

PING CHEN

HOW TO RESPOND TO ANTIDUMPING CHARGES  
AGAINST CHINA?

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## ABSTRACT

Since the World Trade Organization (WTO) was set up, antidumping laws have become a more and more popular measure for resolving trade disputes among its members. The antidumping law has been a vital tool for every country to fight against predatory pricing by foreign companies in order to protect domestic industry. However, antidumping can be one form of protectionism, which nurtures inefficient industries as well as increasing costs to domestic consumers. It also creates impediments to free trade and disregards comparative advantages. In particular, antidumping is controversial because it is quite difficult to distinguish whether or not there is a genuine action against dumping or just trade discrimination. It is necessary for the interested parties to clearly understand what is real dumping and antidumping. How to respond to antidumping charges? How to protect their own interests in the antidumping litigations? How to avoid being a main target of antidumping actions?

In this paper, I will try to find the proper answers to all the above questions. I will also focus on analyzing the characteristics of the antidumping litigations against China because China has become the main target of most antidumping lawsuits in the world.

### Word Length

The text of this paper (excluding contents pages, abstract, footnotes and references) comprises 12281 words.

<sup>1</sup> Jason Z. Yu, *Using U.S. Antidumping Law and Nonreciprocal Trade Preferences (NRTA) to Improve Strategic Options* (PhD Research Paper Department of Management Hong Kong Polytechnic University, 2002).

<sup>2</sup> <http://www.dft.gov.sg/press/021019a.htm>, WIT (TNC) (last accessed 19 October 2003).

The WTO Secretariat reported that during the period 1 January - 30 June 2003, 18 Members initiated 79 anti-dumping investigations against exports from a total of 39 different countries or customs territories. China, with 14 investigations on its exports, still remains at the top of the list of countries subject to anti-dumping investigations.

<sup>3</sup> [http://www.wtochina.org.cn/english/02/MT/02\\_21\\_133.htm](http://www.wtochina.org.cn/english/02/MT/02_21_133.htm) (last accessed 19 October 2003).

(China Daily, December 30, 2002).

## I INTRODUCTION

With the development of the worldwide economy, non-tariff barriers to trade and free competition have become comparatively important issues. However, faced with the need to deal with the negative consequences of trade liberalization, countries do need some safeguards to protect some sensitive domestic industries from foreign competition. Therefore, antidumping actions are designed to be the temporary means to offset unfair competition in international trade.<sup>1</sup> Unfortunately, in practice, contrary to its design, this trade defense measure actually has been used as a long-term remedy for resolving various economic difficulties relating to international trade. Even worse, if antidumping actions are abused or misused they can impose more serious restrictions on international trade and create additional obstacles. As a result, this will be opposite to its original purpose and lead to international trade discrimination.

Therefore, the current situation urgently calls for some research attention to improve the understanding about: what is real dumping and antidumping? How to respond to antidumping charges? How to protect the interests in the antidumping litigations? How to avoid being a main target of antidumping actions?

China has been the major target of antidumping investigations in recent years.<sup>2</sup> The statistics indicate that one-in-six anti-dumping cases involved Chinese products.<sup>3</sup> On the other hand, for imports, China is one of the smallest users of antidumping

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<sup>1</sup> Jason Z. Yin, Ling Li *Antidumping War and Northeast Asian Economies (NEAE): Issues and Strategic Options* (PHD Research Paper Department of Management Hong Kong Polytechnic University, 2002)

<sup>2</sup> <[http://www.sis-verlag.de/031027/stel/DUMP\\_WH.HTM](http://www.sis-verlag.de/031027/stel/DUMP_WH.HTM)> (last accessed 19 October 2003)  
The WTO Secretariat reported that during the period 1 January - 30 June 2003, 18 Members initiated 79 anti-dumping investigations against exports from a total of 30 different countries or customs territories. China, with 12 investigations on its exports, still remains at the top of the list of countries subject to anti-dumping investigations.

<sup>3</sup> <<http://www.china.org.cn/english/MATERIAL/52433.htm>> (last accessed 19 October 2003)  
(China Daily December 30, 2002)

measures in the world.<sup>4</sup> It is crucial for China not only to adopt a proper strategy to face anti-dumping charges but also to use antidumping measures to protect its own interests in international trade.

In this paper, section II will provide an overview of antidumping measures under the WTO framework. It will paraphrase all the legal concepts relating to dumping and antidumping issues. Section III will illustrate the characteristics of the antidumping lawsuits against China. It will try to find the main reasons why so many countries prefer to choose China as antidumping target. Section IV provides some effective ways concerning how to successfully respond to the dumping charges against China. It will analyze some important cases in order to make this issue clearly. In addition, it will discuss how China's accession to the WTO helps the country shake off antidumping charges. Section V is a conclusion. Based on the above study, it will give some strategic suggestions to the Chinese legislators and lawyers to improve the preparation work for fighting against antidumping charges and better protect its trade interests.

## **II REVIEW OF CONCEPTS**

Article 6 of the General Agreement on Tariffs and Trade (GATT), formulated in 1947 and regarded as the most authoritative, defines dumping as when:<sup>5</sup>

- The export price of a product is lower than its normal value;
- The product substantially harms the industry of the importing country; and
- There are cause-and-effect linkages between dumping and the substantive harm.

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<sup>4</sup> <<http://www.china.org.cn/english/MATERIAL/52433.htm>> (last accessed 19 October 2003)  
(China Daily December 30, 2002)

<sup>5</sup> General Agreement on Tariffs and Trade 1947.



