Methodology of the Study

The following research methods have been adopted in the course of the study:

First, relying on empirical, quite a few statistics and data from the WTO, the MOFCOM of China and some international research institutions have been used to account for China's practice on anti-dumping, such as China's special situation as world number one target of anti-dumping measure as well as a new user of international anti-dumping club. In addition, some typical anti-dumping cases relating to China have been examined. All such statistics and cases provide a basis to support the theoretic research and final conclusion in the study.

Secondly, comparative method has been adopted to study WTO ADA provisions and China's anti-dumping regime. The purpose is not only to draw lessons from international perspective with specific reference to China but also encourage China's anti-dumping regime and practice consistent with WTO rules.

Thirdly, critical analysis method has been adopted. Owing to different understanding of China's legal and cultural background, there exist different viewpoints on China's legislation and practice on anti-dumping. The study makes efforts to analyze the prevailing viewpoints not only from scholars of western countries but also from China. The last chapter provides some suggestions on countermeasures against the possibility of abuse of anti-dumping measures against China.

I.7 The Structure of the Study

The study consists of seven chapters, including Introduction and Conclusion.

Chapter I - Introduction

Chapter II – Evolution of the International Law on Anti-Dumping reviews the history and evolution as well as the significance of international legal framework on anti-dumping from the angles of pre-GATT, Article VI of the GATT, the

Anti-Dumping Code 1967, the Anti-Dumping Code 1979, and the WTO ADA. This chapter attempts to provide a global background and perspective for China's legislation and practice on anti-dumping.

Chapter III - China's Legal Framework on Anti-Dumping reviews the manner in which the provisions of the WTO ADA are made part of China's domestic legal system and outline the evolution and main features of China's law, administrative regulations and implementing rules on anti-dumping.

Chapter IV - China's Institutional Framework on Anti-Dumping indicates the evolution and main mandates of the Chinese authorities concerning the anti-dumping practice, especially focusing on the MOFCOM and its two departments, i.e. the Bureau of Fair Trade for Imports & Exports (BOFT), and the Investigation Bureau of Industry Injury (IBII).

Chapter V - China's Practice on Anti-Dumping looks at China's practice on anti-dumping before and after its accession to the WTO. The trends and features of implementations on anti-dumping measures by China, the anti-dumping measures against China, the reasons and causes of the anti-dumping measures against China and China's position on anti-dumping will also be critically analyzed in this chapter.

Chapter VI - WTO Consistency of China's Legal System on Anti-Dumping analyzes WTO consistency of the main provisions, e.g., the provisions relating to the determination of dumping, the determination of injury and related procedural issues. The chapter will also analyze those Chinese legal provisions which need further amendments.

Chapter VII – Conclusion

CHAPTER II

EVOLUTION OF THE INTERNATIONAL LEGAL FRAMEWORK ON ANTI-DUMPING

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This chapter provides a brief introduction of evolution of the international legal framework on anti-dumping, ranging from pre-GATT, Article VI of the GATT, Anti-Dumping Code 1967, Anti-Dumping Code 1979 and the WTO ADA to the revisions of the ADA in Doha Round Negations.

II.1 Pre-GATT

The practice of dumping has been known from medieval times and was documented by Adam Smith in 1776 (Sheela Rai 2004: 1). At the end of the 19th century and the beginning of the 20th century, the European countries including the UK and the Netherlands, concerned with the prevalent dumped sugar, signed an international agreement on anti-dumping in 1902. During its 18-year span, ten European countries joined the British-Dutch agreement but its effect was very limited (Guiguo Wang 2005: 744).

Due to lack of international regulatory system in the early twentieth century, developed countries began to restrict imports of dumped products by enacting domestic legislation.

The first anti-dumping legal system was established in Canada by the Customs Act of 1904. It is regarded as the model on which much of the subsequent national anti-dumping legislation was based (Richard Dale 1980: 12). New Zealand, Australia, South Africa and the United States enacted anti-dumping legislation in 1905, 1906, 1914 and 1916 respectively. Noticeably, the U.S. Emergency Tariff Act 1921 (also called Anti-dumping Act 1921) provided the model for Article VI of the GATT, which was the core international provision on anti-dumping.[2] Some of these laws restricted dumped products through import procedures while others levied anti-dumping duties which were not conditional upon the existence of injury to the domestic industry of

[2] Emergency Tariff Act of 1921, c. 14, 42 Stat. 9, 10.

the importing country (Guiguo Wang 2005: 745).

Although countries like Canada, New Zealand, etc., have enacted national anti-dumping legislation, the methods used to assess dumping, injury and investigating procedures have differed substantially. This divergence, and the growing realization that anti-dumping laws, as applied, had the potential to become significant barriers to international trade, created international concern on dumping as early as the 1920s, a mere 20 years after the passage of the first national anti-dumping law by Canada in 1904 (Vermulst 2005: 2).

During the time of the League of Nations in the 1920s and by the time of the World Economic Conference in 1933, countries had deep fear that their trading partners would use anti-dumping measure as an excuse to purse the policy of trade protectionism. As a result, anti-dumping laws in the international community had a strong flavour of protectionism. At the Genoa Conference convened in 1922,[3] the Secretary-General of the League of Nations pointed out that "questions regarding dumping and differential prices being among those which concern most closely the equitable treatment of commerce, it is desirable that the League of Nations should undertake at an early date an inquiry on the subject" (Guiguo Wang 2005: 745). It was also at the Genoa Conference that the participants decided to request the League of Nations to examine the issues relating to dumping and price. The result of the investigation of the League of Nations was Jacob Viner's Memorandum on Dumping. The League of Nations, however, did not pursue the matter any further. Then the international cooperation on anti-dumping came to a halt with the outbreak of the Second World War (Guiguo Wang 2005: 745).

It was not until the end of the Second World War that the international community began to re-examine the anti-dumping issues. In November 1945, at the completion of the preparation for the International Trade Organization (ITO), the United States suggested the adoption of an international framework on anti-dumping to be based on the U.S. Anti-Dumping Act of 1921. The suggestion of the United States gained

[3] The Genoa Conference was held in Genoa, Italy in 1922 from 10th April to 19th May. At this conference, the representatives of 34 countries convened to speak about monetary economics in the wake of World War I. The purpose was to formulate strategies to rebuild central and eastern Europe after the war, and also to negotiate a relationship between European capitalist economies, and the new Russian Communist economy.

support of other countries. When negotiating the ITO Charter, all the parties condemned the practice of dumping and suggested that the purpose of an international framework was not only on how to prohibit the imposition of anti-dumping duties, but also on how to restrict the abuse of anti-dumping legislation. Nevertheless, the international community at that time did not fully understand the possible impact of anti-dumping legislation on international trade, thus there was no effort to define precisely what a normal use was and what an abuse of anti-dumping legislation was (Guiguo Wang 2005: 746).

II.2 Article VI of the GATT

It was not until 1947, however, that binding international rules were developed. Such rules were enshrined in Article VI of the GATT, which was the first international treaty to address dumping and anti-dumping issues through a multilateral mechanism.

The significance of Article VI is profound. Recognized as the "enabling provision" (Czako 2003:2), Article VI established the framework and basic provisions for the law of dumping, which has remained unchanged for decades. In the successive anti-dumping codes or agreements, concluded during the Kennedy and Tokyo rounds, the basic definition of dumping has been refined and elaborated somewhat, but not essentially altered (Lowenfeld 2002: 243). Today Article VI is still the core international rule regarding dumping (Jackson 1992: 226). It accepts the proposition that dumping is unfair trade, defines the terms, and commits the determination of dumping to authorities of the importing country. Further, Article VI states that the remedy against dumping is an anti-dumping duty, which is to be imposed only upon a finding of injury caused by dumped imports.

However, Article VI was far from adequate for establishing a regulatory framework by which the problems relating to anti-dumping could be resolved, as there was no specific provisions on calculating dumping nor standard for determining the injury or threat of injury caused by the dumped imports to the domestic industry of the importing country (Guiguo Wang 2005: 747). Therefore, Article VI left a great deal to interpretation by individual countries.

II.3 Anti-Dumping Code 1967

As time passed, some countries began to feel that other countries, in applying their anti-dumping laws, were doing it in such a way as to raise a new barrier to trade. Some believed that anti-dumping procedures, such as delay, or certain calculations of dumping margins, certain applications of the injury test, etc., were causing restrictions and distortions on international trade flows, sometimes by creating a period of risk and uncertainty to trades in a particular product. Thus, during the Kennedy Round of trade negotiations (1962-1967), the GATT Contracting Parties negotiated an Anti-Dumping Code 1967. The Code reflected the desire to limit anti-dumping duty practices and procedures of governments which were damaging international trade (Jackson 1992: 226).

As the first of the codes negotiated under the auspices of GATT, the Anti-Dumping Code 1967 contained provisions concerning the determination of dumping,[4] determination of injury,[5] definition of industry,[6] initiation and conduct of investigations,[7] evidence,[8] price undertakings,[9] imposition and collection of anti-dumping duties,[10] duration of anti-dumping duties,[11] and provisional measures,[12] plus a general article obligating each party to the agreement to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the Code.[13] Further, the Code also established a Committee on Anti-Dumping Practices to deal with disputes of the Contracting Parties relating to the enforcement of their anti-dumping legislation as well as on matters of how to improve the GATT anti-dumping system (Guiguo Wang 2005: 751).

II.4 Anti-Dumping Code 1979

In the Tokyo Round Negotiations (1973-1979), the 1967 Code was revised to make it

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[4] Article 2 of Anti-Dumping Code 1967.
[5] Article 3 of Anti-Dumping Code 1967.
[6] Article 4 of Anti-Dumping Code 1967.
[7] Article 5 of Anti-Dumping Code 1967.
[8] Article 6 of Anti-Dumping Code 1967.
[9] Article 7 of Anti-Dumping Code 1967.
[10] Article 8 of Anti-Dumping Code 1967.
[11] Article 9 of Anti-Dumping Code 1967.
[12] Article 10 of Anti-Dumping Code 1967.
[13] Article 14 of Anti-Dumping Code 1967.

parallel to the Subsidies Code. The Committee on Anti-Dumping Practices became a forum for amending the Code, by modifying provisions that had proven unclear and by making provisions for issues not dealt with in the 1967 Code (GATT 1977). It also incorporated a number of provisions of the Agreement on Subsidies and Countervailing Duties. The provisions relating to injury and other matters were directly copied from the Agreement on Subsidies and Countervailing Duties. The Tokyo Round Code rectified, to certain extent, the weaknesses of Article VI of the GATT and clarified and made specific provisions on many aspects of dumping and anti-dumping (Guiguo Wang 2005: 753). The Tokyo Round Code also made it somewhat easier for a domestic petitioner to establish its case in favour of imposition of anti-dumping duty.[14]

However, the Codes developed during the Kennedy and Tokyo Rounds were not binding on all GATT Contracting Parties. Only the interested countries were to be signatories to these provisions.

II.5 The Agreement on Implementation of Article VI of GATT 1994 (WTO ADA)

When trade negotiations took place in the Kennedy and Tokyo Rounds, the negotiators thought that it was necessary to conclude an additional agreement on anti-dumping issues to clarify the meanings of some of the key concepts of the GATT and to provide practical guides for the enforcers of anti-dumping legislation of the Contracting Parties and for exports whose products may be subject to anti-dumping duty. When the Uruguay Round began in 1986, dumping was not mentioned in the agenda. By the closing days of the Uruguay Round, intricate issues of dumping law comprehensible only to the experts had become subjects of major contention, threatening at times the overall success of the Uruguay Round. (Horlick and Shea: 1995: 5).

As one important result of the Uruguay Round (1986-1994), the ADA adopted the overall structure of the Tokyo Round Code. Under the ADA, a Member country can

[14] The provision in the 1967 Code that "a determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are demonstrably the principal cause of material injury" was replaced by the footnotes of 1979 Code Art. 3 (4), which states that: "It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Code. There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports."

impose anti-dumping duties against the dumped goods to the value of the dumping margin. There must be a proof of "dumped imports", "material injury" to a domestic industry, and a causal link between the two, in order to prove an anti-dumping case.[15] The anti-dumping duty to be imposed on the dumped product should be no more than the dumping margin. According to the ADA, normal value refers to the comparable price in the exporting country.[16] If it does not apply, normal value could be drawn from export price to a third country, or a price constructed by the "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits."[17] There are three possible outcomes of an investigation. Definitive measure, as one of the outcomes, normally leads to an anti-dumping duty. Termination, also one of the outcomes, occurs when any of the three mentioned essentials fails to be proved or the case is withdrawn by the complainant. Price undertaking, the third outcome, is agreed upon by the exporter and authorities to revise the exporting prices or to cease exports to the area, rather than imposition of anti-dumping duties.[18]

The ADA contains detailed procedural rules, which have to be observed in conducting investigations, as well as substantive rules regarding the methodologies to be applied in calculating the dumping margin, determining whether 'injury' exists, and in establishing whether a 'causal link' exists between the dumping and the injury.

On the other hand, under the principle of one single undertaking adopted at the Uruguay Round, no WTO Member may make any reservation to the ADA. Moreover, each Member "shall take all necessary steps, of a general or particular character, to ensure... the conformity of its laws, regulations and administrative procedures with the provisions"[19] of the ADA. The requirement of the enforcement by WTO Members makes the ADA much more effective than Article VI of the GATT, although the ADA must be applied in conjunction with Article VI of the GATT (Guiguo Wang 2005: 765).

The ADA presents the rules and procedures of anti-dumping investigations for its

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[15] Article 7, WTO ADA.
[16] Article 2, WTO ADA.
[17] Article 2, WTO ADA.
[18] For provisions of the three outcomes, see Article 7, 8, and 9 of WTO ADA. The statistics on definitive measures compiled by the WTO include both anti-dumping duties and undertakings.
[19] See Article 18.4 of WTO ADA.

Member countries to incorporate them into their national laws. Before the Uruguay Round, only about 40 countries had anti-dumping provisions in their domestic laws. After the Uruguay Round, more than 120 countries agreed to adopt and enforce the ADA (Yoon 1999: 208).

II.6 The Revisions of the ADA in Doha Round Negotiations

At the WTO Ministerial Conference in November 2001 in Doha, WTO Member countries launched a new round of trade negotiations known as the Doha Development Agenda (DDA). In the framework of the DDA, WTO Members are once again negotiating about possible revisions of the ADA.

Paragraph 28 of the Doha Ministerial Declaration clearly provides the negotiating mandate for the process of revisions,[20] which reflects the result of a carefully drafted compromise between two factions. On the one hand, negotiations are to be "aimed at clarifying and improving disciplines", reflecting the desire of victim (including some developing) countries. On the other, such negotiations will have to "preserve the basic concepts, principles and effectiveness of these Agreements" reflecting the concerns of other WTO Members that the instrument remains an effective tool against dumped goods.

Then, in Appendix D of the Hong Kong Ministerial Declaration issued on 18th December 2005, WTO Members reaffirmed that "achievement of substantial results on all aspects of the Rules mandate" (WTO 2001) is important for the further development of the rules-based multilateral trading system. The document recognized that negotiations, especially on anti-dumping procedures, have intensified and deepened and that "participants are demonstrating a high level of constructive engagement" (WTO 2001). The Group was directed "to intensify and accelerate the negotiating process" (WTO 2001) and complete the process of analyzing proposals by participants on the ADA as soon as possible. The Chairman was then directed to prepare consolidated texts of the Anti-dumping and Subsidies Agreements based on

[20] Paragraph 28 of the Doha Ministerial Declaration states that "In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants."

the previous negotiating papers which will become the "basis for the final stage of the negotiations." (WTO 2001)

As anti-dumping is the most frequently used trade remedy action worldwide, quite a few WTO Members have submitted their proposals on the revisions of the ADA. Most of the proposals[21] focus on changing the ADA, currently a somewhat ambiguous document that gives broad guidelines for conducting anti-dumping investigations, in order to provide more specific definitions and stricter procedures. The goal of many of the WTO Members seems to be to lower the level of anti-dumping duties provided per investigation and/or to provide more restrictions on the ability of officials to grant relief to domestic industries (Jones 2006).

II.7 Conclusion

During the last several decades, the international legal framework on anti-dumping has evolved significantly. However, owing to some inherent weakness and loopholes in the ADA, the abuse of anti-dumping measures is quite common. The frequent use of anti-dumping actions by the traditional developed nations as well as some developing countries has come under criticism by other WTO Members as being protectionist. The reform of the ADA has attracted great concern and been incorporated into the framework of the DDA.

It is perhaps too early to predict how the DDA negotiations will turn out. However, it seems unlikely that the basic concepts concerning anti-dumping will significantly change.

[21] Most of such proposals were presented by a coalition of developed and developing WTO member countries called the "Friends of Anti-dumping" - a group consisting of the European Union, Brazil, Chile, China, Colombia, Costa Rica, Hong Kong (China), India, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand and Turkey. They believed that any new framework for negotiations should include talks on improving WTO trade remedy rules.

CHAPTER III

CHINA'S LEGAL FRAMEWORK ON ANTI-DUMPING

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This chapter deals with the sources of Chinese law, the implementation of the WTO ADA in China's legal system as well as China's legal framework on anti-dumping, ranging from the law, administrative regulations to their implementing rules.

III.1 The Sources and Hierarchy of Chinese Law

Although the sources of Chinese law are complex and multilayered (Ostry et al. 2002:158), the legislative system of China is unitary and hierarchical (Zhou 1998:271). Domestic law in the Chinese context refers to numerous sources of laws, regulations and rules, i.e., basic laws by the National People's Congress (NPC),[22] laws by the NPC Standing Committee,[23] administrative regulations by the State Council,[24] local regulations by the Provincial People's Congress,[25] local rules by the peoples' congress at sub-provincial levels and local governments,[26] and administrative rules enacted by ministries.[27]

[22] According to the Constitution of China, the NPC is the highest authority of the State. The Constitution provides that the NPC has the power to enact and amend basic laws. In principle, basic laws refer to such laws as General Principles of Civil Law, the Civil Procedural Law, the Criminal Law, Criminal Procedural Law, Administrative Procedural Law, and the law for Self-Government in the Minority Autonomous Regions, etc.

[23] The NPC Standing Committee is the permanent organ of the NPC. It exercises the legislative power when the NPC adjourns. The NPC Standing Committee has the power to enact and amend laws other than basic laws, supplement and amend to some extent laws made by the NPC.

[24] Under the Chinese Constitution, the State Council is the highest administrative organ of the State. It has the power to enact administrative regulations in accordance with the Constitution and laws. Like the basic law and laws, the administrative regulations are binding nationwide. In China, most of normative rules take the form of administrative regulations.

[25] The People's Congress at provincial level and their standing committees have the power to draw up local regulation, provided that they do not contravene the Constitution, laws and administrative regulations, but the regulations are required to be reported to the NPC Standing Committee for the accord. The People's Congress in Minority Autonomous Regions has the power to work out autonomous regulations and special regulations. Local regulations are binding only in the provinces concerned.

[26] The Constitution provides no reference to the power of local people's congress at sub-provincial levels and local governments to enact regulative rules. The 1986 Organic Law of the Local People's Congresses and Local People's Governments, however, provide that the local people's congresses and local people's governments of cities where the provincial governments are situated and of large-sized cities have the power to work out local rules. These local rules are binding only in the localities concerned.

[27] The Constitution provides that, subject to their respective authority, ministries and ministerial-level

All these laws, regulations and rules are fixed in the hierarchy. Apart from the Constitution of the PRC, the basic laws passed by the NPC are at the top of the hierarchy. Next are the laws by the NPC Standing Committee, the administrative regulations by the State Council, local regulations by the Provincial People's Congress and administrative rules by ministries respectively in hierarchical order. Then, the local rules by local people's congress and people's governments are at the bottom of the hierarchy. The hierarchy means that subordinate normative rule is null and void if it contravenes a higher one. Moreover, the authority adopting a higher normative rule has the power to determine whether such a conflict occurs between that rule and a subordinate one and hence declare the subordinate rule null and void.

III.2 The Implementation of the WTO ADA in China's Domestic Legal System

On 11 December 2001 China became the 143rd Member of the WTO. The perceivable substantial difference between WTO agreements and the relevant Chinese laws will lead to the application of Article 7 of the Law of Procedures for Concluding Treaties, which requires agreements differing from Chinese law to be ratified by the NPC Standing Committee. Indeed, on 25 August 2000, the NPC ratified the Protocol of Accession[28] which provides the detailed commitments made by China for its WTO accession.

However, there is no provision in the Chinese Constitution or any other law for applying international treaties or agreements directly or through domestic law (Qing Jiang Kong 2000: 1207). To implement the WTO ADA in the domestic legal system, China examined and reviewed its existing laws, regulations and rules. Generally, those which are found inconsistent with WTO agreements would be amended or repealed; where no provisions can be found corresponding to relevant WTO agreements, new laws or regulations would be enacted pursuant to WTO agreements (Qing Jiang Kong 2000: 1205).

By the end of 2000, i.e. one year before its entry, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC it was restructured as the MOFCOM) had

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commissions may enact administrative rules in accordance with the laws and administrative regulations of the State Council. Administrative rules are binding nationwide on the matters concerned.