The concept of dumping was made for dealing with underselling-related trade disputes on international trade in Article VI of GATT in 1947.<sup>6</sup> It allows its member states to impose antidumping duties to offset the margin of dumping of dumped goods as long as such dumping is causing or threatening to cause material injury to a domestic industry producing the same or like goods.<sup>7</sup>

In response, States may take antidumping measures to counter dumping -- but only if:<sup>8</sup>

- a) They conduct an investigation.
- b) They determine that the dumped products cause or threaten to cause material injury to, or materially retard the establishment of, a domestic industry within the importing country.

The WTO Antidumping Agreement regulates the application of anti-dumping measures by its member countries. The fundamental guideline is to prevent the use of dumping as non-tariff trade barriers.<sup>9</sup> Nevertheless, if the antidumping measures are not limited, or misused, this is in variance to the guideline of the WTO antidumping Agreement as well. Therefore, the prerequisite is to accurately understand the following key technical terms in order to avoiding wrongful utilization of antidumping.

#### A Normal Value

Normal value as the core judging standard regarding dumping is supposedly designed

<sup>6</sup> General Agreement on Tariffs and Trade 1947.

<sup>7</sup> General Agreement on Tariffs and Trade 1994, art6.

<sup>8</sup> General Agreement on Tariffs and Trade 1994, art6.

<sup>9</sup> Jason Z. Yin, Ling Li *Antidumping War and Northeast Asian Economies (NEAE): Issues and Strategic Options* (PHD Research Paper Department of Management Hong Kong Polytechnic University, 2002)

to combat both price discrimination and predatory pricing.<sup>10</sup> Determination of normal value of goods is central to a determination of whether goods are being dumped. The reason is obvious that the comparison is made between export price and normal value. Whenever the export prices are less than their normal value, dumping occurs. The Antidumping Agreement defines normal value as:<sup>11</sup>

- the comparable price for the product, in the ordinary course of trade, in the exporting country
- if such a price is not available, normal value may be computed using a comparable price for the product exported to a third country
- if this information is not available, the normal value for the product is “constructed” by expenses, and profit, etc.

The alternative methods of ascertaining the normal value of imports in different cases can be divided into three categories including home country price, third country price and constructed normal value.

### **B Dumping Margin**

The dumping margin is important because anti-dumping duties are limited to the dumping margin. The dumping margin is the differential between the export price of the imported product and its normal value. It can be formulated:<sup>12</sup>

$$\text{Dumping Margin} = \text{Normal Value} - \text{Export Sales Price}$$

The practice of calculating dumping margin involves three main steps. Firstly, it needs to establish a set of categories of the product under investigation.<sup>13</sup> Following that,

<sup>10</sup> Jason Z. Yin, Ling Li, above.

<sup>11</sup> Antidumping Agreement, chapter 8, art 1

<sup>12</sup> Jason Z. Yin, Ling Li *Antidumping War and Northeast Asian Economies (NEAE): Issues and Strategic Options* (PHD Research Paper Department of Management Hong Kong Polytechnic University, 2002)

within each category, a weighted average normal value is considered by reference to three methods, which are home country sales, third country sales or a constructed value.<sup>14</sup> Then, the normal value is compared with a weighted average export price for that category. If the normal value is higher, the difference is a positive dumping margin, which indicates there is dumping in the sense used in international trade policy. If the normal value is lower than the export price, a negative dumping margin would exist. In practice, when negative dumping happens, some countries such as European Communities, in calculating a total weighted average for all categories of the product under investigation, change the negative dumping margins to zero. This is called "zeroing."<sup>15</sup>

One issue that should be pointed out here is that "best-information-available" was often used to determine the dumping margin when the investigating authority thought the defendants did not fully cooperate with them.<sup>16</sup> In this situation, the authorities can discretionarily choose alternative information, which is good for them. This is a really tricky problem in practice, because sometimes the defendants want to cooperate properly, but the time is too limited to prepare the requested information "including short response time to questionnaires and the required use of authority's mandated computer and accounting system".<sup>17</sup> It is unfair that even if the respondents are unable to do so, the "best-information-available" will be applied.

### *C Domestic Industry*

Domestic industry is defined as all the domestic producers as a whole of like products

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<sup>13</sup> European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India < <http://www.ejil.org/journal/curdevs/sr15.rtf> > (last accessed 27 October 2003)

<sup>14</sup> European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India < <http://www.ejil.org/journal/curdevs/sr15.rtf> > (last accessed 27 October 2003)

<sup>15</sup> Anti-Dumping Agreement, art 2.4.2.

<sup>16</sup> Michael O. Moore "Antidumping Reform in the United States A Faded Sunset" (1999) 33 *Journal of World Trade*, 1,3.

<sup>17</sup> O. Moore, above 1,3.

or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:<sup>18</sup>

- i) When producers are related to the exporters or importers or are themselves importers of the allegedly dumped product,

This means that domestic producers who are also importers, or related to importers, cannot be included in the term 'domestic industries'.<sup>19</sup>

- ii) In exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.<sup>20</sup>

If the production in question is divided into two or more competitive markets, anti-dumping duties shall be levied only on the products in question consigned for final consumption to that area.

The above interpretation provides guidance on how to determine which industries

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<sup>18</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, part I, art 4.

<sup>19</sup> 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.

<sup>20</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, part I, art 4

belong to domestic industries of dumped products. The illustrative criteria of domestic industry is essential to judge whether or not dumping actions happen because it is the object of the material injury or the threat of injury.

#### *D Substantive Requirements*

In order to apply anti-dumping measures, it is necessary to show not only that dumping has occurred, but also that the dumping in question "causes ... or threatens material injury ... or materially retards establishment of a domestic industry."<sup>21</sup> Thus, the injury determination is a substantive requirement for initiating an antidumping claim.