[28] See Decision of NPC Standing Committee on China's Accession to WTO at the 17th Session of the Standing Committee of the 9th National People's Congress on 25th August 2000.

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reviewed over 1400 laws, regulations, and other similar documents, including six laws (of which five were revised), 164 State Council regulations (of which 114 were repealed and 25 amended), 887 of its own ministry regulations (of which 459 were repealed and 95 amended), 191 bilateral trade agreements, 72 bilateral investment treaties, and 93 bilateral tax treaties. In the first two months of the year 2001, the various ministries and commissions of the State Council reviewed some 2300 laws and regulations, of which 830 were identified as in need of repeal and 325 as in need of revision (Nan 2001).

After its accession to the WTO, China accelerated its market liberalization process and incorporation of the provisions of ADA into its domestic legal system. To abide by the ADA, China promulgated new "Anti-Dumping Regulations (ADR)" in 2001 and enacted more than ten implementing rules, ranging from "Provisional Rules on Hearings in Anti-Dumping Investigations (2002)" to "Rules on Industry Injury in Anti-dumping Investigations (2003)" (see Table1).

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III.3 China's Legal Framework on Anti-Dumping

III.3.1 Law

The principal law governing foreign trade in China is the "Foreign Trade Law".[29] The law comprises eleven chapters, covering general provisions, foreign trade dealers, import and export of goods and technologies, international trade in services, protection of trade-related aspects of intellectual property rights, foreign trade order, foreign trade investigations, foreign trade remedies, foreign trade promotion, legal liabilities, and supplementary provisions.

Before 1997, the only provision of anti-dumping legislation was one paragraph[30] of the Foreign Trade Law of China (1994), authorizing the state to take action against dumping imports. In Chapter 8 "Foreign Trade Remedies", the revised Foreign Trade

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[29] This law was adopted at the Seventh Session of the Standing Committee of the Eight National People's Congress on 12 May 1994, and made effective on 1 July 1994. It was amended in 6 April 2004 and the new amendments took effect from 1 July, 2004. The law is available at: http://www.chinalaw.gov.cn/jsp/contentpub/browser/contentpro.jsp?contentid=co2769684389.

[30] Article 30 the Foreign Trade Law of China (1994) states that "Where a product is imported at less than normal value of the product and causes or threatens to cause material injury to an established domestic industry concerned, or materially retards the establishment of a particular domestic industry, the State may take necessary measures in order to remove or ease such injury or threat of injury or retardation."

Law added clauses concerning how to maintain fair trade order and how to exert trade relief, so that the domestic foreign trade enterprises could utilize anti-dumping means under the WTO framework to safeguard their own interests in international trade affairs.[31] For instance, the State may take appropriate foreign trade remedies on the basis of findings of foreign trade investigation.[32] Where a product from other countries or regions is dumped into the domestic market at a price less than its normal value and under such conditions as to cause or threaten to cause material injury to the established domestic industries, or materially retards the establishment of domestic industries, the State may take anti-dumping measures to eliminate or mitigate such injury, threat of injury or retardation.[33] Moreover, the State may take necessary measures against the activities circumventing the foreign trade remedies provided under this Law.[34] However, no anti-dumping case had ever been initiated until 1997, as there was no specification of the application.

The Foreign Trade Law provides the fundamental legal basis and guiding principles for China's anti-dumping regime.

III.3.2 Administrative Regulations

Taking the Foreign Trade Law as the basis, and suffering the pain of overwhelming numbers of anti-dumping claims against its exports, as well as in preparation for its WTO accession, the State Council of China promulgated China's first regulation on anti-dumping and countervailing duties in 1997, which is the "Anti-Dumping and Anti-Subsidy Regulations (ADASR)".[35]

China's entry into the WTO on 11 December 2001 signaled the beginning of a shift in global political and economic power. Not only is the world's most populous country,

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[31] The concerned provisions are following: Article 40, "The State may take appropriate measures of foreign trade remedies on the basis of the findings of foreign trade investigation" .Article 41, "Where a product from other countries or regions is dumped into the domestic market at a price less than its normal value and under such conditions as to cause or threaten to cause material injury to the established domestic industries, or materially retards the establishment of domestic industries, the State may take anti-dumping measures to eliminate or mitigate such injury, threat of injury or retardation." Article 50, "The State may take necessary anti-circumvention measures against the activities circumventing the foreign trade remedies provided under this Law."

[32] See Article 40 of Foreign Trade Law of China (2004).

[33] Article 41 of Foreign Trade Law of China (2004)..

[34] Article 50, Foreign Trade Law of China (2004).

[35] Anti-Dumping and Anti-Subsidy Regulations of China, adopted by Order 214 of the State Council of China on 25 March 1997.

and potentially its largest market, but China's entry also marks a milestone in its global behaviour, i.e., from one based mainly on power and ideology to one based largely on commonly accepted rules (Chan 2004: 48). As a part of its accession package, China committed to modify its thin anti-dumping legislation with detailed provisions and make its trade laws and regulations compatible with WTO agreements.[36] Thereafter, China repealed the old regulations and enacted two new regulations, i.e., the ADR[37] and the Anti-Subsidy Regulations[38] by separating anti-dumping issues from countervailing issues. These regulations became effective on 1 January 2002, shortly after the National People's Congress of China ratified its accession to the WTO. As the organizational change and the establishment of the MOFCOM, both the ADR and the Anti-Subsidy Regulations were revised in March 2004 and made effective on 1 June 2004.

The ADR prescribes detailed and comprehensive rules on anti-dumping with 59 articles over six chapter, covering a wide variety of subjects ranging from the determination of dumping, calculation of margins, injury determinations, investigation procedure, anti-dumping duty, price undertaking, sunset review and notifications. The details of the ADR will be elaborated in Chapter VI. There are some notable features of the ADR.

First is the brevity of the text, implying that many details are left to the detailed guidelines or to case-by-case practices (Messerlin 2004: 118). This is often the case among countries having just adopted anti-dumping regulations. However, it has the great inconvenience to generate a high level of legal uncertainty in the whole process.

The second feature is that all the (well-known) protectionist features of WTO anti-dumping provisions are included in China's regulations (Messerlin 2004: 118-119), as shown by the following non-exhaustive list: use of the concept of the "major proportion" of the industry as the threshold level for accepting complaints (a condition that domestic monopolies, oligopolies or cartels fit much more easily than

[36] See Report of the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 2001. Paragraph 148 states that: "In response, the representative of China stated that China promulgated regulations and procedures on anti-dumping and countervailing duties in 1997 with reference to the ADA and Agreement on Subsidies and Countervailing Measures. He committed to revising China's current regulations and procedures prior to its accession in order to fully implement China's obligations under the Anti-Dumping and SCM Agreements."

[37] ADR of China, promulgated by Order 328 of the State Council of China on 26 November 2001.

[38] Anti-Subsidy Regulations of China, promulgated by Order 329 of the State Council of China on 26 November 2001.

competitive industries); possibility of ex officio initiation of cases by the Chinese authorities; screening of the complaints by the anti-dumping office and exposing this office to strong and hidden pressures by vested interests; possibility of withdrawal by the petitioners, making easier private collusion between them and the defendants; cumulation of imports, making easier the demonstration of injury and widening the geographical scope of protective measures; accounting practices (such as constructed value or reasonable profit) in case of the absence of comparable prices in the exporting country which can easily inflate the proxies for the foreign exporters' home prices; a broad definition of the confidentiality of the information limiting the rights of the defendants; possibility to impose undertakings as anti-dumping measures and the mandatory provision that anti-dumping duties shall be borne by the importers (the so-called "no absorption" provision); possibility to impose retroactive anti-dumping duties in the case of a "history" of dumping (that is, recurrent anti-dumping complaints); possibility to take "appropriate" measures in case of circumvention of the anti-dumping measures by the foreign firms, etc.

Thirdly, it has no provision of "surrogate country" in determining normal value of imports from the Non-market Economy (NME) Country. This is hardly surprising, given the strong accusation by the Chinese government against the "surrogate country" approach of other countries. Therefore, modeling the approach outlined in the WTO ADA, the MOFCOM calculates normal values of imports based on their domestic sales, third country export price, or constructed value.[39]

Fourthly, the ADR officially introduces the term "public interests" and requires that the imposition of anti-dumping duty conform to the "public interests", i.e., "if considering that a price undertaking made by an exporter is acceptable and in the public interest, the MOFCOM may decide to suspend or terminate the anti-dumping investigation without applying provisional anti-dumping measures or imposing anti-dumping duties."[40] It makes it clear that "Imposition and collection of anti-dumping duties shall be in the public interest."[41] The ADR also provides that the MOFCOM may adopt necessary measures, such as import registration, after the initiation of anti-dumping investigations for the purpose of the possible retroactive

[39] Article 4, ADR.
[40] Article 33, ADR.
[41] Article 37, ADR.

imposition of anti-dumping duties.[42] Moreover, in the event that a price undertaking agreement is reached between an exporter and the investigation authority, but the relevant exporter still requests for the investigation into dumping and injury to continue, the investigation authority shall continue such investigation.[43] Previously, in such circumstances the investigation authority could determine whether or not to continue at its own discretion. However, like the laws of most countries, the Chinese law has no guidelines on application of the public interest clause. For example, in case when the interest of domestic industry is different from the public interest, what standards will be adopted to evaluate which interest is of higher priority? It is uncertain how the Chinese authorities will apply it.

Fifthly, in the ADR, a reference to the possibility of retaliation has raised some concern from overseas. Article 56 of the regulation states that "Where any country (region) discriminatorily applies anti-dumping measures on the exports from China, China may take corresponding measures against that country (region) on the basis of actual circumstances."[44] But how China will adopt "corresponding measures" is not specified in the legislation. So far, no example is found in China based upon this provision.

III.3.3 Implementing Rules

Mandated by the ADR,[45] Chinese anti-dumping authorities have formulated a series of implementing rules on specific measures on anti-dumping (See Table1).

Table1: Existing Anti-Dumping Legislation of China

Legislative body	Title of laws and regulations	Date of adoption/ promulgation/effectuation
National	Foreign Trade Law of the	Adopted on 12 May 1994, effect

[42] The Article 44, Para 2 of ADR of China states that: "After launching an investigation, MOFCOM may take necessary measures, such as imposing import registration onto related imported products, where sufficient evidence exists pointing to the existence of the two circumstances listed above at the same time, in order to collect retroactive anti-dumping duties."
[43] Article 34, Para 1 of ADR of China states that: "After the suspension or termination of the investigation according to the provisions of Paragraph 1, Article 33 of these Regulations, upon the request of the exporters, MOFCOM may continue the investigation of dumping and injury, or MOFCOM may continue the investigation of dumping and injury when it deems necessary."
[44] Article 56, ADR.
[45] The Article 58 of ADR of China states that "The authorities concerned may, in accordance with these Regulations, formulate specific implementing measures".

People's Congress	People's Republic of China	on 1 July 1994. (Amended in 6 April 2004 and effect from 1 July, 2004).
State Council	Anti-Dumping and Anti- Subsidy Regulations of the People's Republic of China	Adopted on 25 March 1997, repealed in November 2001.
	Anti-Dumping Regulations of the People's Republic of China	Promulgated on 26 November 2001.
MOFTEC	Provisional Rules on Hearings in Anti-Dumping Investigations	Promulgated on 16 January 2002, effect on 22 January 2002.
	Provisional Rules on Initiation of Anti-Dumping Investigations	Adopted on 10 February 2002, effect on 13 March 2002.
	Provisional Rules on On-the-spot Verification in Anti-Dumping Investigations	Adopted on 13 March 2002, effect on 15 April 2002.
	Provisional Rules on Anti-Dumping Investigation Questionnaire	Adopted on 13 March 2002, effect on 15 April 2002.
	Provisional Rules on Sampling in Anti-Dumping Investigation	Adopted on 13 March 2002, effect on 15 April 2002.
	Provisional Rules on Access to Non-Confidential Information In Anti-dumping Investigations	Adopted on 13 March 2002, effect on 15 April 2002.
	Provisional Rules on Access to Non-Confidential Information in Anti-Dumping Investigations	Adopted on 13 March 2002, effect on 15 April 2002.
	Provisional Rules on Price Undertakings in Anti-Dumping Investigations	Adopted on 13 March 2002, effect on 15 April 2002.
	Provisional Rules on New Shipper Review in Anti-Dumping Investigations	Adopted on 13 March 2002, effect on 15 April 2002.
	Provisional Rules on Refund of Anti-Dumping Duties	Adopted on 13 March 2002, effect on 15 April 2002.
	Provisional Rules on Interim Review of Dumping and Dumping Margins	Adopted on 13 March 2002, effect on 15 April 2002.
The People's Supreme Court	The Rule in connection with Certain Issues of Law Application for Judicial Review of Anti-Dumping Investigations	Promulgated on 21 November 2002, effect on 1 January 2003
SETC	Rules on Public Hearings on Investigations on Industry Injury	Effect on 15 January 2003.
	Rules on Investigations and Determinations of Industry Injury in Anti-Dumping Investigations	Promulgated on 13 December 2002, effect on 15 January 2003, repealed on 17 November 2003.
MOFCOM	Rules on Industry Injury in Anti-dumping Investigations	Promulgated on 17 October 2003, effect on 17 November 2003.

Source: China Trade Remedy Information Net, http://www.cacs.gov.cn/.

III.4 Conclusion

So far, a relatively complete legislative framework has been established incorporating laws, administrative regulations and ministerial rules which in turn provide a legal basis to perform various tasks in an orderly way with regard to fair trade for imports and exports and to actually defend the interests of China's foreign trade and oversea investment.

CHAPTER IV

CHINA'S INSTITUTIONAL FRAMEWORK ON ANTI-DUMPING

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This chapter provides the evolution, organizational structure and responsibilities of Chinese authorities on anti-dumping, particularly focusing on the MOFCOM and its two departments, i.e. the Bureau of Fair Trade for Imports & Exports and the Investigation Bureau of Industry Injury.

IV.1 Former Anti-Dumping Authorities

Before March 2003, in terms of the Chinese anti-dumping authorities, originally the MOFTEC was in charge of "dumping" investigations, while the SETC was in charge of the determination of "injury" to domestic industry. Their identities and responsibilities were different.

IV.1.1 MOFTEC

The MOFTEC was in charge of receiving anti-dumping and countervailing petitions; conducting investigations on foreign subsidies and on dumping and dumping margins and issuing relevant preliminary determination decisions and notices; negotiating with foreign interested parties on "price undertaking" if necessary; and providing proposals on imposition of definitive anti-dumping or countervailing duties or proposals on duty refund, etc (WTO 2001).

IV.1.2 SETC

The SETC was in charge of the investigation of injury caused to the domestic industry by the dumped or subsidized imports, the extent of such injury and making injury findings. There was a non-permanent decision and policy-making body in the SETC, named the Injury Investigation and Determination Committee (IIDC), which was composed of six commissioners from the relevant departments of SETC. There was a

permanent executive office in charge of the investigation of injury to the industry and submitting its findings to the IIDC for approval (WTO 2001).

IV.2 Current Anti-Dumping Authority: MOFCOM

Pursuant to the National People's Congress Decision on the Institutional Reform of the State Councill[46] and State Council's Notice on Institutional Organization,[47] the central government of China went through a major restructuring in March 2003. As a result, the MOFCOM was established to take over parts of mandates of former MOFTEC and SETC. The MOFCOM is responsible for administering the ADR of China.[48]

Investigations are quasi-judicial in nature and begin with the formal filing of an application by a representative of the domestic industry with the two relevant MOFCOM departments, i.e., the Bureau of Fair Trade for Imports & Exports (BOFT), which determines whether imports are being dumped, and the Investigation Bureau of Industry Injury (IBII), which determines whether a domestic industry is thereby injured.

Both portions of the investigation proceed simultaneously and are completed within one year to eighteen months. The investigation is conducted primarily through "questionnaires" for interested parties, along with hearings and meetings when requested. MOFCOM will issue both a preliminary and final determination in the course of the investigation.

IV.2.1 Bureau of Fair Trade for Imports and Exports (BOFT)

With the approval of the State Council, the MOFTEC established the BOFT in November 2001 in response to the need of post-accession situation with the aim to make full use of the rights enjoyed by WTO Members to defend the interests of Chinese exports and industries and to further strengthen the work on maintaining fair trade for imports and exports.

[46] This decision was adopted at the First Session of the Tenth People's Congress on 10 March 2000.
[47] See Notice 8 of 2003 issued on 21 March 2003.
[48] Article 3, Para 2 of ADR of China states that "The Ministry of Commerce shall be responsible for the investigation and determination of dumping".

IV.2.1.1 Mandates of the BOFT

Major Mandates of the BOFT include (BOFT 2007):

First, to draft and implement ministerial rules and policies regarding fair trade for imports and exports, draft and implement ministerial rules regarding anti-dumping, countervailing, safeguards and other trade remedy measures on imports into China.

Secondly, to undertake relevant work and foreign affairs relating to fair trade for imports and exports such as anti-dumping, countervailing and safeguard measures; initiate investigations thereof, make public notice, adjust the scope of products under investigation, make information disclosure, notify interested parties, etc.; conduct investigations into and make determinations of dumping, subsidies and imports increase in safeguards; draft and release notices on behalf of the MOFCOM, and supervise and evaluate their implementation; and consult, negotiate, conclude agreements of price undertakings and supervise their implementation.

Thirdly, to investigate and analyze laws, regulations, policies and practices concerning trade and investment of other countries or regions, carry out consultation, negotiation and other relevant work concerning contents and practices discriminatory to China.

Fourthly, to guide and coordinate efforts of responding to overseas anti-dumping, countervailing and safeguards investigations on Chinese exports, help establish and improve the responding mechanism.

Fifthly, to monitor and analyze imports and exports, conduct the investigations of trade and investment barriers, carry out the early-warning network and the relevant mechanisms, periodically release country (or region)-specific *Foreign Market Access Report*.

Sixthly, to guide and coordinate government agencies, industry institutions and enterprises in carrying out such activities as public awareness, training and consultation, concerning fair trade for imports and exports.

Seventhly, to coordinate the relevant departments in deciding on China's positions regarding trade remedies in bilateral and multilateral trade agreement negotiations and

take part in such negotiations, conduct bilateral and multilateral consultation under the WTO agreements of anti-dumping, countervailing and safeguards, to be responsible for bilateral and multilateral cooperation and exchange in the area of fair trade for imports and exports.

IV.2.1.2 Organizational Structure of the BOFT

The BOFT is headed by a Director General to the Government of China, who is assisted by an Investigation Commissioner (Director General level), two Deputy Director Generals, and a Deputy Investigation Commissioner (deputy Director General level). Totally, there are about 70 officials in the BOFT.

To perform the above-mentioned mandates, ten divisions and one general office are established within BOFT, namely, the General Office, Division for Horizontal Issues, Division for Case Initiation, Divisions I, II and III for Import Investigation, Division for Reviews, Divisions for Export Regions I, II and III and Division for Barriers Investigation. The respective responsibilities of each division (office) are described here.

IV.2.1.2.1 General Office

General Office has the responsibility to manage the administrative affairs of BOFT; draft the bureau's internal rules and monitor their implementation; undertake documents and archives management; maintain the E-government system and make information publication; manage the utilization and payment of the Ear-Marked Fund for Fair Trade for Imports and Exports; implement training courses on fair trade for imports and exports; and organize the national conferences on fair trade.

IV.2.1.2.2 Division for Horizontal Issues

Division for Horizontal Issues does organize and participate in the research and formulation of China's strategies, guidelines and policies regarding fair trade for imports and exports; carry out research on comprehensive issues concerning fair trade for imports and exports; draft working plans for the whole BOFT and monitor their

implementation; draft documents on comprehensive issues and verify the issuance of important documents; coordinate and participate in bilateral and multilateral consultations and negotiations regarding fair trade for imports and exports; handle press and publicity concerning fair trade for imports and exports.

IV.2.1.2.3 Division for Case Initiation

Division for Case Initiation is responsible to participate in the study and drafting of rules and regulations concerning trade remedies against imports (including anti-dumping, countervailing, safeguards, review, anti-circumvention and anti-absorption, etc.) and bilateral and multilateral exchanges and cooperation with regard to legal issues; establish and improve the early-warning system for imports and monitor and analyze imports comprehensively; receive the advisory requests and applications by domestic industries for trade remedy investigations against imports; examine applications for initiating a trade remedy measure against imports and determine whether to initiate or not; draft the notice of initiation on behalf of the MOFCOM; study and coordinate relevant industrial and trade policies relating to the initiation of trade remedy measures against imports; contact and guide the work of local commerce authorities regarding trade remedy measures against imports.