WTO rules regulate that injury cannot be implied by dumping, if it is so small that one would have to question whether such small sales, even if sold at dumped prices could cause injury. Therefore, a so-called de minimis rule applies.<sup>22</sup>

##### *1 De minimis dumping volume*

Article 5.8 of the Anti Dumping Agreement illustrates that:<sup>23</sup>

the volume of dumped imports shall normally be regarded as negligible, if the volume of dumped imports from a particular country is found to account for less than 3% of imports of the like product, unless countries which individually account for less than 3% of the imports of the like product collectively account for more than 7% of the imports into the importing

<sup>21</sup> General Agreement on Tariffs and Trade 1994, art6.

<sup>22</sup> Anti-Dumping Agreement, art5.8.

<sup>23</sup> Anti-Dumping Agreement, art5.8. < <http://commerce.nic.in/C4497e.doc> >(last accessed 2 November 2003)

Member.

This illustration expresses clearly that if the volume of dumped exports is less than 3% of total imports, then no material injury can be implied.

## 2 *De minimis dumping margin*

Article 5.8 provides that "[t]he margin of dumping shall be considered to be de minimis if this margin is less than two percent, expressed as a percentage of the export price."<sup>24</sup> Therefore, the dumping margin is less than 2%, which is assumed as no dumping injury.

However, in proving material injury, alleged dumping from several sources can be aggregated.<sup>25</sup> If the total dumping products are over the de minimus amounts, material injury may be determined to have occurred.

## **E Procedural Requirements**

WTO Antidumping Agreement sets up both procedural requirements and substantive requirements in order to constrain the use of antidumping measures. "If, and only if, these two conditions are met together, then the importing country may apply antidumping measures --- imposing antidumping duties."<sup>26</sup>

<sup>24</sup> Anti-Dumping Agreement, art5.8.

<sup>25</sup> < <http://www.cid.harvard.edu/caer2/htm/content/papers/paper11/paper11.htm#ret9> >(last accessed 2 November 2003)

<sup>26</sup> Jason Z. Yin, Ling Li *Antidumping War and Northeast Asian Economies (NEAE): Issues and Strategic Options* (PHD Research Paper Department of Management Hong Kong Polytechnic University, 2002)

### *1 Initiation & subsequent investigation*

An antidumping investigation is usually begun after the receipt of a written application filed by or on behalf of the domestic industry producing the like product. In exceptional cases the government of the importing country can begin an investigation without an application having been filed.<sup>27</sup> Article 5.2 in the 1994 Code also regulates that:<sup>28</sup>

an application shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury.

Therefore, a simple allegation, which is not substantiated, as well as related evidence, cannot initiate an antidumping investigation.<sup>29</sup>

Article 5.3 of the 1994 Code requires the investigating authority to examine the accuracy and adequacy of the evidence in the application.<sup>30</sup> Clearly, the accuracy and adequacy of the evidence is relevant to the investigating authorities' determination whether there is sufficient evidence to justify the initiation of an investigation. "It is however the sufficiency of the evidence, and not its adequacy and accuracy per se, which represents the legal standard to be applied in the case of a determination whether to initiate an investigation."<sup>31</sup>

What is more, Article 5.4 of Agreement On Implementation Of Article VI Of GATT

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<sup>27</sup> The term "initiated" as used in the Antidumping Agreement means the procedural action by which a Member formally commences an investigation. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, part 1, art 5.

<sup>28</sup> WTO Antidumping Agreement, art 5.2

<sup>29</sup> WTO Antidumping Agreement, art 5.2

<sup>30</sup> WTO Antidumping Agreement, art 5.3

<sup>31</sup> Dongsheng ZANG, S.J.D. Candidate "Seeking Transparency in Antidumping Actions through Procedural Review: The GATT/WTO Jurisprudence and Its Implications for China" (Conference on China and the World Trade Organization, Australia, 16-17 March, 2001)

codifies that the applicant must be able to represent at no less than 25 percent of the total domestic production of the like product.<sup>32</sup>

Once the investigating authority decides to launch the antidumping investigation, it is required to give a public notice.<sup>33</sup> Nevertheless, the notice of initiation need not include a summary of the factors or analysis underlying, or a statement of the investigating authority's conclusion regarding, the exclusion of some producers from consideration as the relevant domestic industry by the investigating authority in satisfying itself that there is sufficient evidence of injury to justify initiation.<sup>34</sup>

## 2 *Provisional measures*

Provisional measures may be applied only if:<sup>35</sup>

- an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;
- a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and
- the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

Article 7.2 authorizes provisional measures in two forms: either a temporary duty or a security by cash deposit or bond. The amount of above payments will be equal to the provisionally estimated dumping margin.<sup>36</sup>

<sup>32</sup> WTO Antidumping Agreement art5.4.

<sup>33</sup> WTO Antidumping Agreement art12.1.

The WTO Panel suggests that: given the function and context of Article 12.1 in the Antidumping Agreement, we interpret this provision as imposing a procedural obligation on the investigating agency to publish a notice and notify interested parties after it has taken a decision that there is sufficient evidence to proceed with an initiation.

<sup>34</sup> Dongsheng ZANG, above.

<sup>35</sup> WTO Antidumping Agreement, art7.1.

<sup>36</sup> WTO Antidumping Agreement, art7.2.



Under Article 7.3, 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.<sup>37</sup> Furthermore, the WTO Antidumping Agreement specifies that the extension of provisional relief for a total duration of six or nine months is allowed only when the authorities examine whether a duty lower than the margin of dumping would be sufficient to prevent injury.<sup>38</sup> Most importantly, the WTO Agreement requires that provisional duties should be judged necessary to prevent injury during the remainder of the investigation.