IV.2.1.2.4 Division I for Import Investigation

It is the responsibility of Division I for Import Investigation to study and draft laws, regulations and rules with respect to anti-dumping measures against imports; coordinate and participate in bilateral and multilateral exchanges and cooperation with regard to anti-dumping legislation; participate in rules negotiations and dispute settlement proceedings concerning anti-dumping under the WTO; undertake investigations against the alleged dumped imports of metals, minerals, chemicals, mechanic and electronic products, etc.; conduct anti-dumping investigations and form preliminary and final determinations based on results of the investigations; propose anti-dumping measures and publish preliminary and final determinations on behalf of the MOFCOM; conduct anti-circumvention and anti-absorption investigations on relevant imports; make determinations thereof and publish the notices; monitor

implementation of anti-dumping measures and evaluate the effect of the measure; make WTO notifications and notifications to other outside parties; organize and participate in anti-dumping training programs and provide advice on anti-dumping legislation and practices.

IV.2.1.2.5 Division II for Import Investigation

Division II for Import Investigation is assigned the task to study and draft policies with respect to anti-dumping measures against imports; coordinate and participate in bilateral and multilateral exchanges and cooperation with regard to anti-dumping legislation; participate in rules negotiations and dispute settlement proceedings concerning anti-dumping under the WTO; undertake investigations against the alleged dumped imports of products other than metals, minerals, chemicals, mechanic and electronic products; conduct anti-dumping investigations and form preliminary and final determinations based on results of the investigations; propose anti-dumping measures against the alleged imports and publish preliminary and final determinations on behalf of the MOFCOM; conduct anti-circumvention and anti-absorption investigations on relevant imports; make determinations thereof and publish the notices; monitor implementation of anti-dumping measures and evaluate the effect of the measure; make WTO notifications and notifications to other outside parties; organize and participate in anti-dumping training programs and provide advice on anti-dumping legislation and practices.

IV.2.1.2.6 Division III for Import Investigation

Division III for Import Investigation has the duty to study and draft laws, regulations and rules regarding countervailing and safeguard investigations against imported products; undertake countervailing and safeguard investigations into the alleged imports; undertake consultations and negotiations with regard to countervailing and safeguard investigations; organize and participate in training programs on issues of countervailing and safeguard measures; provide advice on legal issues and practices with regard to countervailing and safeguard matters; carry out anti-dumping investigations on certain imported products.

IV.2.1.2.7 Division for Reviews

Division for Reviews is entrusted with the task to undertake study and drafting of rules and policies with respect to review of anti-dumping, countervailing and safeguard measures; participate in rules negotiations and dispute settlement proceedings concerning review issues of anti-dumping, countervailing and safeguard agreements under the WTO; coordinate and participate in bilateral and multilateral exchanges and cooperation regarding review issues of anti-dumping, countervailing and safeguard measures; conduct review investigations on anti-dumping, countervailing and safeguard measures against imports in which final determinations were made and in effect; form findings in dumping and injury review cases based on results of the reviews and draft and publish the final determination on behalf of MOFCOM; investigate and make and publish determinations of anti-circumvention and anti-absorption reviews; notify to the WTO of laws, regulations and specific cases regarding reviews of anti-dumping, countervailing and safeguard measures; monitor and evaluate the effect of the trade remedy measures including anti-dumping, countervailing and safeguard measures; organize and implement training programs on reviews of anti-dumping, countervailing and safeguard measures and provide advice with respect to law and practices on review issues.

IV.2.1.2.8 Division for Export Region I

Division for Export Region I has the responsibility to undertake study and drafting of policies, rules and regulations and their implementation concerning responses to anti-dumping, countervailing and safeguard (including global and transitional product-specific safeguards) investigations initiated by foreign authorities involving Chinese exports and other trade remedy cases; undertake the overall responsibility of responding to anti-dumping, countervailing, safeguard investigations (including global and transitional product-specific safeguards) other trade remedy cases involving Chinese exports brought by authorities of North and South American and Oceanic countries (regions), study trade policies, law and regulations of North and South American and Oceanic countries (regions); consult and negotiate with foreign counterparts of the North and South American and Oceanic countries (regions) on

unfair, discriminatory practices and practices in violation of international rules with respect to investigation, determination and implementation of trade remedies involving Chinese exports; guide and coordinate horizontal governmental agencies, intermediary organizations and enterprises in responding to overseas trade remedy measures; participate in drafting China's position relating to trade remedies in bilateral and multilateral trade agreements negotiations; participate in the bilateral and multilateral negotiations concerning anti-dumping, countervailing and safeguard agreements under the WTO; participate in bilateral and multilateral exchanges and cooperation related to issues of fair trade for imports and exports and provide training program and advisory services to domestic enterprises and intermediary organizations on trade remedy issues.

IV.2.1.2.9 Division for Export Region II

The responsibilities of Division for Export Region II are to undertake study and drafting of policies, rules and regulations and their implementation concerning responding to the overseas anti-dumping, countervailing and safeguard (including global and transitional product-specific safeguards) measures initiated by foreign authorities involving Chinese exports and the other trade remedy cases; undertake the overall responsibility of responding to anti-dumping, countervailing, safeguard measures (including global and transitional product-specific safeguards) involving Chinese exports and other trade remedy cases brought by authorities of Europe and Central Asia countries (regions); study trade policies, law and regulations of Europe and Central Asia countries (regions); consult and negotiate with foreign counterparts of Europe and Central Asia countries (regions) on their unfair and discriminatory practices and practices in violation of international rules with regard to investigation, determination and implementation of trade remedies involving Chinese exports; provide guidance to and coordinate horizontal governmental agencies, intermediary organizations and enterprises in responding to overseas trade remedy measures; participate in drafting China's position relating to trade remedies in bilateral and multilateral trade agreement negotiations, participate in bilateral and multilateral negotiations concerning anti-dumping, countervailing and safeguard agreements under the WTO; participate in bilateral and multilateral exchanges and cooperation

relating to issues of fair trade for imports and exports; and provide training programs and advisory services to domestic enterprises and intermediary organizations on trade remedy issues.

IV.2.1.2.10 Division for Export Region III

This office is entrusted with the task to undertake study and drafting of policies and rules and their implementation with respect to responding to anti-dumping, countervailing, and safeguard (including global and transitional product-specific safeguards) investigations involving Chinese exports in African and Asian regions; provide instruction to and coordinate the work related to responding to overseas investigations mentioned above; provide guidance to and organize China's chambers of commerce, industrial associations and export enterprises in responding to the investigations mentioned above; undertake multilateral and bilaterally exchanges and cooperation with other authorities with regard to legislation in the trade remedy area; be responsible for the early warning work for the above-mentioned investigations, issue early-warning alerts and take corresponding measures; provide legal advice and training programs for domestic enterprises in responding to the investigations.

IV.2.1.2.11 Barrier Investigation Division

Barrier Investigation Division has the responsibility to undertake study of foreign barriers on trade and investment; draft and lead the implementation of plans, policies and measures in response to foreign trade and investment barriers; establish an integrated information system by collecting and compiling discriminatory trade and investment legislation, policies and measures of China's trading partners; research and analyze WTO compliance of trade and investment legislation, policies and measures adopted or to be adopted by China's trading partners and evaluate their impact on China's interests; conduct barrier investigations into such discriminatory trade and investment related legislation, policies and measures and participate in the WTO dispute settlement process of the relevant cases; develop and implement policies, measures and plans in response to foreign trade and investment barriers affecting trade in specific product or business operation; provide early warning

information concerning foreign trade and investment barriers; conduct bilateral and multi-lateral consultations and negotiation with foreign government(s); and compile and publish the annual *Foreign Market Access Report.*

IV.2.2 Investigation Bureau of Industry Injury (IBII)

To protect China's domestic industries, the SETC established in early 2001 an agency called the IBII. The main function of the IBII is to monitor the damage to domestic enterprises that might be caused by a surge in imports. In March 2003, the IBII has been restructured and incorporated into the MOFCOM.

IV.2.2.1 Mandates of the IBII

The main mandates of the IBII are to conduct investigations on the injury of domestic industry, determine and make findings on the injury margin of domestic industry in anti-dumping, anti-subsidies and safeguards cases, including several details (IBII 2007).

First, to formulate departmental regulations and policies concerning investigation on industry injury and organize their implementation; to take part in the formulation of departmental regulations on anti-dumping, countervailing duty, safeguards and other trade remedy measures.

Secondly, to review the issues regarding injury to domestic industry in the initiation of anti-dumping, countervailing duty and safeguard cases.

Thirdly, to conduct investigations and determinations on injury to domestic industry in anti-dumping, countervailing duty and safeguard cases; to take part in the drafting of related publications issued in the name of the MOFCOM.

Fourthly, to monitor and assess the functions and impacts of adopted trade remedy measures on the domestic industry and raise recommendations on the countermeasures to be taken.

Fifthly, to set up and perfect the early-warning mechanism of industry injury, to monitor and analyze the impacts of changes in international economic development as

well as unusual import and export on the domestic industries and their competitiveness, to issue regular reports on early-warning of industry injury, to publicize reports on trends of industrial competitiveness and to study and raise recommendations on the counter-measures to be taken.

Sixthly, to guide and coordinate with other relevant domestic departments and institutions to carry out works on industry safety, and to undertake relevant propagation, consultation and training.

Seventhly, to take part in consultations and negotiations concerning trade remedies measures on imports.

Eighthly, to undertake other tasks assigned by the MOFCOM.

IV.2.2.2 Organizational Structure of the IBII

The IBII is headed by a Director General to the Government of China, who is assisted by two Inspectors (Director General level) and a Deputy Director General. There are about 45 officials in the IBII.

To implement the above-mentioned mandates, the IBII sets up seven divisions, namely, General Office, Divisions No.1, No.2, and No.3 for Investigation, Division for Industry Analysis and Early-Warning, Divisions for Rules and Division for Industry Guidance.

IV.3 Other Government Bodies Responsible for Anti-Dumping Duty

IV.3.1 General Administration of Customs

General Administration of Customs is in charge of coordinating anti-dumping investigations with the MOFCOM; enforcing anti-dumping measures such as collecting cash deposits and dumping duties, enforcing countervailing measures by collecting countervailing duties, and monitoring implementation (WTO 2001).

IV.3.2 Tariff Commission of the State Council

Tariff Commission of the State Council is in charge of making final decisions on whether or not to levy the anti-dumping or countervailing duties based on the suggestions by the MOFCOM with regard to imposing anti-dumping or countervailing duties and reimbursing excess amount of duties, respectively (WTO 2001).

IV.4 Conclusion

The establishment of the BOFT and the IBII in 2001 is a milestone in the history of China's trade remedy regime. After six years of practice, the two authorities have grown up rapidly and accumulated some experience in the field of anti-dumping. However, compared with some sophisticated users of anti-dumping measures like the U.S., the EU and India, China's anti-dumping institutional framework is still young and not full-fledged in a sense of its experience. For example, in some cases, Chinese anti-dumping determinations are somewhat conclusory, with no evidentiary sources cited, little legal reasoning, and little or no response to respondents' legal positions or evidence contradicting the position of the Chinese parties.

CHAPTER V

CHINA'S PRACTICE ON ANTI-DUMPING

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This chapter describes China's practice on anti-dumping, including the implementations on anti-dumping measures by China, the anti-dumping measures against China, the reasons of the anti-dumping measures against China and China's position on anti-dumping.

V.1 Anti-Dumping Measures Against China

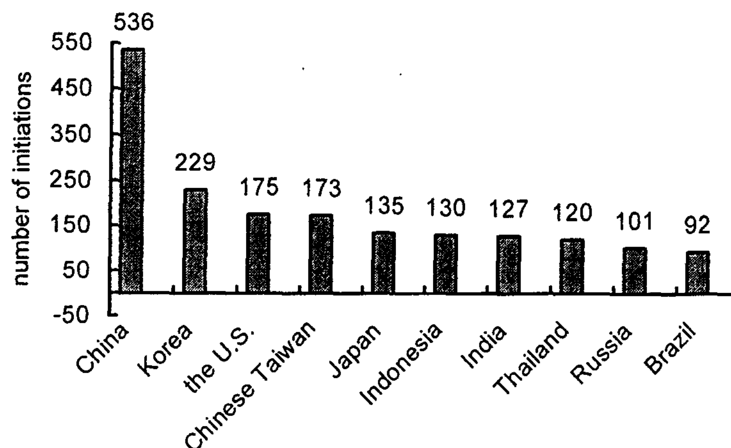
V.1.1 Introduction

China has faced many challenges in the area of anti-dumping. In 1979, the first year of China's economic reform, the country witnessed the very first anti-dumping case regarding a Chinese product (saccharin sodium) in the EC. The number of cases against China was relatively small in the early to mid-1980s. Since 1988, however, the number of anti-dumping charges against China has increased dramatically (Vermulst and Graafsma 1992). The statistics from the MOFCOM show that the whole of the 1970s saw two anti-dumping cases against China; the 1980s saw 64 (about six per year); the 1990s saw 306 (about thirty per year); and the first seven years of the 21st century has seen 375 (about 54 per year).[49]

Since 1995, China has been the number one target of anti-dumping accusations worldwide. One out of every six anti-dumping cases in the world was aimed at China. In the WTO era since 1995, 536 anti-dumping investigations have been initiated against China, out of a total number of 3044 worldwide, as of December 2006 (Chart 1) (WTO Statistics on Anti-Dumping). It is amazing in the sense that about 17.6% of anti-dumping charges in the world have been against Chinese exports in this period of time, considering that China's share of the world's total exports reached only 7.28% in 2005 (WTO Trade Profiles).

Chart 1: Top Ten Affected Countries in Anti-dumping Initiations (1995-2006)

[49] See China Database of Trade Remedy Cases at http://www.cacs.gov.cn/.



Source: WTO Statistics on Anti-dumping (as of 31/12/2006).

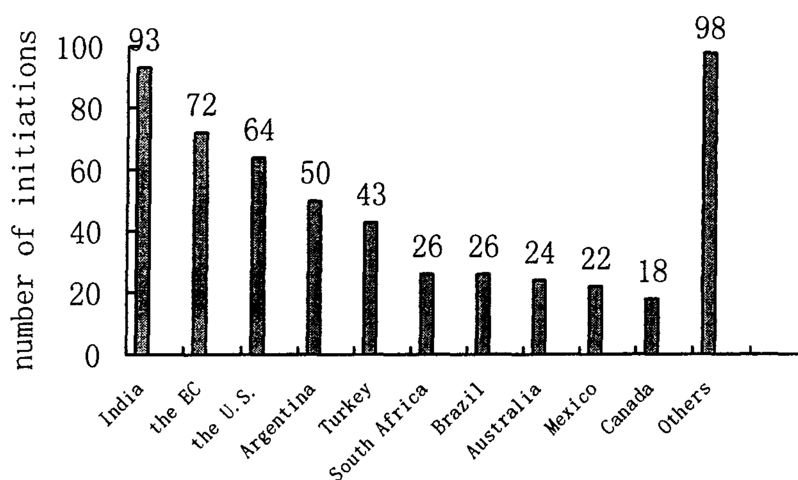
So who has been suing China? The group of dumping complainants against China consists of both developed and developing countries (Chart 2). China is almost exclusively targeted by the top anti-dumping users, all of them being relatively large economies. Traditionally, anti-dumping complaints have been initiated mostly by countries/organizations such as the EU, the U.S., Canada, and Australia. Now, however, along with the expansion of the anti-dumping club by developing nations, China has become the target of both the North and the South. Statistics show that two-third of the initiations against China in the WTO era have been brought up by developing countries (WTO Statistics on Anti-Dumping). Among developing countries, the largest number of dumping cases against China are filed by India.

According to the WTO data, India, the EU, the U.S. and Argentina lead the charges against China in absolute terms, though their numbers of anti-dumping cases are not proportionate to their trade value with China. Messerlin's work (2004: 110) indicates that in India, Argentina and Brazil, during 1995 to 2001, the average share of anti-dumping measures in force against imports from China is 32.3%, 26.8% and 22.3% respectively, while their average percentage by value of imports from China is 10.7%, 10.0% and 4.7%. China's exports of US$1.3 billion worth of goods each year to India has led to initiations totaling 70 cases, while the US$125 billion of exports each year from China to the U.S. has led to initiations totaling 100 cases (WTO Statistics on Anti-Dumping). Messerlin's work (2004: 110) shows that developing countries (including Mexico, Turkey, Argentina, and India) not only initiate more

investigations in absolute terms but also relative to the value of their imports from China. The reasons for that are discussed in the latter part of this chapter.

Nevertheless, the cases initiated by the U.S. and the EU usually cover larger amounts of trade value as they are China's major trading partners.[50] For example, during January to September in 2003, out of 42 charges brought against China, nine were from the U.S. The affected trade value of cases initiated by the U.S. alone amounted to about US$980 million and accounted for 92% of the total affected value, while the 33 cases from other jurisdictions accounted for less than US$90 million (Shichun Wang et at 2004: 11). This explains why the Chinese government and experts usually pay more attention to the cases initiated by the U.S. as well as the EU.

Chart 2: Country Distribution of Anti-dumping Initiations against China (1995-2006)

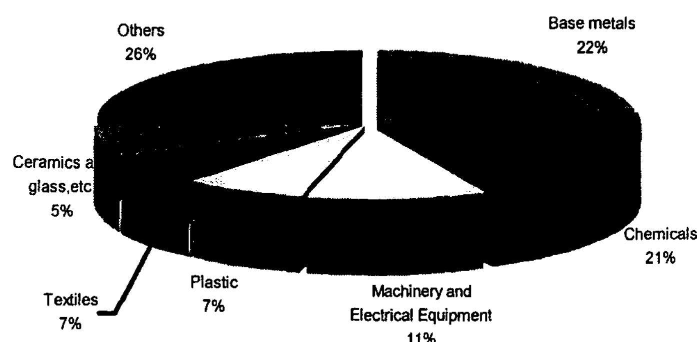


Source: WTO Statistics on Anti-dumping (as of 31/12/2006)

Which Chinese products are involved in these anti-dumping allegations? It is estimated by China's MOFCOM that more than 4000 different products have been affected so far. The most affected sectors in China are chemicals, base metals, machinery and electrical equipment, plastics, and textiles, which have been applied at about 70% of all anti-dumping measures against China in the WTO era. (Chart 3)

Chart 3: Sectoral Distribution of Anti-dumping Initiations against China during 1995-2006

[50] WTO The top five export destinations for China in 2005 are the U.S., Hong Kong (China), the EU, Japan, and South Korea. See WTO International Trade Statistics at http://www.wto.org/english/res_e/statis_e/its2006_e/its06_toc_e.htm.



Source: WTO Statistics on Anti-dumping (as of 31/12/2006)

Cliff Stevenson has also provided statistics in his annual report on anti-dumping, namely, *Global Trade Protection Report 2007: Data & Analysis*. However, because of a small difference in the methodology, the data of Stevenson are somewhat different from the WTO statistics. For example, statistics of the WTO show that China suffered 536 anti-dumping cases against its exports, while Stevenson's Report shows 539.

According to *Global Trade Protection Report 2007*, the following table (Table 2) shows the top targets by WTO anti-dumping moves for the period 1995-2006 (Stevenson 2007:12).

Table 2: Top targets by WTO anti-dumping moves during 1995-2006

China	539
European Union and its Member States	501
South Korea	227
U.S.	172
Chinese Taipei	172
Japan	133
Indonesia	128
India	127
Thailand	119

Russia	102
Brazil	93

Source: Cliff Stevenson, Global Trade Protection Report 2007.

A total of 187 new investigations were launched in 2006, compared with 191 in 2005. However, 70 of 187 new investigations in 2006 were directed against China (Stevenson 2007:13) (Table 3), compared with 57 of 191 in 2005.

Table 3: Top 10 targets by WTO anti-dumping moves in 2006

China	70
Chinese Taipei	12
U.S.	10
Brazil	9
South Korea	9
Thailand	8
Japan	8
EU and its Member States	8
India	7
Indonesia	7

Source: Cliff Stevenson, Global Trade Protection Report 2007.

The following table (Table 4) indicates that China has seen a growth in anti-dumping measures targeted against its exports when such measures in general are on the decline. If the trend increases again, one would expect even further growth in cases against China.

Table 4: Global AD initiations and Initiations against China during 1995-2006

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Global AD initiations	157	225	243	257	354	292	364	312	232	213	191	187
Initiations	20	43	33	28	40	43	53	51	52	49	57	70

against China												
Global (index 1995=100)	100	143	155	164	225	186	232	199	148	136	122	119
China ((index 1995=100)	100	215	165	140	200	215	265	255	260	245	285	350

Source: Cliff Stevenson, Global Trade Protection Report 2007.

The following table (Table 5) indicates that the proportion of total AD cases targeting China continues to increase significantly on a long term upward trend. The trend in 2006 suggests that this continues to rise (Stevenson 2007:13).

Table 5: Proportion of total AD cases targeting China during 1995-2006

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	Total
Total	157	225	243	257	354	292	364	312	232	213	191	187	3027
Other	137	182	210	229	314	249	311	261	180	164	134	117	2488
China	20	43	33	28	40	43	53	51	52	49	57	70	539
%China of total	12.7	19.1	13.6	10.9	11.3	14.7	14.6	16.3	22.4	23.0	29.8	37.4	17.8

Source: Cliff Stevenson, Global Trade Protection Report 2007.

Chu and Prusa (2004) provide incisive comments on the outstanding features of anti-dumping cases against China.