### 3 Price undertakings

A price undertaking mechanism refers to the investigating authorities come to an agreement with an exporter to either revise their prices or cease exports at dumped prices so as to eliminate the injurious effect of dumping.<sup>39</sup>

Three main elements of a price undertaking can be mentioned here. Firstly, a price undertaking is completely voluntary for both the individual exporters and the investigating authorities.<sup>40</sup> Secondly, an undertaking can only be sought or accepted from exporters after a preliminary finding of dumping, injury and causal link.<sup>41</sup> Thirdly, a price undertaking can include monitoring and information requirements, and the possibility of swift imposition of anti-dumping measures if the terms of the undertaking are violated.<sup>42</sup>

In addition, any price increases by the exporter are limited to the amount of the

<sup>37</sup> WTO Antidumping Agreement, art 7.3.

<sup>38</sup> WTO Antidumping Agreement, art 7.4.

<sup>39</sup> WTO Antidumping Agreement, art 8.1.

<sup>40</sup> <[http://www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto04/wto456.htm](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto04/wto456.htm)> (last accessed 13 November 2003)

<sup>41</sup> WTO Antidumping Agreement, art 8.2.

<sup>42</sup> WTO Antidumping Agreement, art 8.6.

dumping margin.<sup>43</sup> It may be a beneficial measure for an exporter if the price revision accepted in an undertaking is less than the margin of dumping.<sup>44</sup> Furthermore, a price increase according to an undertaking yields increased revenues for the exporter or importer, rather than increased duties for the government or the importing Member.<sup>45</sup> In general, the investigation will cease after a price undertaking is accepted.

#### 4 *Final measures*

Article 9 of the Antidumping Agreement sets up the general principle concerning how to apply final measures for antidumping. "It states that imposition of anti-dumping duties is optional, even if all the requirements for imposition have been met."<sup>46</sup> It also illustrates a lesser duty rule that refers to authorities, which could impose duties at a level lower than the margin of dumping if this level is adequate to remove injury to the domestic industry.<sup>47</sup> What is more, the rules in the Antidumping Agreement tries to ensure that the amount of the anti-dumping duty eventually shall not exceed the margin of dumping and rules for applying duties to new shippers.<sup>48</sup>

#### *F Sunset Review*

1994 Uruguay Round Agreements established a new provision that is called "Sunset Provision".<sup>49</sup> It required the authority to conduct a review no later than five years

<sup>43</sup> WTO Antidumping Agreement, art 8.1.

<sup>44</sup> <[http://www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto04/wto456.htm](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto04/wto456.htm)> (last accessed 13 November 2003)

<sup>45</sup> <[http://www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto04/wto456.htm](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto04/wto456.htm)> (last accessed 13 November 2003)

<sup>46</sup> <[http://www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto04/wto4\\_19.htm](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto04/wto4_19.htm)> (last accessed 14 November 2003)

<sup>47</sup> WTO Antidumping Agreement, art 9.1.

<sup>48</sup> WTO Antidumping Agreement, art 9.2 to art 9.5

<sup>49</sup> Michael O. Moore "Antidumping Reform in the United States A Faded Sunset" (1999) 33 *Journal of*

after an antidumping duty order is issued.<sup>50</sup> The purpose is to determine whether revoking the order would likely lead to continuation or recurrence of dumping and material injury.<sup>51</sup> In addition, it should be stressed that, the burden of proof lies with the investigating authorities, rather than exporters.<sup>52</sup> It means the authorities should show why the order should not be revoked, but it is not the respondents responsibility to show the revocation of an order would not lead to renewed dumping and injury.<sup>53</sup>

In order to show clearly how this provision is going in reality, this paper will analyse the US sunset review as an example.

U.S. law stipulates that antidumping duty orders must be reviewed by Commerce and the International Trade Commission (ITC) every five years, and revoked unless it is demonstrated that dumping and material injury would be likely to continue or recur within a reasonably foreseeable time.<sup>54</sup> There are two main stages involved in the sunset review process.<sup>55</sup>

### *1 Possibility of dumping*

The main task for US Commerce is to determine the possibility of dumping if the dumping duty order is revoked. Three things could happen in this process.

Firstly, after commerce informs domestic parties none of them participate into the

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World Trade, 1,6.

<sup>50</sup> Antidumping Agreement, art 11.3.

<sup>51</sup> Antidumping Agreement, art 11.3.

<sup>52</sup> Gary N. Horlick & Eleanor C. Shea "The World Trade Organization Antidumping Agreement" (1995), 29, *Journal of World Trade*, 5,29.

<sup>53</sup> Horlick & Shea, above, 29.

<sup>54</sup> 19 U.S.C. § 1675 (c) (1) (1994).

<sup>55</sup> Michael O. Moore "Antidumping Reform in the United States A Faded Sunset" (1999) 33 *Journal of World Trade*, 1,7.

sunset review, the order will be revoked automatically.<sup>56</sup>

Secondly, after Commerce direction, there is an inadequate level of response from interested domestic parties; an expedited review based on the facts available will be conducted.<sup>57</sup>

Finally, full reviews are conducted if there is sufficient willingness to participate. One question arising here is that how to decide whether revocation of the anti-dumping order would be likely to lead to continuation or recurrence of dumping. In general, it will decide dumping is likely to continue or recur if:<sup>58</sup>

- dumping continued at any level above de minimis after the issuance of the order;
- imports of the subject merchandise ceased after the issuance of the order; or
- dumping was eliminated after the issuance of the order, and import volumes for the subject merchandise declined significantly.

The above regulation is rather problematic. For instance, according to this rule, in order to win the sunset review, the respondents have to show that after the dumping duty is imposed, at the same time the US sales will grow, although the price increases.<sup>59</sup> This is an abnormal combination. But if the respondents fail to prove this illogical relationship then it means the likelihood of recurrence or continuation of dumping.