First, China constitutes the largest single economy being targeted by anti-dumping investigations;

Secondly, the trend in using anti-dumping measures against China is positive and is growing faster than any other economy;

Thirdly, the intensity which Chinese exports are targeted is high, and the likelihood that anti-dumping duties are imposed is high;

Fourthly, when anti-dumping duties are imposed, they are very high, often prohibitive;

Fifthly, the sectors covered by the anti-dumping cases are broad, nearly comprehensive;

Sixthly, quite a few and widely-distributed developing and developed countries target Chinese exports.

V.1.2 Why Has China Become the World's Number One Target of Anti-Dumping?

The dramatic increase of anti-dumping charges against China can be attributed to various factors, which can be divided into two categories: external and domestic.

V.1.2.1 External Factors

V.1.2.1.1 The Prevalence of Anti-Dumping Measures in the Global Context

Over the past two decades, anti-dumping actions have spread dramatically throughout the world, along with substantial free trade promotion by the GATT/WTO. Prior to the 1970s, major western countries with established anti-dumping systems had limited application of anti-dumping measures. At that time, domestic economies were booming, and the external competition was not very severe given the tariff barriers. The signing of the GATT in 1947, which aimed at promoting free cross-border trade, marked the start of tariff cuts in the industrialized countries. The 1970s saw the deterioration of many western economies due to the global economic crisis, coupled with increasing competition from emerging nations. Meanwhile, tariffs were brought down substantially at the end of the Tokyo Round of GATT in 1979 (Jackson 1992).

The above-mentioned factors led to a growing need of trade protection from governments. As anti-dumping activities can be invoked relatively easily and selectively compared to other trade measures, and as anti-dumping investigations, regardless of the nature of their final rulings, can lead to almost immediate loss of market share on the part of exporting countries, they have also become the most frequently used trade remedy measures.

There were 1558 anti-dumping investigations initiated worldwide in the 1980s (an average of 156 per year), doubling the number in the 1970s. In the 1990s, the investigations went up to 2483 (an average of 248 per year), which is far more than in the previous forty years.[51] From 1995 to 2006, 3044 initiations were recorded (about

[51] See WTO Document (2002), No.G/L/581 of 29 October 2002, "Anti-Dumping Legislation

254 per year).[52] Meanwhile, the proportion of affirmative outcomes to the investigations initiated has increased markedly. Prior to the 1970s, only 5% of anti-dumping investigations led to affirmative outcomes. In contrast, current statistics show that about half of the investigations worldwide wound up with affirmative measures (Wang and Zhang 2004: 2). This means that a majority of anti-dumping measures are well founded.

By the 1990s, anti-dumping had become a major instrument of trade protection for developed countries. Since the WTO ADA came into effect in 1995, this instrument has become increasingly popular in all countries. So, while trade liberalization opens doors for late industrializers, anti-dumping has been used to deter or harass them in general, and China in particular (Yuefen Li 2007: 142).

V.1.2.1.2 Multinational Enterprises Have Used Anti-Dumping Laws as a Weapon to Strengthen Monopoly

One common feature of anti-dumping laws or agreements is that they have sufficient loopholes to allow Multinational Enterprises (MNEs) to use them to squeeze out efficient new market competitors. This is one important reason why major newly-industrializing economies (NIEs) experiences a hard time when they were the targets of contingent protection measures; this comes at a time when they underwent fast economic growth and foreign trade expansion, which quite often forced them to set up foreign direct investment (FDI) operations abroad. China has entered such a period, but has not yet developed the capacity to engage in large scale FDI to jump anti-dumping activities (Yuefen Li 2007: 135).

MNEs are also capable of creating a dumping scenario for the purpose of benefiting from a protected market after a positive dumping ruling. When MNEs spot a new efficient entrant to the market, they purposely reduce their sales in that market in order to fabricate proof of injury at the investigation stage of an anti-dumping petition, for example Philips company in the case of *Integrated Electronic Compact Fluorescent Lamps* in 2000. Then, after anti-dumping restrictive measures have forced

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Notifications: Report of the Committee of Anti-Dumping Practices.

[52] See WTO Statistics on Anti-Dumping, which is available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm.

the new rival to withdraw from the market, they would re-enter the much more protected market. This is a strategic way for MNEs to maximize their profit margin and optimize their monopoly (Yuefen Li 2007: 140). This explains why most NIEs are targets of anti-dumping activities or have experienced a period of intense trade friction with major industrialized countries (Yuefen Li 2007: 139).

V.1.2.2 Domestic Factors

Another category of reasons for increasing anti-dumping measures is peculiar to China, a unique, transitional, and booming economy. Chinese exports have been the target of the anti-dumping measures worldwide not only because of their competitiveness but also, among others, because of a number of special factors. The most important ones are identified here.

V.1.2.2.1 "Surrogate Country" Approach

The ADA does not mention explicitly the term NME country as one of the circumstances. Instead, such a provision is found in second supplementary provision to paragraph 1 of Article VI in Annex I to GATT1994 (Sohn 2005: 765).[53]

However, the term "Market Economy Status" (MES) is originally derived from anti-dumping laws in the U.S., which established criteria for an exporting country to meet in order to qualify as a Market Economy (ME) in anti-dumping cases.[54] Then the approach of differential treatment against an NME country was adopted by the GATT and became a practice in many WTO Members. Under such practice, for an ME country, normal value is based on the price in the domestic market of the export

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[53] The second Supplementary provision to paragraph 1 of Article VI in Annex I to GATT1994 states that "It is recognized 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 the 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."

[54] In the Tariff Act of 1930 of the U.S., an NME country is defined in Article 771 (18) A as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise". Six factors are enumerated to determine whether a country has a market economy, such as: currency convertibility; wage rate determination; allowance of foreign joint venture; extent of government ownership; extent of government control over resources; such other factors as the administering authority considers appropriate.

country, whereas for a NME, normal value often refers to price in a substitute country or a third country. The latter approach for a NME is the so-called "surrogate country" (or "analogue country") approach, where the anti-dumping authorities rely on obtaining cost and price information from surrogate countries with market economies considered to be at or close to the same level of development as the NME subject to the anti-dumping investigation.

As a NME, China is likely to have to endure and be involved in rough trade disputes (Magarinos et al. 2002: 9). An introduction of "surrogate country" in an anti-dumping investigation, where data from third or fourth country work together, simply makes the anti-dumping procedure more confusing. NMEs are at a real disadvantage because there is considerable scope under the loose rules for manipulation of data on prices and costs in ways that increase dumping margins (Stoler 2003). Arguably this approach of the surrogate country has often been taken advantage of by petitioners in proposing a higher dumping margin.

Therefore, China's greatest concern in anti-dumping investigations is its status as an NME. In its protocol of accession to the WTO, China has accepted that investigating authorities in other WTO Members may apply NM methodologies in anti-dumping and anti-subsidy investigations for up to fifteen years (WTO 2001).

The NME approach has had a significant effect on the levels of dumping found in the anti-dumping investigations against Chinese exports. Given the fact that the anti-dumping authorities have broad discretion in choosing the surrogate country, and that they employ complicated methods of calculation and variables of adjusting the price from the chosen country, this makes it easy for Chinese firms to be found guilty of dumping. As a result, China faces seven times as many anti-dumping actions per dollar of exports as the United States (Will Martin et al. 2002: 55). The average forty percent duty applied by the United States against non-market economies was more than ten times high than in cases where the margin was calculated based on actual costs (Will Martin et al. 2002: 38). Thus China, being a low-cost producer, large exporter, and labelled NME, seems destined to be the largest anti-dumping target in the world.

Few surrogate countries have China's cheap pool of labour (a key component of its price); even so, few exporters of chosen surrogate countries, for various reasons,

would provide the large amount of genuine information (often relating to confidential business data) demanded by a foreign government in anti-dumping investigations. In some cases, the companies in nominated surrogate countries simply refuse to provide price or cost information. In the Australian *case of glyphosate from China* in 1996 (Australian Customs Service, Anti-Dumping Authority Report No. 159), for example, the refusal of the Malaysian producers (the suggested substitute country by the Chinese respondents) in providing the cost information resulted in the U.S. being chosen as the surrogate country. In some other cases, the reliability of information from chosen countries thousands of miles away may be questionable. In the long lasting U.S. case of *concentrated apple juice concentrate from China* initiated in 1999 (DOC, 64 FR 36330), the Chinese respondents found out, after on-the-spot research, that the apple price from India (the surrogate country) provided by American petitioners was for those nicely displayed in a supermarket, not those massively used for making juice which are much cheaper because of lower quality requirements (Shichun Wang et al 2004: 58). In many cases, the cost factors from a few countries are used complementarily to determine the "normal value" of a Chinese product, when information from a single surrogate country could not complete the construction of the product's cost. In the U.S. case of *crawfish meat from China* in 1997, the production factors referred to India's data for labour, energy, etc., and Spanish data for its imported crawfish meat from Portugal since India does not produce crawfish (DOC 1997). In short, it is to some degree a subjective process in choosing a "surrogate country" in anti-dumping procedures; hence, uncertainty is the main concern for Chinese respondents in such cases.

Furthermore, the lack of comparability of firms across countries with different levels of development and the wide range of products open the door to abuses of this approach. In anti-dumping investigations, China has been "substituted" by many countries, comparably or incomparably. Some cases mentioned above showed the possibility of choosing surrogate countries with different development levels and that normally means different production costs. The EU case of *sulphanilic acid from China* in 2001 is another example where the U.S. was chosen as the substitute country of China in determining dumping margin (Official Journal of the EU 2002). Also, the EU case of *colour TV receiver from China* in 1999 referred to the costs in Singapore (Official Journal of the EU 2002). Although countries like India, Indonesia, and the

Philippines are often referred to in anti-dumping investigations, circumstances can be very particular in each case. In another EU case of *brushes from China* (Official Journal of the EC 1989) concluded in 1989, the price of Chinese brushes was substituted by that of Sri Lanka. This was incompatible as Sri Lanka produced different types of brushes and had a much smaller production volume (by only two producers), accounting for 0.5% of China's, and in fact relied on imported materials.

Admittedly, the continued treatment of China as an NME in anti-dumping investigations is a serious problem, which will involve very lax triggers that could lead to a domino-effect closing of many markets for China's exports (Bhattasali et al 2004: 2). However, it is undoubtedly temporary. China's WTO protocol sets a deadline for this treatment that will expire fifteen years after the date of China's accession to the WTO, and it is likely that China will effectively cease to be treated as an NME long before 2016 (WTO 2001). As a practical matter, it seems that the continued development of the market and related government policies will demonstrate the market-based nature of the Chinese economy in the distant future.

V.1.2.2.2 The Significant Expansion of Exports

China's exports have expanded dramatically along with its open-up reform which started in 1978. The economic liberalization and institutional changes led by the reform are substantially reshaping the country from a planned economy to a market-oriented economy. Moreover, the nation's accession to the WTO in 2001 has further accelerated the process of liberalization and integration into the world economy.

As a significant part of China's international trade, its export growth is noticeably outpacing the rest of the world. The average annual growth rate of China's exports has been about 17% since 1978 (Shichun Wang et at 2004: 11). The WTO statistics show that China's share of the world's total exports is also growing. It hit 7.28% in 2005, growing by 28% compared to the previous year, ranking China the third largest exporter worldwide with an export value of US$761.95 billion (WTO Trade Profiles 2005). As the world's fastest growing economy and the only developing country among the world top ten exporters, China cannot avoid being treated differently from other developing partners in the anti-dumping club.

Given the picture above, it is not hard to see how China's rapid export growth relates to its status as the world's number one anti-dumping target. The dramatic economic boom and speedy export expansion of China have increased not only cross-border trade friction but also the level of threat faced by other competitors, further compounding the emerging concern of the "China threat" (Chalmers Johnson 2005). One can only imagine the reaction of American producers when 1.2 billion shoes per year were shipped from China to the U.S., which has a population of less than 0.3 billion. Industries in different countries tend to apply trade remedies to protect themselves from the threat of an import surge. The fact that China has a large trade surplus with its major trading partners, namely the U.S. and the EU, has resulted in the growing number of complaints, where they simply link their business loss to the Chinese exports.

V.1.2.2.3 China's Vulnerable Trade Structure

China's trade structure also makes it an easy target of trade protectionist measures. Exports are highly concentrated in certain key destinations. Although great efforts have been made to diversify, progress has not been as fast as it could have been. The U.S., Japan, the EU and Hong Kong (China) still account for 70 per cent of China's exports (Yuefen Li 2007: 144). For example, 75 per cent of China's textile and apparel exports are concentrated in five destinations, i.e., Hong Kong (China), Japan, the U.S., the EU and South Korea. Another example is furniture export. According to official statistics, China produced nearly US$20 billion worth of furniture in 2002, of which one-third was exported, half of it to the United States (China Daily 2003). This high reliance on a few markets gives rise to higher anti-dumping pressure in these markets.

On the other hand, China's exports were mostly labour intensive and composed of standard and basic products. As a result, seventy per cent of China's exports are in the products that are most vulnerable to anti-dumping measures (Will Martin et al 2002: 38). However, these were also the products of sunset industries in industrialized countries that have become the object of intensive/vigorous anti-dumping claims. Anti-dumping investigation can win time and allow market share for those industries in developed countries to adjust as this normally will take longer with protection. According to a Chinese Government source, 70 to 80 per cent of the total

anti-dumping investigations against China are concentrated on textiles, chemicals, steel and mineral sectors, all of which are labour intensive and sectors characterized with low value added. Most of them are the sunset industries in developed countries that are at the same time the mainstay industries for countries undergoing the first stage of industrialization. In the past three years, chemicals and metals still ranked foremost for anti-dumping investigations (Yuefen Li 2007: 145).

Economies such as Hong Kong (China), Japan, South Korea, Singapore and Chinese Taipei have reduced their exposure to foreign anti-dumping measures by upgrading their exported products. One could even argue that foreign anti-dumping measures may have accelerated the economic development of these industrial countries by inducing them to shift production more quickly to highly differentiated products in which they anticipated having comparative advantages (Messerlin 2004: 115).

V.1.2.2.4 Low Price of Products and Price-Cutting Competition Approach in the Foreign Markets

China exports relatively cheap products, and certain business practices by Chinese exporters make the situation even worse.

The majority of the products exported are labour or resource-intensive products, with relatively low added value, constituting over 80% of Chinese exports. Compared with competing products from many other countries, Chinese products are traditionally of low price, less variety, and in simple packaging. As there is a large pool of cheap labour for its manufacturing and service sectors, China is one of the countries with the lowest wages in the world, which is a significant factor in the cost of labour-intensive product (International Labour Organization LABORSTA Database). Together, these factors allow for maintenance of low prices.

Furthermore, the business practice of many Chinese producers further induces anti-dumping investigations in importing countries. For many Chinese firms, a common way to attract customers is to offer a favourable price. This is the case for many Chinese products overseas. There have been price wars almost everywhere in the world among Chinese exporters when they compete to survive, to acquire market share, and to earn hard currency. For example, several years ago, Chinese Ginseng

poured into Brazil at a price almost comparable to that of local carrots, as a result of severe price competition amongst many Chinese exporters. This ended up with an anti-dumping investigation and a duty was imposed on Chinese ginseng that consequently shut it out of the Brazilian market.

Fortunately, learning from the lessons of anti-dumping, some Chinese manufactures have begun to form alliance, restricting the price of exports to the U.S. For example, the apple cider producers in China now meet annually to determine the minimum price to the U.S. It is natural to see more and more firms become aware and begin to charge higher export prices toward major users of AD (Chu and Prusa 2004).

V.1.2.2.5 Poor Performance of Affected Chinese Producers

In order to reach a fair result, it is important that both sides involved in the case participate actively in the anti-dumping investigation. If the accused does not participate or fails to "cooperate" properly in an anti-dumping investigation, it will be put into a very disadvantageous position.[55] For example, in the absence of data provided by the accused exporter, the anti-dumping authority often applies the data provided by the domestic complainant.[56] If this were the case, obviously, it would be easy to find the exporter guilty, based on information from the petitioner. In fact, arguably some biases inherent in anti-dumping law already place the respondents at a disadvantage. In many jurisdictions, exporters must prove the negative (e.g. no hidden discounts) and basis for all favourable adjustment, while the petitioner's allegation is assumed to be true unless disproved by exporter. Hence, silence from the accused exporters usually means loss for them in anti-dumping cases. Not surprisingly, participating and non-participating exporters, in a single case often get different results.

For instance, in the *Glyphosate* case, the EU sent questionnaires to all thirty-five Chinese producers. Only one company responded. The sole co-operating exporter also requested individual treatment and submitted some information to support its claim.

[55] In practice, the respondents fail to co-operate "properly" when their answer is not completed or satisfying, judged by the anti-dumping authority in the importing country.

[56] It is labelled, for example, "best information available" (BIA) in the U.S. anti-dumping procedures. See Section 1677e (a), Tariff Act of 1930, 19 U.S.C. 1677e. This provision allows the U.S. authorities to make an adverse inference upon information from the petition, determination in the investigation, or previous review.

The European {?} Commission deemed such information insufficient and sent a specific individual treatment questionnaire to the Chinese company. However, no reply was made to this questionnaire. In the absence of co-operation from the Chinese exporters, the Commission can use whatever information is available, i.e. the so-called "best fact available" practice. In the review case, the complaining community producers submitted some evidence to show that the imposition of the original anti-dumping duty of 24 percent had no impact on the selling prices in the community. The Chinese exporters did not respond to the dumping charge. Despite the fact that the fall of the resale prices of glyphosate was partly attributed to a world-wide decline in the cost of production of glyphosate, the Commission decided to impose a new duty on Chinese glyphosate, which was 48 percent (Liu and Vandenbussche 2002: 1135).

Similarly in the U.S. disposable pocket lighters case of 1994, which affected fifty-seven Chinese lighter producers, only five participated in the investigations. Those who participated were found to have dumping margins of 0%~27.91%, while the others who ignored the case were found to have as high as 197.85%, although the producers were mostly private and in similar conditions in China.[57] This shows that the decisions on the allegations were influenced by the factor of representation.

A survey revealed that more than half the Chinese firms involved in anti-dumping charges had been reluctant to participate in foreign anti-dumping procedures. Subsequently, the Chinese firms were the losers in over 80% of cases (Yeung and Mok 2004: 948). This is mainly due to the fact that quite a few Chinese companies have a fear of international law suits due to their lack of familiarity with international anti-dumping practices and high legal fees. In the beginning of anti-dumping charges against China in the late 1970s and early 1980s, most affected Chinese companies had no idea what anti-dumping was all about, and hardly any companies participated in such investigations. It is widely agreed that the response rate and the degree of cooperation of Chinese companies in anti-dumping investigations were low. The study from the EU by Liu and Vandenbussche (2002) maintained that Chinese companies had largely ignored demands for information from the EU, and in cases where they provided it, it was often incomplete or untimely. The poor performance of affected

[57] See Department of Commerce of the U.S., Notice of Final Determination of Sales at Less Than Fair Value: Disposable Pocket Lighters from China, 60 FR 5/5/1995.

Chinese producers leaves China vulnerable in many anti-dumping investigations.

Recently the participation of Chinese companies in overseas anti-dumping investigations has improved gradually with the efforts of the Chinese government and a number of industrial associations. To encourage the affected Chinese firms to participate in foreign anti-dumping investigations, the MOFCOM (formerly MOFTEC), the Chinese anti-dumping authority) issued Provisions on Answering Anti-dumping Investigations of Export Product in 2001. The central and provincial governments now provide more support for their affected exporting companies than before. The former MOFTEC, for example, set up the first Chinese web site on trade remedies, providing service on information and consultancy. Some provinces, e.g., Guangdong and Zhejiang, where most of the affected producers reside, regularly organize training programs on anti-dumping for exporting firms. Some industrial associations, such as China Import and Export Commercial Association for Five-mineral Chemical Industry, participate actively in overseas anti-dumping investigations against China. A number of anti-dumping practitioners and scholars frequently give speeches in various forms across the nation. It is said that in recent years, affected Chinese exporters have answered 60% to 70% of investigations worldwide, and they have won more and more cases (BOFT 2007). Particularly, in recent years, they have participated in all the U.S. and the EU cases, which are usually of large trade value. Compared to zero show-ups prior to 1994, this is tremendous progress. However, an issue China faces in this area is whether, realistically, it makes sense to fight anti-dumping actions if the legal and informational costs are high (Whalley 2006:220). A recent report also shows that China has improved its overall performance in answering anti-dumping charges, winning 35.7% of all cases, but this was at a high cost in legal fees and other charges (Xie 2002).

V.1.2.2.6 High Possibility of a Guilty Verdict Resulted in a Domino Effect

The high possibility of being found "guilty," coupled with the imposition of high duties on Chinese producers in anti-dumping investigations, has induced more charges against them. It is as simple as that if a hunter has found a rabbit is easy to capture, other hunters will tend to hunt rabbits. Similarly, many countries in the past two decades have found that it was relatively easy to prove dumping cases against

China, and so impose duties on its exports. This is supported by the higher percentage of proving anti-dumping cases against China, and higher anti-dumping duties imposed on Chinese exports, compared with other target countries (WTO Statistics on Anti-dumping). It is estimated that about 64% of the initiations against China end up with affirmative anti-dumping measures, compared with the worldwide average of 44% (Yang et al 2004: 2). In the U.S., Moore estimates that the average dumping margin found on Chinese exports is 96%, whereas the total average has been 65% in cases where exporters failed to cooperate with the DOC since 1980 (Moore 2002).