## 2 Possibility of injury

The main task for the ITC is to determine whether revocation of an order would be

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<sup>56</sup> O. Moore, above 7.

<sup>57</sup> O. Moore, above 7.

<sup>58</sup> O. Moore, above 8.

<sup>59</sup> O. Moore, above 9.

likely to result in continuation or recurrence of material injury within a reasonably foreseeable time.<sup>60</sup>

The ITC normally holds on although the standard in five-year reviews is not the same as that applied in the original anti-dumping investigations, it contains some of the same elements such as dumping margin.<sup>61</sup> This is particularly unfair because the dumping margin will keep varying with the economic and market situation in 5 years.

Therefore, it is obvious that under the sunset provision, antidumping orders can be automatically terminated only when no domestic industry responds. Otherwise, stern statutory requirements make it almost impossible to revoke an antidumping order. Thus, in fact, once an antidumping order is issued, it is more likely to stay on in effect for the foreseeable future.

In conclusion, from the review of all above regulations it is clearly exposed that the nature of antidumping law is a general source of protection from foreign competition more than seeking the fairness of that competition.

The antidumping laws are ambiguous and vague which leaves plenty of room for divergent interpretations. Moreover, various rules and procedures can be easily used to reach a conclusion of dumping.

Although over the years of negotiation on Article VI of the GATT,<sup>62</sup> the eventual outcome from 1994 Antidumping Agreement is that just as long as the domestic industry seeking protection could demonstrate it has been injured by the imports, then that is enough. They do not need to testify the imports are really dumped. Therefore,

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<sup>60</sup> O. Moore, above 9.

<sup>61</sup> O. Moore, above 13.

<sup>62</sup> The first AD Code, negotiated in 1966-67 during the Kennedy Round, was eventually replaced by the 1979 Code that emerged from the Tokyo Round. Further revision at the Uruguay Round yielded the 1994 AD Code.

in fact, nothing happened to protect fair competition at all. In addition, the current Agreement through strict procedural requirements evolved more and more difficulties for foreign enterprises to defend successfully against antidumping charges.

### **III ANTIDUMPING CHARGES AGAINST CHINA**

China is the country most frequently targeted by other countries for anti-dumping investigation against its exports. According to statistics released by the WTO, Anti-dumping charges against Chinese manufacturers by overseas countries totalled 500 by the end of 2002, accounting for 14 percent of the world's total, ranking first in the world.<sup>63</sup> Anti-dumping moves against China have been one of the most serious obstacles to the development of Chinese foreign trade, which costs China dozens of billions in lost export revenues.<sup>64</sup>

#### **A Characteristics of Antidumping Charges**

Four main characteristics are involved in foreign anti-dumping measures against Chinese merchandise:

##### **1 Variety of goods**

First of all, the variety of goods, which is brought under anti-dumping measures, has gradually enlarged. Since the first anti-dumping case against Chinese exports, foreign accusations have expanded from the original raw material products, such as mineral

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<sup>63</sup> <[http://english.peopledaily.com.cn/200309/14/eng20030914\\_124248.shtml](http://english.peopledaily.com.cn/200309/14/eng20030914_124248.shtml)> (last accessed 14 November 2003)

<sup>64</sup> People's Daily <[http://english.peopledaily.com.cn/200309/14/eng20030914\\_124248.shtml](http://english.peopledaily.com.cn/200309/14/eng20030914_124248.shtml)> (last accessed 14 November 2003)

products and chemical products, to textile products, clothing, light industry products, home electric appliances, hardware, medicine and farm produce, etc.<sup>65</sup> In particular, most of these litigations end with China losing and being facing high dumping duties.<sup>66</sup>

## 2 Increase of petitioners

Secondly, petitioners who have filed anti-dumping lawsuits against China are no longer limited by "big eight", but include in more and more countries, such as Germany, France, Italy, Japan, Mexico, Venezuela, Nigeria, South Africa, Nigeria, South Korea, New Zealand and Turkey.<sup>67</sup>

## 3 High dumping duties

Thirdly, the rates of dumping duties are dramatically growing. In the past, the rate of dumping duties imposed on Chinese goods normally were at 10-30 percent, but now it generally reaches 100-500 percent.<sup>68</sup> In particular, Mexico even imposed a rate as high as 1,004 percent on China-made footwear.<sup>69</sup> Therefore, in fact, many Chinese export products have been squeezed out of these markets.<sup>70</sup>

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<sup>65</sup> Han Guojian *China Learns How to Deal With Dumping Charges* (submission to Chinese Fair Trade Bureau)

<sup>66</sup> Han Guojian, above.

<sup>67</sup> Four developed countries, the U.S., EU, Australia and Canada initiated about 90% of antidumping investigations in the 1980s, which are referred as the "big four". Since 1995, four developing countries, India, South Africa, Argentina, and Brazil, became active in initiating antidumping activities. The four developed countries together with the four developing countries composed the "big eight".

<sup>68</sup> Han Guojian, above.

<sup>69</sup> Han Guojian, above.

<sup>70</sup> People's Daily <[http://english.peopledaily.com.cn/200309/14/eng20030914\\_124248.shtml](http://english.peopledaily.com.cn/200309/14/eng20030914_124248.shtml)> (last accessed 14 November 2003)

<sup>71</sup> Han Guojian, above.

#### 4 Original product rule

In the end, more and more countries are adopting the rule of the origin of products as being the target of anti-dumping suits.<sup>71</sup> This means that exports originally made in China and directly exported or indirectly exported through Hong Kong or other regions are also becoming the target of anti-dumping investigations as well.<sup>72</sup>

#### B Key Reasons As Major Target

The U.S. is the major trade partner for China, but it is also one of the nations most actively using antidumping measures against its trade partners, especially China. Following that, the other countries such as European Community (EU) also employed different strategies for antidumping determination against Chinese exports. So, the question arising here is that why these countries' keenness is to choose China as antidumping target.