The countries also found that through anti-dumping measures, they could effectively protect their own industries from China, the major exporter of many goods. This phenomenon paved the way for more industries and more countries, following the preceding model, to launch new charges targeting the same country.

V.1.3 Why China Has Not Referred Any Case to the WTO Disputes Settlement Body (DSB)?

Although it has emerged as the number one target of anti-dumping measures since 1995, China has not yet referred any anti-dumping case to the Dispute Settlement Body (DSB).

While China has increased its use of anti-dumping measures, statistics of the WTO show that among all 63 cases of the WTO dispute involving anti-dumping issues,[58] none has been filed by China (WTO Statistics on Anti-dumping). China is the only one economy among the top-ten target economies that has not filed a single WTO dispute on anti-dumping issues.

The reasons of China's reluctance to file the anti-dumping cases to the DSB perhaps could be attributed to three factors.

First, as the new Member of the WTO, China lacks adequate experience in the field of international anti-dumping practice. The lack of qualified staff with good knowledge of the language of the country initiating the case and anti-dumping practice also prevented China from defending their interests effectively. The ability to prepare and defend an anti-dumping case before the Dispute Settlement Panel of the WTO is

[58] As of 1 May 2007.

another instance where the developing countries are at a clear disadvantage.

Secondly, as Jackson pointed out, "[a] very important consideration affecting a nation's willingness to accept the WTO dispute procedure is that nation's view of the role that the treaty and its institutions should play in its international economic diplomacy" (Jackson 1998: 76-78). The traditional Chinese culture of "no litigation" deeply rooted in Confucian thoughts[59] generally discouraged litigation. Due to its culture, China is never shy to express its preference for amicable means of dispute settlement in diplomacy. That attitude might discourage China from using, or even accepting, the adjudicating method used by WTO Panels for dispute settlement, which is arguably the strength of the WTO Dispute Settlement Mechanism.

Thirdly, in the general practice of anti-dumping investigations, countries of market economies have a clearly defined route to challenge such miscalculations through the Disputes Settlement Understanding (DSU), while for the NMEs where the "surrogate country" approach applies, it is difficult to bring a successful challenge to the DSB.

It is still unclear if China will begin to lodge some complains to the DSB in the near future. It remains to be seen whether filing complaints has any impact on the cases initiated or not. If it does, as common sense would predict, the fact that China does not use the DSB might lead the initiating economy over-reach in its efforts to levy anti-dumping duties on cases against China (Chu and Prusa 2004).

V.1.4 Case Study: Integrated Electronic Compact Fluorescent Lamps

V.1.4.1 Introduction

On 4 April 2000 European Lighting Companies Federation (ELC), which encompasses Philips Lighting BV (Netherlands), Osram GmbH (Germany) and SLI Lighting (the UK), filed an anti-dumping petition to the EC. This petition was against the imports of integrated electronic compact fluorescent lamps (CFL-i, also called energy-saving lamp) originating in China.

On 17 May 2000 the Commission initiated the anti-dumping proceeding with regard

[59] Confucianism is a Chinese ethical and philosophical system originally developed from the teachings of the early Chinese sage Confucius. Confucius was the founder of the teachings of Confucianism. Confucianism is a complex system of moral, social, political, philosophical, and religious thought which has had tremendous influence on the culture and history of East Asia up to the 21st century.

to imports into the Community of CFL-i originating in China (Official Journal of the EU 2000). It was at that time disastrous news to the Chinese manufacturers, who were booming while heavily relying on foreign markets; the Chinese domestic consumption of subject products was limited. It was noted that Philips Lighting's joint venture in China, i.e. Philips & Yaming Lighting Co., Ltd. in Shanghai, was among the Chinese respondents in the investigation (Official Journal of the EU 2001). The investigation on dumping and injury was set to cover a 15-month period from 1 January 1999 to 31 March 2000, which meant the import prices in this investigation period would be examined to determine if "dumping" had taken place. 127 Chinese producers were involved. Within the requested period of time, twelve of them replied the questionnaires sent by the European Commission. Ten of the twelve exporting producers claimed for Market Economy Treatment (MET) with one of them failing to respond (Official Journal of the EU 2001).

Therefore, provisional anti-dumping duty was imposed on 7 February 2001 (Official Journal of the EU 2001). Because China was considered as an NE, Mexico was used as the "analogue country", of which the CFL-i price was used as the substitute of the Chinese domestic price to compare with the EU importing price in determining the "dumping margin" (Official Journal of the EU 2001).

After five months, on 4 July 2001, the EU reached a definitive final decision (Official Journal of the EU 2001). During the investigations, two Chinese exporting producers, including Philips & Yaming Lighting Co., Ltd., and Lisheng Electronic & Lighting (Xiamen) Co. Ltd, were granted "Market Economy Treatment (MET)" after the Commission's scrutiny (Official Journal of the EU 2001), so that their own domestic prices in China could be used as the comparable prices, instead of those of substitute countries. When the price for domestic sales in China was used as normal value for determining dumping margin for Lisheng, a margin of *de minimus* was found, hence only 0% anti-dumping duty applied on its exports. Meanwhile, as Philips & Yaming did not have domestic sales in China, the Commission calculated a "constructed normal value" based on the figures from the other Chinese MET companies, and reached a dumping margin of 61.8% though in the end an anti-dumping duty of 32.3% was applied (Official Journal of the EU 2001). Moreover, six Chinese exporting producers were given individual rates ranging from 8.4% to 59.6% (Official Journal of the EU 2001). A five-year duty of 66.1% was imposed on all other Chinese

exporting producers. It should be noted that Philips & Yaming indeed engaged in dumping, but it finally got a "better" rate than most of the other Chinese producers.

One of the key debates among the procedures is whether or not the domestic sales of the MET Chinese companies should be used as the closest base of comparison for calculating the normal value of products from other Chinese producers. It is a legitimate request from the Chinese respondents, who have realized the many disadvantages of using data from a third country. However, in the end, the Council of the EU refused to do so upon a rigid interpretation of the basic Anti-dumping Regulation, rather choosing Philips Mexico as the comparison for calculating the dumping margin for all other non-MET Chinese firms (Official Journal of the EU 2001).

V.1.4.2 The Result

The result of the *CFL-i* case of anti-dumping was that hundreds of Chinese makers lost the EU market. It was estimated by the China Association of Lighting Industry (CALI) that half of Chinese energy saving lamp producers went bankrupt in 2001, which cut the number of such manufacturers from 4,000 to around 2,000, and further to around 1,400 in 2002. Obviously, the anti-dumping issue is not just about the export of the Chinese industry, but also about the industry's overall competitiveness. The competitiveness of Chinese industries was adversely affected by the attack from foreign firms in the international market, which increased the overall costs for the Chinese industries. Consequently, in cases like *CFL-i*, many Chinese firms could do nothing but transfer the risk to the home market by closing down their plants in the absence of a substitute market for their products.

On the other hand, multinational enterprises often have more options in the international market. Philips continues to purchase Chinese lamps to supplement its low-end production exporting to the world market including the E.U. The anti-dumping measures are likely to highlight the insufficient competition in the E.U. market, where only Philips, Osram, and Sylvania have been the major lamp manufacturers.

V.1.4.3 Assessment

The *CFL-i* case is the first occasion that raised broad public attention in China, which has given the Chinese industries a good lesson on anti-dumping mechanisms.

First, the anti-dumping measures could be strategically used by multinational enterprises and their affiliates to squeeze out new foreign market entrants, particular new and weak entrants from developing countries. In this case, the anti-dumping device was in fact used by the petitioners such as Philips, Osram and Sylvania to improve their market dominance. The question remained for the anti-dumping authorities to carefully ponder over is whether anti-dumping investigations are aiming to attack unfair trade or are manipulated to facilitate market power.

Secondly, it is important for Chinese producers to gain ME treatment under the importing country's legal framework, which most likely will lead to different results in anti-dumping investigations. However, once again, the ME issue is sensitive economically and politically, and needs joint work by the Chinese industry and government.

Thirdly, the small and medium Chinese companies are more vulnerable than multinational giants who often act as "victims" in anti-dumping petitions. The smaller firms face extremely difficult situations with few options. Nevertheless, this experience will enrich the lessons that the Chinese have learned from international trade practice and prepare them in the international market.

V.2 Anti-Dumping Measures by China

V.2.1 Introduction

In 1997, when the Anti-Dumping and Anti-Subsidy Regulations of China was drafted, the only experience China had in regard to ADR was defending its enterprises in anti-dumping investigations conducted by other WTO Members. It was not until the end of 1997 that China initiated its first anti-dumping investigation in the newsprint case.[60]

As further opening in China's market, domestic industry suffers industrial injury from dumping in recent years. Until the end of 2006, China initiated 47 anti-dumping

[60] On 10 December 1997 the Chinese anti-dumping authority (Ministry of Foreign Trade and Economic Cooperation, MOFTEC) received a petition by Chinese Newsprint manufacturers and initiated the first anti-dumping investigation under the new Regulations by targeting Newsprint (HTS 4801.000) imported from the United States, Canada, and Korea.

investigations of 44 imports originated from 24 countries and regions (Table 6).[61] There were 37 final affirmative anti-dumping determinations which imposed anti-dumping tariff, 4 no injury determination, 4 ceasing determination, and 2 still pending. The imports engaged with seven industries in China like chemical, light industry, steel, textile, electronic, pharmaceutical and agricultural industry which the enterprises located in 26 provinces, municipalities and autonomous regions (China Trade Remedy Information Net 2007).

In 2006, according to the application of China's injured ventures, the MOFCOM filed an anti-dumping investigation on 5 imports, which positively maintained China's industry safety.[62] For example, on 6 February, the MOFCOM filed an investigation on imported *potato starch originated from the EU.* On 18 October, according to the preliminary determination on dumping, the MOFCOM undertook temporary anti-dumping measures on it which will benefit basic living of over 3 million farmers in central and west China. On 18 April, 2006 the MOFCOM filed an anti-dumping investigation on imported *paper for electrolytic capacitor originated from Japan.* On 20 October, according to preliminary determination, the MOFCOM undertook temporary anti-dumping measures on it. On 16 June, the MOFCOM filed an anti-dumping investigation on imported *sulfamethoxazole originated from India.* On 30 October, the MOFCOM filed an anti-dumping investigation on imported *Bisphenol-A Originated from Japan, Korea, Singapore, and Chinese* Taipei. On 22 November, the MOFCOM filed an anti-dumping investigation on imported *Methyl Ethyl Ketone Originated from Japan, Chinese Taipei and Singapore.* All are still in investigation. The MOFCOM made final determination on eight dumping imports which filed before 2006 which released that dumping existed in these imports and would be imposed anti-dumping duty. The imports included *Silicone originated from Japan, the U.S., the U.K. and German, Nonyl Phenol originated from India and Chinese Taipei, Furan Phenol originated from Japan, the European Union and the U.S., Disodium 5'-Inosinate, Disodium 5-Guanylate and Disodium 5'-Ribonucleotide originated from Japan and Korea, o-Dihydroxybenzene originated from the U.S. and Japan, Epichlorohydrin Products originated from Russia, Korea, Japan and the U.S., Polybutylene Terephthalate Resin originated from Japan and Chinese Taipei,*

[61] See China Database of Trade Remedy Cases, which is available at http://www.cacs.gov.cn/DefaultWebApp/chaxun.jsp#.

[62] See China Trade Remedy Information Net, which is available at http://www.cacs.gov.cn/.

Polyurethane originated from Japan, Singapore, Korea, Chinese Taipei and the U.S., and Wear Resistant Overlay originated from the U.S. and the EU. In 2006, the MOFCOM properly used such trade remedy measures (MOFCOM 2007).

Rapid tariff reductions, lower market access, and import expansion during and after the WTO accession partly explain the increasing anti-dumping usage. Prior to and following its commitments under the WTO agreements, China has been reducing the general level of tariff protection. The average Most Favored Nation (MFN) tariff rates in China, for all goods, decreased from nearly 24% in 1996 to 17% in 2000 and to 10.5% in 2004. For industrial goods, the MFN rates fell 56% between 1996 and 2004 and by 60% for textiles and clothing (World Bank TRAINS Database). The weighted average (by trade volume) has also decreased significantly in the past eight years. Motorcars and parts thereof (target date June 2006), certain chemicals, e.g. some unfinished plastics (2008), and synthetic woven fabrics (2010) are exempted from this rule. Among the tariff commitments of special interest is the acceptance of both the Information Technology Agreement which provides for duty free entry of a wide range of IT products and the Chemical Tariff Harmonization Agreement setting tariff rates for most products at 0%, 5.5% or at 6.5%. The door of China's market is being widely open for the past decade. From 1995 to 2003, Chinese merchandise imports increased at an average annual rate of 15% (faster than its export grow rate of 14%) and at a faster pace most recently (e.g. the imports grew by 21% in 2002 and 40% in 2003), along with the realization of China's commitments on tariff reduction in the WTO (WTO Trade Profiles). China, the small trader two decades ago, has now become the third largest importer in the world, as the only developing country in the top ten importers worldwide (WTO International Trade Statistics).[63] The massive and fast import expansion has made Chinese industries feel the tension more or less from import competition.

In the anti-dumping practice, Chinese authorities generally follow such guidelines: case information (non-confidential) is accessible to the public through the internet and public reading rooms; legal documents are updated on the authority's web site; decisions are made based on required data following the international practice. Anti-dumping investigations are relatively transparent and fair compared with other

[63] The top ten importers in the world in 2005 were: U.S., Germany, China, Japan, the U.K., France, Italy, the Netherlands, Canada, and Belgium. See WTO International Trade Statistics, which is available at http://www.wto.org/english/res_e/statis_e/its2006_e/its06_toc_e.htm.

administrative cases in China, although the transparency and accessibility of information is still questioned by some foreign observers (WTO 2004).

V.2.2 The Main Features of Anti-Dumping Cases by China

V.2.2.1 High Concentration on Raw Materials

The anti-dumping petitions in China concentrate on raw materials, especially chemicals, accounting for about 77%, followed by the paper industry (10%), base metals (steel, 7%), electrical goods (optical fiber, 3%) and textiles (yarn, 2%) (MOFCOM 2007). Not surprisingly, China has trade deficits in those industries where anti-dumping investigations occur (MOFCOM 2007). This reflects the pressure of import competition on them. Some sectors have thus become active in the anti-dumping club. For instance, in July 2002 the Working Committee for the Coordination of International Trade Disputes in the Petroleum and Chemical Industry was established in China (China Chemical Reporter 2002). The committee reports to the China Petroleum and Chemical Industry Association, and aims to organize the research and formulation of anti-dumping, anti-subsidy, and other remedy measures for the Chinese petroleum and chemical industry.

Besides the universal reasons for the industry, the high concentration on chemicals is due to certain factors.

First, the chemical industry, as a capital-intensive sector which has been largely invested in by the government, has been one of China's key industrial establishments since the economic reform (Shichun Wang et al 2004: 29). The newly established and mostly state-owned enterprises (SOE) are very sensitive to import competition.

Secondly, the uncommonly low prices of certain chemical imports from foreign multinational companies attract the attention of domestic producers, who suspect strategic pricing by foreign giants.

Thirdly, the concentration of producers in the chemical industry makes it easy to meet the requirements of representing "domestic industry"[64] set out in the Chinese

[64] According to Article 11 of the ADR and Article 5 of the Provisional Rules on Initiation of Anti-Dumping Investigations, the term "domestic industry" means the domestic producers as a whole of the like products within China or those of them whose collective output of the product constitutes a "major proportion" of the total production of those products, and "major proportion" means "more

anti-dumping law to request anti-dumping investigations (Shichun Wang et al 2004: 29).

Since Chinese chemical and metal industries will not be likely to rebound from the global recession and vigorous competition in the world market, the concentration within such industries will remain (Wang and Zhang 2004: 23). In contrast, the low concentration of anti-dumping initiations in China on machinery/electrical goods and textiles, which are on the contrary frequently targeted worldwide, implies China's comparative advantage on these manufactures.

V.2.2.2 Main Targets are the Asia-pacific Region and Other Major Trade Partners

Countries in the Asia-Pacific region and other major trade partners are the main targets of Chinese anti-dumping investigations. South Korea accounts for 24 investigations, followed by Japan (20), the U.S. (17), Russia, and Chinese Taipei (7 each) (MOFCOM 2007). It has been noted that China has trade deficits with both South Korea (US$23 billion deficit in 2003) and Japan (US$9.7 billion in 2003), which particularly develop the market of China for some of their products, resulting in import pressures on the Chinese counterparts (Shichun Wang et al 2004: 30). Quite a few countries/regions in Asia, such as Chinese Taipei, Indonesia, Thailand, and Malaysia, have been affected by China's anti-dumping measures. They all share some manufacturing similarities with China, so competition between their producers and Chinese counterparts in certain markets are obvious (Wang and Zhang 2004: 23). Most of them also have had a trade surplus with China in recent years. This supports what was previously discussed that an anti-dumping investigation is likely to occur where the nation has a trade deficit with its trade partner.

V.2.2.3 The Anti-Dumping Applicants are Mainly State-Owned Enterprises (SOEs)

The anti-dumping applicants are mainly SOEs and a few resident plants of multinational corporations. The anti-dumping charges from the former imply SOE vulnerability in facing import competition. The multinationals, in some sense, use anti-dumping as their market strategies, since anti-dumping can effectively reduce competition in the domestic market (Wang and Zhang 2004: 23).

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than 50 per cent".

All in all, it is expected that there will be a growing number of anti-dumping investigations in China in the future, resulting from the need of domestic companies as they are exposed to more severe competition after the WTO accession. It is also expected that more personnel will be trained for China's anti-dumping exercise, as it is emerging and in short of professionals.

V.2.3 Case Study

V.2.3.1 Newsprint from the U.S., Canada, and South Korea

V.2.3.1.1 Introduction

In 1997 China initiated its first anti-dumping case in its history. It was brought by the Chinese newsprint industry, represented by the nine largest manufacturers, targeting the imports from the U.S., Canada, and South Korea.

In December 1997, the MOFTEC and the SETC started an anti-dumping investigation. The MOFTEC sent questionnaires to the foreign companies involved, but only five Canadian companies and one Korean firm responded to the charges on time. It is found that owing to the imports of foreign newsprint, the price of newsprint in domestic market has dropped 9.1% and the total profits of the nine Chinese companies have dropped 88% and the domestic inventory of newsprint has evidently increased. In addition, the domestic newsprint industry has witnessed a large-scale layoff. Based on these factors, the investigating authorities concluded that the imports of newsprint from the U.S., Canada and Korea had serious material injury for Chinese newsprint industry.

In June 1999, the MOFTEC and the SETC issued its final verdict of China's first anti-dumping case, imposing punitive anti-dumping tariffs on newsprint imports from the U.S., Canada and South Korea. The anti-dumping duty for each country was based on a normal price, which is determined according to the CIF value of the product. Due to the variation in costs and market prices from company to company, the U.S., Canada, and South Korea were subject to tariff rates of 78%, 57-78%, and 55% respectively (China Database of Trade Remedy Cases).

V.2.3.1.2 The Significance of the Case

This case caught international attention as the first attempt of China in this field. The rest of the world was curious about how China would deal with such cases. The significance of this case was not just in protecting the Chinese newsprint industry but also in setting an example for other domestic industries that might also have suffered from dumped imports. Moreover, it showed that the Chinese industries would eventually resort to the law for resolving certain trade problems across the border, rather than relying on governmental measures such as quotas or tariffs as before. It also marked legal history in China, demonstrating that the China had learnt international rules and joined the international anti-dumping club.

V.2.3.2 Chloroprene Rubber from Japan, the U.S. and the EU

V.2.3.2.1 Introduction

On 10 November 2003 the MOFCOM initiated an anti-dumping investigation on chloroprene rubber from Japan, the U.S. and the EU, upon the request from two Chinese producers, i.e. Chongqing Changshou Chemical Industrial Co., Ltd. and Shanxi Synthetic Rubber Group Co., Ltd., which represent 100% domestic industry.

On 1 December 2004 the MOFCOM made the preliminary determination in which the MOFCOM confirmed the dumping of the investigated commodity as well as the causality between dumping of the investigated commodity and the injury of domestic industries, and decided to carry out provisional anti-dumping measures on chloroprene rubber originating from Japan, the U.S. and the EU.

In its final determination dated 10 May 2005, the MOFCOM found dumping margins ranging from 2-151% for the exports, and material injury to domestic industry (China Database of Trade Remedy Cases).