##### 1 Non-market economy methodology

It is found that most of the antidumping cases filed against Chinese goods were based on the 'non-market economy' status of China. If China is treated as a non-market economy in an import country's trade law, this means that the import country does not determine whether or not a product is being dumped in their own market by comparing the price of a good imported from China with price of the same goods sold in China or in a third market. However, they can just simply use this assumption. The

<sup>71</sup> Grossman G.M. *Strategic Trade Policies and the New International Economics* (1 ed, MIT Cambridge, 1986) 47-68.

<sup>72</sup> Han Guojian, above. < C:\Documents and Settings\Harvey Norman\Desktop\antidumping I\“China Learns How to Deal With Dumping Charges.”.htm>



presumption is that since China is in a transition from a planned to a market-based economy, not all of its domestic prices fully reflect supply and demand.<sup>73</sup> For instance, Chinese government can subsidize some inputs greatly; thus, domestic prices of goods utilizing the inputs will not reflect the true cost of production.<sup>74</sup> In this situation, comparisons of the home country prices with prices of the same goods sold abroad would not necessarily indicate whether or not a good is being sold at less than "normal value."<sup>75</sup> As a result, constructed price is extensively used to decide the normal value in non-market economy country.

The non-market economy methodology is against China in four different ways:

(a) Labour cost

Chinese producers claim that they are able to sell goods at prices lower than most of their competitors because of two main reasons. One is the lower labour cost; the other is that they do not have to comply with environmental standards. However, the non-market economy methodology believes that the labour costs are much higher than the actual labour cost of those prevailing in China.<sup>76</sup> These approaches reduce Chinese producers' comparative advantage over its worldwide competitors.<sup>77</sup>

(b) Calculation method

Market economies also allow producers sometimes to sell their products for less than average total cost, which is named as marginal cost of production.<sup>78</sup> However, the constructed value method normally includes profit when it calculates normal value. In

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<sup>73</sup> Alford, William P. "When Is China Paraguay? An examination of the Application of the Antidumping and Countervailing Duty Laws of the United States to China and Other 'Non-market Economy' Nations" (1987) 61 Southern California Law Review 79,81.

<sup>74</sup> Alford, William P, above, 85.

<sup>75</sup> Mah, Jai S. *The United States' Antidumping Decisions against the Northeast Asian Dynamic Economies* (Blackwell Publishers Ltd, 2000) 721-732.

<sup>76</sup> Jason Z. Yin, Ling Li *Antidumping War and Northeast Asian Economies (NEAE): Issues and Strategic Options* (PHD Research Paper Department of Management Hong Kong Polytechnic University, 2002)

<sup>77</sup> Jason Z. Yin, above.

<sup>78</sup> Ross, Lester and Ning, Susan "Modern Protectionism: China's Own Antidumping Regulations." (2000), *The China Business Review*, Washington 30-33.

particular, the calculation of the profit margins depends on the selected sales, but does not use generally accepted accounting principles.<sup>79</sup> As a result, it is not surprising that they can establish that the Chinese goods are sold always at "dumping" price.

(c) Definition of market economy

The definition of market economy is not provided in WTO provisions. Therefore, no precise model of market economy conditions can be followed by the WTO members. In practice, each member has broad discretion in setting or even changing the conditions under which it applies non-market economy provisions in antidumping cases against Chinese industries.<sup>80</sup>

(d) Outside of judicial review

Finally, under some countries' trade law such as US, the decision of the US Department of the Commerce (DOC) to designate a trading partner, as a non-market economy such as China, means that China is not subject to a judicial review.<sup>81</sup> So, undoubtedly, this puts Chinese government in a very difficult position to defend itself in antidumping cases through WTO dispute settlement system.<sup>82</sup>

It should be stressed that China's WTO Accession Agreement explicitly permits the U.S. to continue to use its anti-dumping methodology for fifteen years after China's accession to the WTO.<sup>83</sup> It means China has accepted the discriminatory provision by allowing the United States and other WTO members to use the non-market economy methodology in dumping cases for another fifteen years from the time of its accession.

As a result, as long as the antidumping cases against China are involved, it will

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<sup>79</sup> Gary N. Horlick & Eleanor C. Shea "The World Trade Organization Antidumping Agreement" (1995), 29, *Journal of World Trade*, 5, 26.

<sup>80</sup> Ross, Lester and Ning, Susan, above.

<sup>81</sup> Jason Z. Yin, Ling Li, above.

<sup>82</sup> Jason Z. Yin, Ling Li, above.

<sup>83</sup> U.S.-China WTO Accession Agreement 2000.

automatically follow a different procedure from another members. For instance, according to current antidumping laws in the U.S., when dealing with a non-market economy the price of the subject product in a comparable market economy must be used.<sup>84</sup> This is usually called the surrogate country approach.<sup>85</sup> It will affect trading with China immensely as long as China is treated as a non-market economy country.

However, in April 1998, the European Council with Council Regulation gave special treatment to Chinese companies. This special treatment gives Chinese producers the opportunity to claim that they operate business in market economy conditions on a case-by-case basis.<sup>86</sup> In order to take advantage of this special treatment, producers need to comply with the following requirements:<sup>87</sup>

- Company decisions must be made without significant State influence;
- Accounts must be independently audited in line with international accounting standards;
- Production costs and the financial situation of the company are not affected by distortions carried over from the former State-led economic system, barter trade or compensation of debts;

It is obvious that this regulation does not grant China the status of full market economy. Nonetheless, for Chinese companies own options, if they can satisfy the above requirements; dumping calculations are based on their own domestic price. The constructed value method and the surrogate country approach will be not applied. Therefore, it is widely accepted by most of Chinese producers as a relatively fair treatment.