V.2.3.2.2 The Problems and Points Raised

The final outcome of this recent case raises two issues. One represents the different results between respondents and non-respondents on the accused side. Two cooperative Japanese companies, i.e., Denki Kagaku Kogyo Kabushiki Kaisha and

Tosoh Corporation, are found to have dumping margins of 3% and 2% respectively, as well as a German producer (LANXESS Deutschland GmbH) and a French one (Polimeri Europa Elastomères France S.A.) found to have 11% and 53% respectively, while all the other non-respondents are determined dumping margin of 151% (China Database of Trade Remedy Cases).[65]

The other issue is that the case demonstrates in how limited a way, under current legislation, rational principles from an economy-wide perspective (such as a broader public interest inquiry and active intervention) are incorporated into anti-dumping enforcement practice. During the investigation, opposition opinions were heard from downstream users. In January 2004, the China Adhesives Industry Association submitted to the MOFCOM the "Disagreement to Anti-Dumping on Chloroprene Rubber Used for Chloroprene Adhesives". A meeting was held in March 2004 for complainants and downstream users to express their opinions, and a field investigation was made by the MOFCOM on users in Guangdong province in September (China Database of Trade Remedy Cases).[66] For the "injury" investigation, 15 companies registered as respondents, including 5 foreign producers that export the subject product and 10 Chinese downstream intermediate producers, which tried to defend their interests. However, in the final determination, the authority still drew the conclusion of "material injury" to domestic industry upon a not-so-convincing base.

V.2.3.2.3 The Significance of the Case

The case highlights the dependence of a public interest inquiry on an exceptionally strong lobby of users or intermediate producers. Important improvement in the existing anti-dumping legislation and a strict compliance of them would likely be called on, before principles in line with an economy-wide perspective could be established and consistently applied in China. These requirements seem demanding for China under the current political and legal system, but they will lead the Chinese legal system in the right direction towards social welfare in a larger scale.

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[65] See Final Determination on Chloroprene Rubber from Japan, the U.S. and the EU by the MOFCOM, 10/5/2005.

[66] See Final Determination on Chloroprene Rubber from Japan, the U.S. and the EU by MOFCOM, 10/5/2005.

V.3 China's Position on Anti-Dumping

China has not been a very active participant in the Rules Group Negotiations under the DDA, nor in the ad hoc working groups on implementation and anti-circumvention. In fact, China has acted thus far more as an observer than as an active participant (Kommerskollegium 2005: 33). Though the Chinese delegation is fairly small, they have nevertheless made two contributions, one on fisheries and of the other of a general nature covering anti-dumping. The paper on anti-dumping focuses on issues surrounding the initiation of investigations and on price comparisons. In addition, China has also contributed to a paper which expresses the concerns of developing countries with respect to the use of anti-dumping in textiles and clothing and to Special and Differential Treatment more generally (WTO 2003).

China to some degree plays a careful role in the anti-dumping club. It is taking a relatively conservative position while the camps are divided in their views on the WTO ADA reform. On the one hand, China opposes the overuse or abuse of anti-dumping by some nations. On the other, it actively advocates restriction over anti-dumping initiations. As explained by the former Director General of the BOFT, the reason why China is not very radical in reforming the WTO anti-dumping system is the consideration of the growing application of anti-dumping measures of China itself as a new user (Shichun Wang 2004: 33).

V.4 Conclusion

Caused by some complicated factors, China has gradually emerged as a prime target of anti-dumping measures since 1995. Based on the above analysis of reasons behind the accusations against China, it is predicted that China will possibly remain the No. 1 target of anti-dumping measures in the next decade. It is a formidable challenge for China to change such special situation in the near future.

On the other hand, with the dissemination of the WTO agreements, anti-dumping terminology and the common rules embodied in the WTO ADA have become increasingly understood and accepted by the Chinese industries and authorities concerned. China has learned to use anti-dumping measures since 1997. Furthermore, China has caught attention in the world arena for its increasing use of antidumping

measures. However, owing to being a new member of international anti-dumping club and its "non-aggressive" traditional culture, it is believed that China will not be the number one user of anti-dumping measures in the near future. In the long term, China will take all efforts to seek full WTO consistency of its practice of anti-dumping.

Table 6: China's Anti-Dumping Investigations against Imports during 1997- 2006

Date of Initiation	Product	Affected country/region	Preliminary determination	Final determination
10/12/1997	Newsprint Paper	The U.S., Canada, South Korea	9/7/1998 Dumping margin 17.11-78.93%	3/6/1999 Anti-dumping duty 9-78%
12/3/1999	Cold-Rolled Silica Steel Sheet	Russia	30/12/1999 Dumping margin 11-73%	11/9/2000 Anti-dumping duty 6-62%
16/4/1999	Polyester Film	South Korea	29/12/1999 Dumping margin 21-72%	25/8/2000 Anti-dumping duty 13-46%
17/6/1999	Cold-rolled Stainless Steel Sheet	South Korea, Japan	13/4/2000 Dumping margin 4-75%	18/12/2000 Anti-dumping duty 17-58% & undertakings by 6 companies
10/12/1999	Acrylic Ester	The U.S., Japan, Germany	23/11/2000 Dumping margin 24-74%	9/6/2001 Anti-dumping duty 31-69% (termination on Germany)
20/12/2000	Dichloromethane	The U.K., the U.S., Netherlands, Germany, France, South Korea	16/8/2001 Dumping margin 7-75%	11/4/2002 Anti-dumping duty 4-66% (termination on France)
9/2/2001	Polystyrene	South Korea, Japan, Thailand	6/12/2001 Termination (no injury)	
14/6/2001	Feedstuff Grade L-Lysine Hydrochloric Acid Salt	South Korea, the U.S., Indonesia	29/9/2002 Termination (no injury)	
3/8/2001	Polyester Chips	South Korea	29/10/2002 Dumping margin 8-52%	3/2/2003 Anti-dumping duty 5-52%
3/8/2001	Staple Fibre	South Korea	22/10/2002 Dumping margin 4-48%	3/1/2003 Anti-dumping duty 2-48%
10/10/2001	Acrylic Ester	South Korea,	5/12/2002	10/4/2003

		Malaysia, Singapore, Indonesia,	Dumping margin 11-49%	Anti-dumping duty 2-49%
7/12/2001	Caprolactam	Japan, Belgium, Germany, the Netherlands, Norway	7/1/2003 Dumping margin 5-38%	6/6/2003 Anti-dumping duty 5-28%
6/2/2002	Coated Art Paper	South Korea, Japan, the U.S., Finland	26/11/2002 Dumping margin 5.58-71.02% (termination on Finland)	6/8/2003 Anti-dumping duty 4-71% (termination on the U.S.)
1/3/2002	Catechol	The EU	4/11/2002 Dumping margin 50-92%	27/8/2003 Anti-dumping duty 20-79%
6/3/2002	Phthalic Anhydride	India, Japan, South Korea	8/1/2003 Dumping margin 14-66%	3/9/2003 Anti-dumping duty 0-66%
19/3/2002	Styrene Butadiene Rubber	Russia, South Korea, Japan	16/4/2003 Dumping margin 0-46%	9/9/2003 Anti-dumping duty 0-38%
20/3/2002	Cold-rolled Steel Products	Russia, South Korea, Ukraine, Kazakhstan, Chinese Taipei	20/5/2003 Dumping margin 8-55%	24/9/2003 Anti-dumping duty 0-55% (terminated in 2004 after an annual review)
29/3/2002	Polyvinyl Chloride	The U.S., Japan, South Korea, Russia, Chinese Taipei	12/5/2003 Dumping margin 10-115%	29/9/2003 Anti-dumping duty 6-84%
22/5/2002	Toluene Diisocyanate (TDI)	The U.S., Japan, South Korea	10/6/2003 Dumping margin 6-49%	22/11/2003 Anti-dumping duty 3-49%
1/8/2002	Phenol	Japan, South Korea, the U.S., Chinese Taipei	9/6/2003 Dumping margin 7-14%	1/2/2004 Anti-dumping duty 3-144%
20/9/2002	MDI	Japan, South Korea	28/11/2003 Termination (withdrawal)	
14/5/2003	Ethanolamine	Japan, the U.S., Germany, Iran, Malaysia,	25/3/2004 Dumping margin 9-137%	14/11/2004 Anti-dumping duty 9-74%

		Chinese Taipei, Mexico	(termination on Germany)	
30/5/2003	Chloroform	the EU, South Korea, the U.S., India	8/4/2004 Dumping margin 0-96%	30/11/2004 Anti-dumping duty 32-96% & undertakings by 5 companies
1/7/2003	Dispersion Unshifted Single-Mode Optical Fiber	the U.S., Japan, South Korea	16/6/2004 Dumping margin 7-46%	1/1/2005 Anti-dumping duty 7-46%
30/10/2003	Nylon 6, 66 Filament Yarn	Chinese Taipei	27/8/2004 Dumping margin 0-13%	Termination (*de mininis* dumping margin)
10/11/2003	Chloroprene Rubber	Japan, the U.S., the EU	1/12/2004 Dumping margin 0-151%	10/5/2005 Anti-dumping duty 2-151%
17/12/2003	Hydrazine Hydrate	France, South Korea, the U.S., Japan	3/8/2004 Dumping margin 28-184%	17/6/2005 Anti-dumping duty 28-184%
31/3/2004	Unbleached Kraft Liner/Linerboard	South Korea, the U.S., Chinese Taipei, Thailand	31/5/2005 Dumping margin 7.2-65.2%	30/9/2005 Anti-dumping duty 7-65.2%
16/4/2004	Trichloroethylene (TCE)	Russia, Japan	7/1/2005 Dumping margin 5-159%	22/7/2005 Anti-dumping duty 3-159%
12/5/2004	Bisphenol—A (BPA)	Russia, South Korea, Japan, Chinese Taipei, Singapore	7/11/2005 Termination (withdrawal)	
16/7/2004	Dimethyl cyclosiloxane	Germany, the U.S., Japan, the U.K.	29/9/2005 Dumping margin 13-35%	16/1/2006 Anti-dumping duty 13-22%
10/8/2004	Ethylene-Propylene-non-conjugated Diene Rubber, (EPDM)	South Korea, Netherlands, the U.S.	16/11/2005 Dumping margin 3-43%	9/2/2006 Termination (withdrawal)
12/8/2004	Furan phenol	Japan, the EU, the U.S.	16/6/2005 Dumping margin 74.6-113.2%	16/6/2005 Anti-dumping duty 74.6-113.2%
12/11/2004	Disodium 5'-Inosinate、Disodium	Japan, South Korea	4/8/2005 Dumping margin 25-144%	12/5/2005 Anti-dumping duty 25-119%

	5'-Guanylate and Disodium 5'-Ribonucleotid e			
28/12/2004	Epichlorohydrin	Russia, South Korea, Japan, the U.S.	21/9/2005 Dumping margin 0-71.5%	28/6/2006 Anti-dumping duty 0-71.5%
13/4/2005	Polyurethane	South Korea, the U.S., Japan, Chinese Taipei, Singapore	24/5/2006 Dumping margin 0-61%	13/10/2006 Anti-dumping duty 0-61%
31/5/2005	Pyrocatechol	the U.S., Japan	2/12/2005 Dumping margin 6-46.81%	22/5/2006 Anti-dumping duty 4-46.81%
6/6/2005	Polybutylene Terephthalate Resin(PBT)	Japan, Chinese Taipei	22/3/2006 Dumping margin 12.78-17.31%	22/7/2006 Anti-dumping duty 6.24-17.31%
13/6/2005	Wear Resistant Overlay	the U.S., the EU	16/6/2006 Dumping margin 10.35-42.79%	12/12/2006 Anti-dumping duty 4.10-42.80%
15/9/2005	Octanol (Octyl Alcohol)	South Korea, Saudi Arabia, Japan, the EU, Indonesia	31/1/2007 Termination (no injury)	
14/10/2005	Butanols	Russia, the U.S., the EU, Japan, South Africa. Malaysia	2/3/2007 Termination (no injury)	
29/12/2005	Nonyl Phenol (NP)	India, Chinese Taipei	10/7/2006 Dumping margin 9.07-20.38%	28/3/2007 Anti-dumping duty 4.08-20.38%
6/2/2006	Potato Starch	the EU	18/8/2006 Deposit 35-57.1%	5/2/2007 Anti-dumping duty 17-35%
18/4/2006	Paper for Electrolytic Capacitor	Japan	16/10/2006 Dumping margin 15-40.83%	17/4/2007 Anti-dumping duty 15%-40.83%
16/6/2006	Sulfamethoxazole	India	1/2/2007 Dumping margin 15.20-37.70%	15/6/2007 Anti-dumping duty 10.10%-37.70%
30/8/2006	Bisphenol-A	Japan, South Korea, Singapore,	21/3/2007 Dumping margin 5.30-37.10%	Pending

		Chinese Taipei		
22/11/2006	Methyl Ethyl Ketone (Butanone)	Japan, Singapore, Chinese Taipei	Pending	

Source: China Database of Trade Remedy Cases (as of 31/12/2006).

CHAPTER VI

WTO CONSISTENCY OF CHINA'S LEGAL SYSTEM ON ANTI-DUMPING

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WTO CONSISTENCY OF CHINA'S LEGAL SYSTEM ON ANTI-DUMPING

One can assess WTO compliance of Chinese law and practice on dumping by focusing on their main features such as definition and determination of dumping, efficacy of the applicable procedure, verification of information, and judicial review. This chapter seeks to do that.

VI.1 Determination of Dumping

VI.1.1 Definition of Dumping

The ADR defines dumping as "an import is introduced, in the ordinary course of trade, into the market of China at an export price less than its normal value".[67]

It is noteworthy that two important common concepts have been adopted in the ADR. First, it introduces the concept of "ordinary course of trade", which is essential for a dumping investigation and well recognized in the WTO ADA[68] as well as in the U.S. and the EU anti-dumping laws. Secondly, only products imported and entered into the commerce of the Chinese market are products that can be subject to an anti-dumping investigation.

VI.1.2 Normal Value

The ADR provides that there are three options to determine the normal value: first, "comparable" prices in the exporting country, i.e., home market price; secondly, prices of similar products exported to a third country, i.e. third country price; and thirdly, cost of production plus reasonable expenses and profit, i.e. constructed price. The last two methods are in principle available when "products similar to the imported product do not have comparable prices at normal trade in the domestic market of exporting countries (areas), or the price or volume cannot be compared

[67] Article3, ADR.
[68] Article 2.1, WTO ADA.

fairly with similar products."[69]

In the *Dichloromethane* case, the MOFTEC excluded the main part of domestic sale from its consideration of normal value, as it is sold for less than its production cost, while it takes the rest of domestic sale under "ordinary course of trade" as a basis to calculate the normal value both for ATOFINA and Akzo Nobel Base Chemicals BV. As for Samsung Fine Chemicals Co. Ltd in the same case, the MOFTEC neglected the part of sale less than cost, but took the whole sales as a basis to establish the normal value, on the ground that the sale less than cost is "too little to consider" (Wang and Yu 2002: 907).

The ADR has no special method for determination of normal value for imports from NME. In the *Cold-rolled Silicon Steel Sheets* case, some Russian companies argued that the domestic price in Russia for the product under consideration should not be comparable, since Russia is not a Market Economy, but a transitional economy. The MOFTEC rejected that argument and took the market price in Russia as comparable normal value (MOFTEC 2001: 72-75).

Moreover, the ADR also develops a method for establishing the normal value indirectly imported products, which consists with Article 2.5 of the WTO ADA. The ADR stipulates that "in cases where a product is not imported directly from the country (region) of origin, its normal value shall be determined in accordance with Item 1 of the preceding paragraph. However, under the circumstances that the product is merely trans-shipped through the exporting country (region), or such product is not produced in the exporting country (region), or there is no comparable price for such product in the exporting country (region), the price of the like product in the country (region) of origin may be considered as the normal value."[70]

However, Magnus (2002) argues that the ADR should provide greater clarity, to the trading public and to the implementing authority, by specifying what "at normal trade" and "cannot be compared fairly" mean. It would also be useful to specify how cost of production should be calculated, including what constitutes reasonable expenses and profit. Consideration could also be given to providing alternate methods of ascertaining the normal value of imports from a Non-market Economy country.

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[69] Article 4, ADR.
[70] Article 4, ADR.

VI.1.3 Export Price

The ADR provides that there are three options to determine the export price: first, price actually paid or payable; secondly, the price for which the imported product is resold for the first time to an independent buyer; and thirdly, a price constructed by MOFCOM on a "reasonable basis". The second method applies in principle when "the imported product does not have an export price or the price is unreliable". The third method supersedes the second method "if the imported product is not resold to an independent buyer or is not resold under the conditions at the time of import".[71]

Though it is almost the same as Article 2.3 of the WTO ADA, the phrase of "unreliable" in the ADR seems to give wide discretion for authorities concerned to make decisions on the export price. Magnus (2002) argues that the ADR does not make clear what constitutes unreliability of the export price such that the second or third methods above would be used. In addition, the ADR could be expanded somewhat to clarify what qualifies as a "reasonable basis" for a constructed export price.

VI.1.4 Determination of Dumping Margin

The margin of dumping is the amount by which the export price of an imported product is less than its normal value. Therefore, how to compare the export price with the normal value is an important issue in determining dumping margins.

According to ADR, MOFCOM may choose two methods of comparison: first, compare the weighted average normal value with the weighted average prices in all comparable export transactions (A-to-A comparison); second, compare the normal value with the export price on a transaction-to-transaction basis (T-to-T comparison).[72] Where the export prices differ significantly among different purchasers, regions or time periods, and therefore it is difficult to make comparison by using these methods, comparison may be made between the weighted average

[71] Article 5, ADR.
[72] Article 6, ADR.

normal value and prices of individual export transactions (A-to-T comparison).[73]

According to the WTO ADA, the investigating authorities may use the A-to-T comparison method only in exceptional circumstances. If the method is used, the authorities must "provide an explanation" as to why it is not appropriate to take normal A-to-A or T-to-T comparison methods. [74] This means that a burden of showing an existence of the exceptional circumstances must be borne by the investigating authorities.

Under the ADR, the authorities may adopt the A-to-T method in exceptional circumstances, but there is no explicit obligation for the authority to explain its reason. Moreover, it has not specified what kinds of adjustment factors must be considered in making a fair comparison between normal values and export prices. What are these factors and how to consider them are questions that are totally left to the discretion of Chinese authorities. Such wide discretion might be inconsistent with WTO rules.

VI.2 Determination of Injury

VI.2.1 Like Product and Subject Merchandise

The ADR provides that the like product is a product "identical to the dumped imported product" or, failing that, the product "with the closest characteristics to that of the dumped imported product."[75]

Magnus (2002) argues that the ADR would provide better guidance by including criteria according to which a like product can be identified when no identical product is available. In addition, the ADR formulation appears to narrow the discretion otherwise available to the authority under the WTO ADA, which defines the like product as "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, although not alike in all respects, has characteristics closely resembling those of the product under consideration."[76]

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[73] Article 6, ADR.
[74] Article 2.4.2, WTO ADA.
[75] Article 12, ADR.
[76] Article 2.6, WTO ADA.

VI.2.2 Domestic Industry

According to the ADR and related provisional rules, the term "domestic industry" means the domestic producers as a whole of the like products within China or those of them whose collective output of the product constitutes a "major proportion" of the total production of those products,[77] and "major proportion" means "more than 50 per cent."[78] Certain domestic producers are excluded from the scope of the domestic industry when the producers are "related" to the exporters or importers, or are "themselves importers" of the dumped imports or like products.[79]

In addition, the provisional rules include a "regional industry" concept. According to this, the producers located in a certain area of the domestic market may be regarded as a separate industry (regional industry), provided that they sell all or almost all of their production of the like products in that market, and the demand for the like products in that market is not to any substantial degree supplied by the producers located elsewhere in China.[80] When determining such a regional industry, sales performance and demands for the product in the region must be taken into account.[81]

The following aspects of these Chinese rules and regulations can be examined by comparison with WTO jurisprudence:

The first point of analysis is the concept of domestic industry. How to define the concept of "domestic industry" is an issue necessarily related to such matters as standing, injury determination, and the scope of products subject to anti-dumping duties. According to the WTO ADA, the term 'domestic industry' refers to 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 like products.[82] Because the term "a major proportion" is not defined in the WTO ADA, controversy may arise as to the interpretation of the term. The Chinese Regulations seems to be consistent with WTO rules because "more than 50 per cent" certainly qualifies as a "major" proportion. This rule is a good example

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[77] Article 11, ADR.
[78] Article 5, Provisional Rules on Initiation of Anti-Dumping Investigations.
[79] Article 11, ADR; Article 8, Provisional Rules on Initiation of Anti-Dumping Investigations.
[80] Article 9, Provisional Rules on Initiation of Anti-Dumping Investigations.
[81] Article 14, Provisions on Industry Injury in Anti-Dumping Investigations, Order No. 5 (2003) of the Ministry of Commerce issued on October 17, 2003.
[82] Article 4.1, WTO ADA.

of clarification of the meaning of WTO provisions.

Secondly, the scope of producers excluded from the concept of domestic industry is another point of analysis. The WTO ADA enables its Members to exclude from the scope of domestic industry the so-called "related producers", i.e. domestic producers who are "related" to the exporters or importers or are "themselves importers" of the allegedly dumped product.[83] The Agreement has the following definition clause for the word "related" which uses the relationship of "control" as the major criterion: "Producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers."[84]

Under the Chinese rules, investigating authorities may exclude domestic producers who are "related" to the exporters or importers or are "themselves importers" of the allegedly dumped product.[85] It is possible that MOFCOM may define related producers in a broader sense than as defined under the WTO agreement given that there is no definition clause of the term "related" under the Chinese law and regulations, such possibility of excessive exclusion and WTO inconsistency is always latent.

Thirdly, it seems that the regional industry provision under the Chinese Regulations is consistent with the WTO ADA[86] in that both are stipulating the same factors (i.e. sales performance and demands) as criteria to recognize a separate domestic industry. Even though it has been rarely used, in practice, by the MOFCOM, this provision is very useful to China given the great size of the Chinese territory.

Fourthly, the ADR does not provide guidance on how MOFCOM is to determine whether a producer is "connected" to an exporter or importer of the like product. Some illustrative criteria, at least, would be useful, and a single line of processing test,

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[83] Article 4.1, WTO ADA.
[84] Footnote 11, ADA.
[85] Article 11, ADR; Article 8, Provisional Rules on Initiation of Anti-Dumping Investigations; Article 13, Provisions on Industry Injury in Anti-Dumping Investigations (issued by the MOFCOM on 17 October, 2003).
[86] Article 4.1, ADA.

e.g., for agricultural products, would make China's anti-dumping regime more effective with regard to sectors that include closely integrated raw materials and processing industries.

VI.2.3 Injury and Causation

The ADR recognizes three types of injury, i.e., "material injury", "threat of material injury", and "the threat of obstacles to the establishment of corresponding domestic industry".[87] Articles 2, 28 and 37, along with Article 30, of the Foreign Trade Law, provide a general causation requirement. Moreover, the ADR sets out a single list of factors to be considered in assessing both the existence of injury/threat, and the causal relationship between the injury/threat and dumped imports. These factors include the following.

First, the quantity of dumped imports, both absolutely and in terms of any market share growth;

Secondly, the prices of dumped imports, including any reduction in such prices and the effect on the prices of like domestic products;

Thirdly, the effect of the dumped products on "related economic factors and indexes of domestic industry".

Fourthly, the production capacity, export capacity and "inventory situation" of the exporting country;

Fifthly, other factors causing injury to the domestic industry.

The factors listed above are the same as those contained in Article 3 of the WTO ADA.

In order to fulfill its obligations under the WTO, China applies some more detailed provisions in the determination of injury, e.g., the requirement that "the determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility".[88] This is taken wholly from the first sentence of Article 3.7 of the WTO ADA. Further, while the ADR stipulates that injury findings

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[87] Article 7, ADR.

[88] Article 8, ADR.

must be based on positive evidence "which does not include the contribution of non-dumping factors",[89] it does not contain a "negative list" of non-dumping causes whose adverse effects must not be ascribed to imports.

However, using a single list of factors to guide analysis of material injury, threat of material injury and causation almost unavoidably results in leaving out some items which the Chinese authority must or should consider in each area. It is still of course possible for the authority to consider all the required factors in actual cases that arise, but a more detailed breakout would be useful in the ADR itself. The ADR does not provide guidance to the administering authority on factors to consider regarding whether dumping has caused material retardation of a domestic industry. Comparison of normal start-up difficulties with the actual situation experienced by the domestic industry may be useful in this regard. Tian (2005: 101) argues that the final injury determinations of China usually only list the description of different indicators and the final decision often lacks of convincing analysis especially when there are both positive and negative indicators and neither of them is prevailing.

VI.2.4 Cumulation/Negligible Import Levels

The ADR permits cumulative injury analysis of products imported from two or more countries where the dumping margins for each are above 2% and the volume shipped by each is not negligible.[90] The ADR further specifies that "it is appropriate to make cumulative estimates according to competitive conditions among dumped products or between dumped products and {like} domestic products".[91] It also defines imports from a country as negligible when they account for less than 3% of total imports of the like product, except that imports from a group of countries individually accounting for less than 3% may be cumulated if they collectively account for more than 7%.

The ADR sets the above-mentioned conditions to the effects on the domestic industry, which is in line with Article 3 of the WTO ADA. However, Magnus (2002) argues that the ADR does not specify the time period over which a comparison of individual country imports and total imports is to be made for the purpose of determining

[89] Article 8, ADR.
[90] Article 9, paragraph 1, ADR.
[91] Article 9, paragraph 2, ADR.

negligibility. Specifying a period would provide greater guidance to the authority. One good standard would be to focus on the most recent 12 month period for which official government import data have been published as of the filing of a petition.

VI.3 Procedural Issues

VI.3.1 Petition and its Industry Support

The ADR provides that the MOFCOM may either initiate the investigations by itself or upon receiving petitions from domestic industry.[92] The ADR of China recognizes the right of petition by providing that "a domestic industry or a natural person, legal person or relevant organization representing a domestic industry may file a written application for an anti-dumping investigation to the MOFCOM".[93]

The issue of standing to file petitions is prescribed in the Provisional Rules on Initiation of Anti-Dumping Investigations.[94] According to these rules, an application is considered to have been made by or on behalf of the domestic industry and an anti-dumping investigation may be initiated, if the application is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total output of the like products produced by that portion of the domestic industry expressing either support for or opposition to the application and such output accounts for at least 25 per cent of total production of the like domestic product.[95] If the domestic industry is fragmented and involving a large number of producers, the MOFCOM may examine the standing of the applicant by using statistically valid sampling methods.[96]

However, Magnus (2002) argues that the ADR says nothing about the manner in which support expressed by workers, as opposed to enterprises, will be counted in determining industry support. Some guidance on this point could be quite valuable to the administering authority and to the trading public.

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[92] Articles 13, 16 and 18, ADR.
[93] Article 13 of the ADR; Articles 4 and 10 of Provisional Rules on Initiation of Anti-Dumping Investigation. The application must be submitted to the Bureau of Fair Trade for Imports and Exports of the MOFCOM. See Article 30 of the Provisional Rules.
[94] Adopted on 10 February 2002, became effective on 13 March 2002.
[95] Article 17, ADR; Article 6, Provisional Rules on Initiation of Anti-Dumping Investigations.
[96] Article 7, Provisional Rules on Initiation of Anti-Dumping Investigations.

VI.3.2 Initiation of Investigation

According to the ADR, within 60 days from petitions, the MOFCOM must examine contents of the application, the evidence, and whether the application is made by or on behalf of the domestic industry, and decide whether or not to initiate the investigation.[97] The ADR states that the MOFCOM must notify the decision of initiation to the government of the exporting country prior to the decision.[98] This prior notification obligation conforms to the requirement under the WTO ADA.[99]

In exceptional circumstances, the MOFCOM may proceed to an anti-dumping investigation by self-initiation. In order to do this, the MOFCOM must have sufficient evidence of dumping, injury and causality between the two.[100] This self-initiation mechanism and its conditions are consistent with the WTO anti-dumping rules.[101]

The ADR provides that an anti-dumping investigation shall be concluded within 12 months from the date of publication of the decision to initiate the investigation, and such period may be extended in special circumstances, but in no case shall the extension be more than six months.[102] Tian (2005: 98) argues that, although the WTO ADA also does not provide for definite time-limits for investigations except for the final determination, in the practice of China most of final determinations so far were completed at the end of the 18th month and on the average, it took 11 months to issue preliminary determinations. Lengthy procedures increase the burden of participants who will find it hard to prepare for the result of the investigation. For example, the unpredictable time-limits of preliminary determinations makes it difficult to plan for the provisional dumping measures.

According to the Chinese Regulations, the MOFCOM shall terminate an investigation in any of the following circumstances: first, the application has been withdrawn by the applicant; secondly, there is no sufficient evidence of the existence of dumping, injury and the causal link between the two; thirdly, the margin of dumping is less than 2 per cent; fourthly, the actual or potential volume of dumped imports or the injury is

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97 Article 16, ADR; Article 33, Provisional Rules on Initiation of Anti-Dumping Investigations.
98 Article 16, ADR.
99 Article 5.5, ADA.
100 Article 18, ADR; Article 42, Provisional Rules on Initiation of Anti-Dumping Investigations.
101 According to the ADA, in "special circumstances", the authorities may initiate investigations without having received a petition. See Article 5.6 of ADA.
102 Article 26, ADR.

negligible; fifthly, other circumstances that the MOFCOM considers not appropriate to continue the anti-dumping investigation.[103]

These grounds for termination seem to be compatible with WTO anti-dumping rules because they largely correspond with those under the WTO ADA, including the 2 per cent standard of dumping margin.[104]

VI.3.3 Verification of Information and Reliance on Facts Available

The ADR provides for "questionnaires, surveys, hearings, and on-site investigations" and states that MOFCOM "may send work teams to the relevant country (area) to conduct the investigation, provided the relevant country (area) does not raise objections".[105] Verifications outside of China usually are performed by a group made up of experts from MOFCOM and from the General Administration of Customs, after the provisional determination. This was the case with the group to Korea in *Newsprint case* (November 1998), the group to Russia in *Cold-rolled Silicon Steel Sheets case* (April 2000), the group to Korea in *Polyester Films case* (March 2000), and the group to Japan and South Korea in *Cold-rolled Stainless Sheet case* (July 2000). The MOFCOM also sends case-handlers with experts and in collaboration with other departments to verify some domestic enterprises relating to the industry under investigation (Wang and Yu 2002: 914).

The ADR further states that if parties "fail to provide information and relevant documents, or fail to provide essential information within a reasonable time frame, or seriously obstruct the investigation by other means, the investigating body may make a final ruling based upon facts already obtained and the best information obtainable".[106]

Magnus (2002) argues that the ADR provides no detailed procedures or requirements on how the administering authority is to verify information. Added detail would provide valuable guidance to the authority and increase the anti-dumping remedy's effectiveness. It would also be useful to specify that final determinations (whether affirmative or negative) may not be based on unverified evidence. Moreover, the ADR likewise provides little guidance to the authority regarding application of facts

[103] Article 27, ADR.
[104] Articles 5.3, 5.4 and 5.8, ADA.
[105] Article20, ADR.
[106] Article21, ADR.

available, including when it is appropriate to apply the more punitive standard of adverse facts available. Criteria for application of each level of facts available would provide the authority with needed guidance and would ensure WTO compliance.

VI.3.4 Rights and Obligations of the Interested Parties

There is no special clause on the right and obligations of the interested parties in China's anti-dumping laws. However, some of the following points may be drawn from the ADR and related provisional rules.

VI.3.4.1 Rights of the Interested Parties

The first is the opportunity to present views and evidence. The MOFCOM shall provide the interested parties an opportunity to present their views, statements and evidence.[107]

The second is the request for confidentiality. Information that have been submitted to authorities and which could cause serious impacts, shall be kept as confidential files. The MOFCOM should treat that information as confidential upon a request from the interested parties, and demand a non-confidential summary of that information. Any information treated as confidential shall not be revealed without permission of the parties that have submitted them.[108]

The third is the inspection of related information. The MOFCOM shall allow the applicant and the interested parties to have access to the information relevant to the investigation, provided that the information is not treated as confidential.[109] The interested parties relevant to an anti-dumping case may go to a place designated by MOFCOM to search, read, transcribe and copy the non-confidential information and materials submitted by other interested parties with regard to the anti-dumping case in question.[110]

VI.3.4.2 Obligations of the Interested Parties

[107] Article 20, ADR.
[108] Article 22, ADR.
[109] Article 23, ADR.
[110] Article 3, Provisional Rules on Access to Non-Confidential Information In Anti-dumping Investigations.

The first is to reply to the Questionnaire. The responding company shall, according to the requirements made by MOFCOM, reply completely and accurately to all questions listed and submit all information and materials required in the investigation questionnaire.[111]

The second is to provide Information/Evidence or Summary when Required. The interested parties shall provide authentic information and relevant documentation to the MOFCOM in the process of the investigation. In the event that any interested party does not provide authentic information and relevant documentation, or does not provide necessary information within a reasonable time limit, or significantly impedes the investigation in other ways, the MOFCOM may make determinations on the basis of the facts already known and the best information available.[112]

VI.3.5 Provisional Measures

The ADR provides that the MOFCOM shall, on the basis of its findings, make a preliminary determination on dumping and injury, as well as on whether there exists a causal link between dumping and injury.[113] The ADR authorizes provisional relief in two forms: either a "temporary anti-dumping duty" or the "provision of a cash deposit, bond or other form of security."[114] It further states that the MOFCOM "may propose" a temporary anti-dumping duty, but that the Tariff Commission of the State Council shall make a decision thereon. However, the MOFCOM may itself decide to require a cash deposit, bond or other form of security.[115] The ADR also stipulates that temporary anti-dumping measures cannot be adopted during the first 60 days of an investigation, and may remain in force for no longer than four months from the date they are announced (except where extended to 9 months in "special circumstances").[116]

According to the WTO ADA, if the above-mentioned periods would be extended to six and nine months respectively, authorities shall examine whether a duty lower than the margin of dumping would be sufficient to remove injury in the course of an

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[111] Article 5, Provisional Rules on Questionnaire in Anti-Dumping Investigations.
[112] Article 21, ADR.
[113] Article 24, ADR.
[114] Article 28, ADR.
[115] Article 29, ADR.
[116] Article 30, ADR.

investigation.[117] However, the ADR does not specify such prerequisite. The ADR does not reflect the WTO requirement that provisional duties be judged necessary to prevent injury during the remainder of the investigation.[118]

VI.3.6 Price Undertakings

The repealed ADASR had no details about price undertakings, although it was practice as early as 2000. In the *Cold-rolled stainless Steel Sheet* case, the MOFTEC accepted applications for price undertakings from Kawasaki Steel Co. Ltd and six Korean companies in 15 December 2000, three days before the announcement of the final definitive determination (Wang and Yu 2002: 916).

According to the ADR, during the period of an anti-dumping investigation, an exporter of the dumped imports may offer the MOFCOM an undertaking to revise its prices or to cease exporting at dumped prices.[119] This undertaking is called the "price undertaking". Provisional Rules on Price Undertaking of China defines it as follows: "The term 'Price Undertakings' mentioned in these Rules refers to undertakings voluntarily offered to the MOFCOM by exporters and producers who have responded to an anti-dumping investigation by way of revising prices or ceasing exports of the product under investigation at dumped prices, and accepted by the MOFCOM, in order to suspend or terminate the said investigation."[120] Main provisions of Provisional Rules on Price Undertaking are taken from Article 5.5 of the WTO ADA.

The MOFCOM may make price undertaking offers, but it must not force exporters to accept the offers.[121] The fact that exporters or producers do not offer a price undertaking or do not accept a suggested price undertaking must in no way prejudice the proper investigation and determination of dumping and dumping margin.[122] If the MOFCOM considers that price undertaking offers made by exporters are acceptable, it may decide to suspend or terminate the anti-dumping investigation without applying

[117] Articles 7.4, ADA.
[118] Articles 7.1, ADA.
[119] Article 31, ADR.
[120] Article 3, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.
[121] Article 31, ADR; Articles 4 and 5, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.
[122] Article 32, ADR; Article 5, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.

provisional anti-dumping measures or imposing anti-dumping duties.[123] The decision of suspension or termination must be published.[124] If the MOFCOM does not accept a price undertaking offer, it must provide reasons for the non-acceptance to the exporters concerned.[125] Price undertakings must not be sought or accepted unless the investigating authorities have made a preliminary affirmative determination of dumping and injury.[126]

Notwithstanding the suspension or termination of the investigation, the MOFCOM may still continue the investigation of dumping and injury upon the request of the exporters or if itself deems necessary.[127] Upon the conclusion of such investigation, the price undertaking will either automatically lapse if a negative determination is made on dumping or injury, or remain in force if the determination is affirmative.[128] The MOFCOM may require the exporter from whom an undertaking has been accepted to periodically provide information and documentation relevant to the fulfillment of such an undertaking, and verify such information and documentation.[129]

Most of these provisions do not conflict with the WTO Agreement because they address procedural issues that are not covered in the WTO Agreement. However, two aspects of Chinese rules might be inconsistent with WTO rules:

First, the Provisional Rules on Price Undertakings provide that the MOFCOM may accept only undertaking proposals submitted by "exporters who have been sufficiently cooperative during the investigation procedure".[130] According to the WTO Agreement, undertakings offered need not be accepted if the authorities consider their acceptance "impractical" or for reasons of "general policy", and upon rejecting, authorities should provide to the exporter the reasons of rejection and an opportunity to make comments.[131] Absent a standard of determination of being

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[123] Article 33, ADR.
[124] Article 32, ADR; Article 5, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.
[125] Article 32, ADR; Article 5, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.
[126] Article 32, ADR; Article 5, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.
[127] Article 34, ADR.
[128] Article 32, ADR; Article 5, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.
[129] Article 35, ADR.
[130] Article 11, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.
[131] Article 8.3, ADA.

"sufficiently cooperative" and without a consistent application of the standard to actual cases, it will be difficult to see that any rejection of undertaking offers by reason of lack of "sufficient cooperation" is based on any reason consistent with WTO rules.

Secondly, according to the Chinese ADR, if exporters breach price undertaking arrangements, Chinese authorities may resume investigations based on the best information available, and decide to apply provisional measures and levy anti-dumping duties retroactively on the products imported within 90 days prior to the application of such provisional anti-dumping measures, provided that the products imported before the violation of the undertaking are not subject to such retroactive duties.[132] The Provisional Rules on Price Undertakings further stipulates that if the definitive anti-dumping duty established in the final determination is lower than the amount of cash deposit established in the preliminary determination, the difference must be refunded.[133] This provision is compatible with the principle of refund under the ADA.[134]

However, a serious problem of inconsistency with WTO rules arises from the subsequent part of the rules stating that "if the definitive anti-dumping duty established in the final determination is higher than the amount of cash deposit established in the preliminary determination, the difference shall be levied".[135] According to the WTO ADA, if the definitive anti-dumping duty is higher than the provisional duty paid or payable, the difference shall not be collected".[136] This provision has no exception clause that is applicable for the case of violation of price undertakings. From these WTO rules, it can be concluded that any collection of the differences (if the definitive anti-dumping duty is higher than the provisional duty paid or payable) in the case of violation of undertakings cannot be qualified as levying definitive duties "in accordance with this Agreement" within the meaning of WTO rules. Such collection will lead to violation of the WTO Agreement.

[132] Article 36, ADR; Article 27, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.
[133] Article 27, Provisional Rules on Price Undertakings in Anti-Dumping Investigations
[134] Article 10.3, ADA ("... the difference shall be reimbursed...").
[135] Article 27, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.
[136] Article 10.3, ADA.

VI.3.7 Final Measures

The ADR establishes a twelve-month investigation period and permits this to be extended to a maximum of eighteen months. The ADR states that "[i]f the final ruling establishes the existence of dumping as well as resultant injury to domestic industry, an anti-dumping duty may be imposed."[137] It further explains that while MOFCOM may "propose" an anti-dumping duty, the Tariff Commission of the State Council shall make a final decision on whether to impose it.[138]

Having evidence to prove that the anti-dumping duty paid is higher than the actual dumping margin, the importer of the dumped product may file an application with the MOFCOM for anti-dumping duty refund, within 3 months after the payment or the definitive determination.[139] upon the receipt of the application, the MOFCOM shall complete the review for duty refund within 12 months and submit a proposal for duty refund to the Customs Tariff Commission of the State Council 15 days prior to the end of the investigation of review for duty refund, and shall notify the applicant and the Customs of the decision made by the Customs Tariff Commission of the State Council before such investigation of review is ended.[140]

It seems that the basic criteria for the relief where the anti-dumping duty paid is higher than the actual dumping margin has been established.

VI.3.8 Interim review

The ADR has provisions on the interim review. After a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, MOFCOM may decide to review the need for the continued imposition of the anti-dumping duties.[141] Such a review may be conducted upon request by any interested party or on the MOFCOM's own initiative.[142]

To aid performance on the interim review of anti-dumping action, the MOFCOM released the Provisional Rules on Interim Review of Dumping and Dumping Margin to coincide with the ADR. An interim review is defined as follows: " reviews,

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137 Article 37, ADR.
138 Article 38, ADR.
139 Article 3 & 4, Provisional Rules on Refund of Anti-Dumping Duty.
140 Article 16 & 17, Provisional Rules on Refund of Anti-Dumping Duty.
141 Article 49, ADR.
142 Article 11.3, ADA, Article 4, Provisional Rules on Interim Review of Dumping and Dumping Margins.

conducted during the period that anti-dumping measures are effective, on the necessity of whether to continue those measures under the original form and at the original level given the facts that the normal value and export price have changed since the anti-dumping measures entered into force".[143]

The ADR and provisional rules elaborate detailed conditions and procedures that are applicable to reviews, which are consistent with the provisions of the WTO ADA. Among these conditions and procedures, several ones are noteworthy.

First, the ADR and provisional rules provide that any application of review may be made after "one year has elapsed" since the imposition of the definitive anti-dumping duty, and that the time period of carrying out the review is "within 12 months",[144] which set a good example by imposing the maximum review period of 12 months without any exceptions.