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<sup>84</sup> U.S Antidumping Law 1995.

<sup>85</sup> Jason Z. Yin, Ling Li, above.

<sup>86</sup> Hong Kong Trade Development Council. "Commission proposal to maintain the current special anti-dumping regime for China." (2000) 14.

<sup>87</sup> Nadeem M. Firoz & Ramón E. García *Antidumping War against China and the Effects of WTO Membership* (Montclair State University of USA)

## 2 Worrying about market share

### IV HOW TO RESPOND TO ANTIDUMPING CHARGES AGAINST CHINA

Another reason for some country's keenness to sue China is that they fear their market share will be affected after China enters the World Trade Organization and enjoys tax reduction treatment.<sup>88</sup> Therefore, it is reasonable to believe some countries' governments support or even encourage their domestic enterprises to attack China's export merchandise as dumped goods in order to perfectly protect their own trade interests.<sup>89</sup> In the litigation, they can easily adopt non-market economy as excuse. It should be pointed out that as well as their insistence on regarding China as a non-market economy; they also refuse to give a separate ruling to Chinese state-owned enterprises. They definitely ignored the actual export price's differences between various enterprises that produce the same product.<sup>90</sup> Eventually, the same rate of dumping duties is levied, which generally affect exports of the whole industry in China.

## 3 Lack of legal support

The lack of antidumping or related legislation is also a major reason that its trade partners commonly attacked China as antidumping target. Without an advanced law, China has difficulty in reacting effectively to foreign anti-dumping charges on a corresponding basis.<sup>91</sup>

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<sup>88</sup> <C:\Documents and Settings\Harvey Norman\Desktop\antidumping IV\China Learns How to Deal With Dumping Charges.>.htm (last accessed 13 November 2003)

<sup>89</sup> Han Guojian *China Learns How to Deal With Dumping Charges* (submission to Chinese Fair Trade Bureau)

<sup>90</sup> Han Guojian, above.

<sup>91</sup> Han Guojian, above.

“As a result, some countries have no scruples while attacking China for dumping.”<sup>92</sup>

#### **IV HOW TO RESPOND TO ANTIDUMPING CHARGES AGAINST CHINA**

In recent years, the number of antidumping cases against China has considerably increased which bring numerous damages for Chinese international trading.

In general, from the day, which an anti-dumping charge is filed, a Chinese producer is forced to halt the export of merchandise immediately. Two results might happen in the procedure, but neither of them is positive for the Chinese defendants. One is that the Chinese enterprise loses; it will either have to pay high dumping duties or promise to raise the export price and reduce the export volume. Which means, it is quite possible for this enterprise to be driven out of the export market, even though the dumping duty rate was not too high, its exports would be decreased. On the other hand, probably, after investigation, the Chinese enterprises eventually win; but its export producers will be adversely affected as well because of the yearlong investigation and judgment.

When one notices the serious result antidumping charges cause, then, it should be realized how important effectively responding to the unfair charges is. Therefore, it is urgent for Chinese exporters to pay great attention on how to properly deal with antidumping charges.

However, in order to effectively respond to the antidumping lawsuits, the first important thing is to make sure that genuine dumping exists.

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<sup>92</sup> Han Guojian, above.

## A *How To Test Genuine "Dumping"?*

As stated in the second part of this paper, dumping occurs when the imported goods are sold at a price below the normal value. Thus, first of all, normal value must be established. However, the question that arises here is:

### 1 *How to calculate normal value?*

In general, there are three common methods for the decision of normal value.

(a) Three common methods

(i) Home country price

According to GATT stipulations, the normal value of a product equals the domestic price of the same or similar commodities in an exporting country.<sup>93</sup> However, it is possible that, while there are some sales in the home country's market, the level of such sales is so low that its significance is questionable. Thus, the WTO Agreement recognizes that some sales in the home market may be so low in volume that they do not permit a proper comparison of home market and export prices.<sup>94</sup>

It provides that the level of home market sales is sufficient if home market sales constitute 5 per cent or more of the export sales in the country conducting the investigation, provided that a lower ratio "should" be accepted if the volume of domestic sales nevertheless is "of sufficient magnitude" to provide for a fair

<sup>93</sup> Agreement On Implementation Of Article VI of General Agreement on Tariffs and Trade 1994, part1, art2.

<sup>94</sup> <C:\Documents and Settings\Harvey Norman\Desktop\normal value.htm> (last accessed 19 October 2003)

comparison.

(ii) Third country price

When many items are produced specifically for export and no domestic equivalent is available. The alternative method for determining normal value is to look at the comparable price of the like product when exported to an appropriate third country.

However, the WTO Agreement does not specify any standard for determining which kind of third country is appropriate.

(iii) Constructed normal value

When a price in the ordinary course of trade cannot be used as a normal value in the country of export, another option is constructed value. "A constructed value includes the cost of production and reasonable amounts for administration and selling costs, delivery charges, and other charges incurred in the sale, and an amount for profit."<sup>95</sup>

This method uses many inputs, which are arbitrary.<sup>96</sup> Firstly, actual production cost information is confidential as it is normally proprietary. Secondly, an anti-dumping proceeding is adversarial. None of the exporting firm is likely to reveal such important information.<sup>97</sup> Thirdly, the customs service is not able to record very precisely all the import transactions. Therefore, it is hard to accurately calculate normal value in this way.