Secondly, the ADR and rules prescribe many provisions related to reviews, and provide that the review proceedings must be conducted with reference to the relevant provisions of the original anti-dumping investigations.[145]

Thirdly, according to the general interpretation of WTO rules, the burden of proving whether it is necessary to continue to impose anti-dumping duties, and whether expiry of the duty would be likely to lead to recurrence of dumping and injury, must be borne by the investigation authorities (WTO 1999). This matter of burden of proof is not clarified under the ADR and rules.

VI.3.9 Sunset Reviews

According to the ADR, an anti-dumping duty is imposed for a period of 5 years, and effects of a price undertaking also last for 5 years. However, the period for anti-dumping duty levies may be extended as appropriate if, as a result of the review, it is determined that the termination of the duty would be likely to lead to continuation or recurrence of dumping and injury.[146] This is consistent with Article 11.3 of the WTO ADA. Such review is called a "sunset review" under the WTO.

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[143] Article 3, Provisional Rules on Interim Review of Dumping and Dumping Margins.
[144] Article 51, ADR; Article 36, Provisional Rules on Interim Review of Dumping and Dumping Margins.
[145] Article 51, ADR.
[146] Article 48, ADR.

However, there is no provision under the Chinese Regulations and rules that indicate the detailed sunset review proceedings. It seems that sunset review proceedings in China are also conducted with reference to the relevant provisions of original anti-dumping investigations and must be concluded within 12 months from the date of initiation.[147] One way to resolve this problem is to provide a reference clause in the Provisional Rules on Interim Review of Dumping and Dumping Margin, by which procedural rules of interim reviews apply also to sunset review proceedings.

VI.3.10 Judicial Review

The ADR provide that where any party is not satisfied with a final determination made under the ADR, or not satisfied with a decision on whether or not to impose an anti-dumping duty or a decision on retroactive imposition of an anti-dumping duty, reimbursement of an anti-dumping duty or imposition of an anti-dumping duty on new exporters, or not satisfied with the findings of an interim or sunset review, it may, in accordance with the law, apply for administrative reconsideration or file a lawsuit in the people's court.[148]

To implement to the judicial review provision under the ADR, the People's Supreme Court promulgated the Rule in connection with Certain Issues of Law Application for Judicial Review of Anti-Dumping Investigations on 21 November 2002, which has become effect on 1 January 2003. The rule stipulates that the standard of judicial review is: lack of material evidence, misapplication of regulation of regulations and rules, infringement of procedural requirements, or misuse of powers.[149] According to the rule, the investigating authority has obligations to provide evidence and legal basis to prove the legitimacy of it determination.[150]

Tian (2005: 99) argues that judicial review in China of anti-dumping determinations is still in its infancy. Under China's judicial review system, participants will find it hard to challenge substantive issues in the determinations, such as methodology of dumping margin calculation and selection of profit ration for calculation of

[147] Interpretation of Articles 48 and 51 of the ADR.
[148] Article 53, ADR.
[149] Article 3, the Rule in connection with Certain Issues of Law Application for Judicial Review of Anti-Dumping Investigations.
[150] Article 7, the Rule in connection with Certain Issues of Law Application for Judicial Review of Anti-Dumping Investigations.

constructive value. In addition, China does not have any special international trade court in its judicial review system, while the normal court will lack of sufficient expertise and experience to review anti-dumping determinations.

VI.3.11 Retaliatory Measures

Article 7 of the Foreign Trade Law of China prescribes that in the event that any country or region applies prohibitive, restrictive or other like measures on a discriminatory basis against China in respect of trade, China may, as the case may be, take countermeasures against the country or region in question.[151]

This clause provides a great discretionary power for retaliation to the Chinese authorities. Any restrictive or discriminatory measures "in respect of trade" may be subject to this countermeasure system. Therefore, if any country takes discriminatory trade remedy measures, including anti-dumping or countervailing measures, against Chinese exports, China may take similar trade remedy measures against its exports.

The ADR embodies this countermeasure system in the context of anti-dumping procedures. Article 56 of the Regulations prescribes that: "Where a country (region) discriminatorily imposes anti-dumping or countervailing measures on the exports from China, China may take corresponding measures against such country (region) on the basis of the actual circumstances".[152]

For the countermeasures, the State Council department in charge of foreign trade may conduct investigations of foreign trade barriers.[153] Even though this investigation provision has rarely been invoked,[154] its very existence shows that China is well prepared to retaliate against foreign trade restrictions with corresponding measures. Indeed, this system provides an effective trade remedy tool for China and exercises a sizable potential threat upon its trading partners, given the considerable economic clout that China carries.

Compatibility of this countermeasure system with the WTO agreement is

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151 Article 7, Foreign Trade Law of China.
152 Article 56, ADR.
153 Article 37, Foreign Trade Law.
154 It was put into action in the 2004 Japan—Laver case. See e.g. MOFCOM Notice 10 of 2005 on Terminating the Trade Barrier Investigation on the Import Control Measures on Laver by Japan.

controversial. This provision raises many interpretive issues in regard to the meanings of "discriminatory imposition" of anti-dumping measures, "corresponding measures" and "on the basis of the actual situations".

To be consistent with this international norm, the terms "on the basis of the actual situations" in the Chinese Regulations must be interpreted to mean "if the case satisfies all conditions stated under the WTO Agreement", and China is obliged to pursue retaliations consistently with the WTO dispute settlement procedure. In other words, if China takes corresponding anti-dumping measures in a situation where such conditions are not satisfied, WTO violation will occur.[155]

Indeed, China has confirmed that the term "corresponding measures" refers to "the measures China is entitled to take after recourse to the dispute settlement procedures pursuant to the ADA and the Disputes Settlement Understanding (DSU) if the counterpart country is a WTO Member (WTO 2003).

VI.4 Conclusion

China has made a significant improvement to bring its anti-dumping regime and practice in line with the applicable WTO rules. However, to some extent China is still in its infancy with regard to the ADR and rules. For instance, some definitions of several key legal terms are absent, some legal problems and issues remain to be solved and clarified. As a result, China should continue to proceed with the task of clarification and improvement of its legislation on anti-dumping.

[155] Violations of Article 5 of ADA and Article I of GATT.

CHAPTER VII

CONCLUSION

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CONCLUSION

Our study of the anti-dumping law and practice of China allows us to draw some conclusions and to make a few suggestions. This chapter presents major conclusions and suggestions.

VII.1 The Evaluation and Findings of the Study

The concept of "anti-dumping measures" gained prominence in international trade around the beginning of the 20th century. Historically, the countries, such as Canada, Australia, New Zealand, South Africa and the United States, have been the first ones to have anti-dumping laws. Since then, the history of anti-dumping is one of increased refinement and fine-tuning. With the passage of time, almost all the WTO Members had been compelled to enact new anti-dumping legislation after 1995.

When the GATT was negotiated in 1947, special provision was made for cases of dumping. Article VI of the GATT allows the GATT Contracting Parties to utilize anti-dumping import duties to offset the profit margin of dumping, provided that it can be shown that such dumping is causing or threatens to cause "material injury" to competing domestic industries. Article VI establishes the framework and basic provisions for international legislation on anti-dumping.

However, Article VI was far from adequate, which leaves a great deal to interpretation by individual states. As time passed, some of the Contracting Parties of GATT began to feel that certain countries, in applying their anti-dumping laws, were doing it in such a way as to raise a new protectionist barrier to trade. Some believed that anti-dumping procedures, such as margin calculations and the injury test, were causing restrictions and distortions on international trade flows, therefore creating risks and uncertainties for traders.

Consequently, during the Kennedy Round of the GATT trade negotiations (1962-1967), the Contracting Parties of GATT negotiated the first international Anti-Dumping Code, which set forth a series of procedural and substantive rules regarding the application of anti-dumping duties. The Code was intended to limit the abuse of anti-dumping

measures in the international arena.

In 1979, the Tokyo Round developed a new Anti-dumping Agreement replacing the 1967 GATT Anti-dumping Code. The Uruguay Round, building on the prior anti-dumping agreements, further modified the anti-dumping rules, and led to the birth of ADA. The ADA transformed anti-dumping rules from general guidelines to what is now essentially a detailed international legal system and constituted a further refinement of international anti-dumping rules. Moreover, the ADA has become a mandatory agreement in the WTO.

However, the ADA has asymmetries and gaps in its text, which are on account of a consensus because of the existence of divergent national interests. This resultant lack of clarity has enabled the Members to include subtle variations in their national anti-dumping legislation and therefore led to different interpretations, understanding and applications by WTO Members. The vagueness of the ADA even enable the administering authorities to interpret it in an unduly protectionist manner.

Therefore, the use of anti-dumping measures is causing a concern among WTO Members. Many Members have tabled suggestions for improving the application of anti-dumping measures. In addition, the revisions of the ADA have been placed on the agenda of the Doha Round Negotiations. The mandate of the Doha Ministerial Conference of the WTO in 2001 provides for negotiations aimed at clarifying and improving disciplines under the ADA, while preserving the basic concepts, principles and effectiveness of the ADA.

China did not have any anti-dumping clause until 1994 and full anti-dumping legislation until 2001. Moreover, China was not in the international anti-dumping club until 1997. It is in such an international context that China enacted its legislation on anti-dumping which include laws, regulations and administrative implementing rules.

In 1994, China enacted the Foreign Trade Law, which provides the fundamental legal basis and guiding principles for China's anti-dumping policies. With the mandate given by the Foreign Trade Law, the State Council of China promulgated ADASR in 1997. The ADASR contains a lot of deficiencies.

After its accession to the WTO in 2001, China accelerated its market liberalization process and incorporation of the provisions of ADA into its domestic legal system. To

abide by the ADA, China promulgated the ADR in 2001 and subsequently enacted more than ten implementing rules, ranging from the initiation of anti-dumping investigations to the interim review and judicial review.

In March 2004, the ADR was revised and made effective on 1st June 2004. The new ADR prescribes detailed and comprehensive rules on anti-dumping, covers a wide variety of subjects ranging from the determination of dumping, calculation of margins, injury determinations, investigation procedure, anti-dumping duty, price undertaking, sunset review and notifications.

All the above-mentioned legislation are fixed in a hierarchy: the Foreign Trade Law is at the top of the hierarchy; next is the ADR; then follows the administrative implementing rules. The hierarchy means that subordinate legislation is null and void if it contravenes a higher one.

From the analysis of the Chinese anti-dumping legislation, it is revealed that China has established its primary legislative framework on anti-dumping, but the framework is far from complete. The immaturity of its framework manifests in some aspects, e.g., the hierarchy of China's full anti-dumping legislation is not high enough; several provisions on anti-dumping, including sunset review and sampling in investigations of industry injury, have not been elaborated.

In 2001, China established two new anti-dumping authorities, namely the BOFT under the former MOFTEC, which determines whether imports are being dumped, and the IBII under the former SETC, which determines whether a domestic industry is thereby injured. There is a clear bifurcation of responsibilities between these two agencies, i.e., determination of dumping and injury.

As a result of the organizational restructuring in 2003, the MOFCOM was established to take over parts of the responsibilities of the MOFTEC and the SETC. Both the BOFT and the IBII were incorporated into the MOFCOM. Therefore, the MOFCOM has become the sole designated authority which is responsible for administering the ADR.

Based on the suggestions by the MOFCOM with regard to imposing anti-dumping duties, the Tariff Commission of the State Council has the authority to make final decisions on whether or not to levy the anti-dumping duties and the General

Administration of Customs is empowered to enforce anti-dumping measures such as collecting cash deposits and dumping duties.

Apparently, China has adopted the model of the United States in the establishment of anti-dumping agencies. However, in comparison to the US or the EU, the biggest problem confronted by China is the shortage of trained manpower in anti-dumping investigations, which is also prevalent in most of the developing Members of the WTO.

China has learned to use anti-dumping measures to defend the legitimate and fair interests of its domestic industries since 1997. Till the end of 2006, China has initiated 47 cases against 44 imports originated from 24 countries and regions. While China has increased its use of antidumping, it is not, either in absolute or in relative terms, a large user of antidumping. However, in the practice of anti-dumping, China should try to balance its social and political objectives of protecting domestic industry from foreign competition and the goals of opening its market to the world, partly for the sake of improving its economic well-being and efficiency.

It is noted that among 45 cases initiated by China during December 1997 to June 2006, 37 of them (82.22% of the total cases) end up with affirmative anti-dumping measures. It is revealed that high possibility of affirmative anti-dumping measures occurs in Chinese practice, which to a certain extent reflects a flavour in favour of domestic industries.

Understandably, owing to being a new member of international anti-dumping club and its lack of experience, China's anti-dumping practice from time to time gives rise to some doubts, concerns and criticism. However, China is all along endeavouring to make its practice of anti-dumping consistent with the WTO ADA.

On the other hand, with the increasing use of anti-dumping measures against it, China has been the number one target of anti-dumping accusations worldwide. The reasons are complicated but can be attributed to two categories. In the international perspective, the use of anti-dumping measures is prevailing in the global context and the multinational enterprises have learned to use anti-dumping measures as a weapon to strengthen their monopoly in international market. In its internal perspective, as China is considered as a NME, anti-dumping authorities have broad discretion in choosing the surrogate country to determine normal value, which makes it highly

possible for Chinese enterprises to be found guilty of dumping. Moreover, China's significant expansion of exports, vulnerable trade structure, low price of products, price-cutting competition approach of Chinese enterprises in overseas market and poor performance of affected Chinese producers in responding the anti-dumping charges, etc., make the situation even worse.

However, China has not yet referred any anti-dumping case to the WTO DSB. The reasons behind this special situation perhaps result from various factors, such as the lack of adequate experience in the field of international anti-dumping practice, the traditional Chinese culture of "no litigation", the difficulty to bring a successful challenge to the DSB as the "surrogate country" approach applies to China.

As the labour and natural conditions of China are unlikely to change overnight, the comparative advantage of the price of China's products will remain. Also, the negotiations between the Chinese government and its trade partners regarding the status of NME are still going on. It is, therefore, predicted that China is likely to remain the number one target country in the anti-dumping wave worldwide for the next decade.

In the international anti-dumping forum, China has not been a very active participant in the Rules Group Negotiations under the Doha Agenda, nor in the ad hoc working groups on implementation and anti-circumvention. In fact, as a new WTO Member, China has acted thus far more as an observer than as an active participant. China to some degree plays a careful role in the anti-dumping club.

After its efforts spanning the last ten years, China has made great efforts in its short history of trade regulation to shape its trade remedy system through legal and organizational changes in conformity with the WTO. From the very outset, China's anti-dumping law and its implementing rules are required to be compatible with WTO rules, which are developed from the long-term practices of major trading powers such as the U.S. and the EU.

Indeed, China has made a significant achievement in the WTO consistency of its anti-dumping legal system. It is obvious that the better the Chinese authorities are able to comply with WTO rules both in law and in practice, the more likely will they be able to avoid the costly legal accusation under the WTO DSB. To this end, China should further improve its anti-dumping legislation as well as its anti-dumping regime

on administration and enforcement.

However, as the anti-dumping measures against China have posed a potential threat to its export development, some appropriate countermeasures should be explored.

VII.2 Suggestions

In the light of the above-mentioned analysis, the following recommendations seem useful for China to improve its anti-dumping regime:

First, China should upgrade the hierarchy of its anti-dumping legislation, i.e., upgrade the current ADR to the Anti-Dumping Law. In China's legislative system, the hierarchy of regulations follows behind basic laws passed by the NPC and laws by the NPC Standing Committee. To upgrade the hierarchy will definitely improve the authoritativeness of China's anti-dumping legislation and strengthen its enforcement.

Secondly, China should further improve it legislation on anti-dumping to fill in the gap between the ADR and the WTO ADA. To this end, some new implementing rules should be enacted, such as Rules on Sampling in Anti-Dumping Investigations of Industry Injury, Rules on Sunset Review in Anti-Dumping Investigations, Rules on Judicial Review, etc. Moreover, some definitions of key terms should be clarified in the future legislation, such as "public interests", "reasonable basis" for a constructed export price, etc.

Thirdly, China should establish special international trade court in its judicial review system. Ever since the People's Supreme Court promulgated the Rule in connection with Certain Issues of Law Application for Judicial Review of Anti-Dumping Investigations in 2002, none of the anti-dumping determinations has been submitted for judicial review. Interested parties are reluctant to bring the determinations to the court, not only because of the lack of clear and detailed provisions but also the lack of special court on judicial review. It is reasonable to think that the general court that usually deals with normal trials will lack sufficient expertise and experience to review anti-dumping determinations.

Fourthly, China should make further efforts to seek for the MES and reduce the adverse effects resulted from the surrogate country approach. Bearing in mind the ME criteria set by the U.S. and some other countries, as well as a general politicized

nature of anti-dumping investigations in the international arena, the operational value of NME provision is highly questionable (Polouektov 2002: 32). The subjectivity of the "surrogate country" approach has been condemned by China as a discriminatory treatment. While Romania and Russia have been recognized by the U.S. and the EU as ME recently, many have realized that this issue is more political than economic. Therefore, China has launched a campaign to gain MES through diplomatic channels. Different governments answer differently according to their own economic parameters coupled with their strategic purposes. In total, 64 countries have granted MES to China till the end of 2006, including Australia, Egypt, New Zealand, South Africa, South Korea, etc (BOFT 2007). Moreover, China should press for new rules on the automatic granting of MES in a particular commodity, as long as a country meets basic conditions such as low rates of protection, an absence of serious non-tariff barriers, and an absence of state monopoly in the distribution of that commodity.

Fifthly, in the long run, it is necessary for China to shift its export products away from anti-dumping-intensive sectors by upgrading export products from standard products into highly differentiated products. The development of China's own brand of products, and undertaking a horizontal production for some important dynamic products can also minimize exposure to foreign anti-dumping charges against Chinese exports and thereby reduce financial losses. Moreover, China should diversify its export destinations as broad as possible so as to lessen its reliance on a few specific markets. In view of the cost of anti-dumping to the economy, it is now time for China to put into place a screening mechanism as permitted by the WTO accession conditions before engaging itself in new processing trade deals.

Sixthly, the Chinese government, especially local government, should be more supportive when their enterprises are facing anti-dumping investigation. For example, the Chinese government should adopt a proactive approach by issuing guidelines and conducting workshops on the possible challenges that the industry may encounter during the post-accession period, e.g., how to deal with the expected surge of anti-dumping suits and how to respond to the anti-dumping investigations against China. In addition, Chinese government should provide help on some significant cases in the bilateral negotiation level.

Seventhly, China should further strengthen the training of its manpower in

anti-dumping matters by various means, such as seminar, training course, exchange program, internship, etc.

Eighthly, Chinese enterprises should avoid price war or the price-cutting competition approach in the foreign markets. They should be aware that the competition approach of price-cutting might be of use to survive or expand in a foreign market, but such price wars will induce a high risk of anti-dumping investigation by the importing government. Hence for the Chinese enterprises, price war should be avoided under the threat of an anti-dumping system, though such competition is essentially not inappropriate in a free market.

Ninthly, China should refer its anti-dumping disputes to the WTO DSB at an appropriate time. Under the WTO, the most effective means to ensure enforcement of the ADA is the Dispute Settlement Mechanism (DSM). As a right, any Member who "considers that any benefit accruing to it, directly or indirectly, under the ADA is being nullified or impaired or that the achievement of any objective is being impeded by another Member or Members"[156] may request consultation with the Member(s) concerned. Where no satisfactory result can be reached through consultation, either party may submit the dispute to the Dispute Settlement Body.[157] China is eligible to file complaints to the WTO DSB after it became a Member in 2001. Therefore, according to the mandate of the ADA, China now should make adequate preparations for submitting its disputes to the DSB. Among the approximately 200 anti-dumping cases targeting China annually, it is unlikely that all cases are handled in conformity with WTO laws.

Tenthly, as the inherent weakness and loopholes of the ADA usually result in the excessive use of anti-dumping measures, China should actively seek reform of the anti-dumping rules to put forward or strongly support the proposals to narrow the use of anti-dumping measures and to reduce their severity. For example, China should suggest that the issue of the second supplementary provision to GATT 1994 must be put on the agenda for the eventual new round of Multinational Trade Negotiations (MTNs). Such actions could greatly improve the performance of its own economy in the short run, and the global trading system in the long run. In addition, the increasing use of anti-dumping measures by major trading countries and also by a growing

[156] Article 17.3 of WTO ADA.
[157] Article 17.4 of WTO ADA.

number of developing countries is a problem for most of the other economies of East Asia. Therefore, China could strengthen the coalitions formed at the WTO to push for stronger rules against this trend. Moreover, there should be consensus among developing countries on the issue of anti-dumping so as to establish a cooperation mechanism to check the abuse of anti-dumping measures between the developing countries.

In sum, although China now is confronted with heavy tasks for its compliance with WTO rules and somewhat formidable tasks for restraining the excessive use of anti-dumping measures, it is restructuring and developing its trade regime, including anti-dumping law, and improving its anti-dumping practice in the right direction. There are enough reasons to believe that China is willing to meet all challenges faced by it on the anti-dumping front.

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