(b) The special rule for China

<sup>95</sup> <[http://www.med.govt.nz/buslt/trade\\_rem/glossary/](http://www.med.govt.nz/buslt/trade_rem/glossary/)>(last accessed 27 October 2003)

<sup>96</sup> William Loehr *Dumping and Anti-Dumping Policy with Applications in Lithuania* (Discussion Paper, Harvard Institute for International Development, 1997)

<sup>97</sup> Loehr, above.

As mentioned above, in order to determine the existence of dumping, comparisons normally would be made between the export price and home country price. However, China is treated as a non-market economy country so the rules of determination are different. The popular argument is that the export prices from a non-market economy country are monopolized by the State, which cannot reflect real value of the goods. Therefore, the normal value of Chinese export merchandise is calculated by the so-called analogue price.<sup>98</sup> It means

a surrogate country is often selected and the home country price is calculated based on prices in the surrogate market where like products are manufactured, preferably by the same process, and sold, preferably under the same competitive conditions.<sup>99</sup>

It is criticized that using surrogate country method to decide normal value often results in unfair and inaccurate comparison with the Chinese market. For instance, India and Pakistan often serve as surrogates of China.<sup>100</sup> However, in reality, most of raw materials in both of them are cost much more than China. Moreover, developed countries such as Norway and France have also been surrogates of China; it is ignored that there is a significant gap in labour costs between the developed and developing countries, so that this seriously warps the real normal value. Therefore, this calculation method results in the "normal value" in name, which could be always higher than export price, so it is proved that "dumping" occurs.

What is more, tremendous anti-dumping disputes relate to the decision of normal value, which in every case, the Chinese exporters initially argued that the type or volume of production, price charges, distribution of profits, or the company's right to

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<sup>98</sup> <C:\Documents and Settings\Harvey Norman\Desktop\antidumping 1\China Learns How to Deal With Dumping Charges.htm>(last accessed 27 October 2003)

<sup>99</sup> Lei Yu "RULE OF LAW OR RULE OF PROTECTIONISM: ANTI-DUMPING PRACTICES TOWARD CHINA AND THE WTO DISPUTE SETTLEMENT SYSTEM" (2002) *Colu L Rev* 293, 311.

<sup>100</sup> Lei Yu, above, 368.



obtain, use, or dispose of capital are not controlled by the Chinese government.<sup>101</sup> But, in reality, how to test all of above legal, financial and economic factors are independent from Chinese government is still a confusing issue because no uniform international standard can be followed

(c) *Shakeproof Assembly Components, Inc. v. United States*

In *Shakeproof Assembly Components, Inc. v. United States*, the petitioners in the investigation of helical spring lock washers challenged the US Commerce Department's (DOC) valuation of steel wire rod used by the Chinese manufacturer in producing the subject merchandise.<sup>102</sup>

*Shakeproof Assembly Components, Inc.* is a U.S. corporation, which imports washers, which are produced in China.<sup>103</sup> The washers are made up of steel wire rod, which are from about two-thirds Chinese steel and one-third steel purchased from the United Kingdom. (UK)<sup>104</sup> However, the US DOC determined the value of the washers by relying solely on the market price of the steel purchased from the U.K.<sup>105</sup>

*Shakeproof* challenged the determination, claiming that the DOC should not calculate the normal value of the steel only based on the UK's price and ignore the majority of steel are Chinese domestic steel. "The Court of International Trade (CIT) remanded the case to allow the DOC to show that its reliance on the market value of steel in the U.K. produced accurate results."<sup>106</sup> DOC stated that the steel's normal value should depend on the price from UK because it was actual evidence of market price for the steel in China.<sup>107</sup> Then, the CIT affirmed the decision and *Shakeproof* appealed to the

<sup>101</sup> Lei Yu, above, 369.

<sup>102</sup> Bernd G. Janzen "INTERNATIONAL TRADE DECISIONS OF THE FEDERAL CIRCUIT: THREE YEARS OF RIGOROUS REVIEW" (2003) 52 AMULR 1027, 1103.

<sup>103</sup> *Shakeproof Assembly Components v. United States*, 102 F. Supp. 2d 486.

<sup>104</sup> *Shakeproof Assembly Components v. United States*, above.

<sup>105</sup> *Shakeproof Assembly Components v. United States*, above.

<sup>106</sup> *Shakeproof Assembly Components v. United States*, above.

<sup>107</sup> *Shakeproof Assembly Components v. United States*, above.

Federal Circuit. The Federal Circuit continued to affirm the CIT 's decision. Judge Gajarsa wrote the opinion of the court, with Judges Clevenger and Schall on the panel.<sup>108</sup>

The court held that Commerce may, but is not required to use prices in a surrogate country to determine the value of the washer. Furthermore, Commerce is required to use the best available information to determine the value of non-market goods. Commerce's actions in this case were therefore appropriate because it based its determination on actual evidence of the market value of the steel used in the production of the washers. The fact that the steel used to determine value made up only one-third of the total used in production was not dispositive.

This paper thought this case has already used UK as surrogate country for decision the normal value of the steel but not of the whole washers. The reason is that China is non-market economy country, the normal value of domestic steel cannot be determined by its real price but by the UK'S steel price. Even more, it should be noticed that if the whole washer applies the surrogate country's price, but not just component part--steel, probably the normal value of the washer would reduce as well.

As a result, through this case, it is obvious that the US court actually admitted the DOC's reliance on the best evidence available, including the market price of incorporated components, even if they merely compose of a small portion of the total amount used in the product. This is against fact, and not an accurate valuation of domestic components, and thus cannot provide a genuine antidumping valuation for the whole product.

In conclusion, it is argued that the real dumping does not exist at all in this case.

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<sup>108</sup> *Shakeproof Assembly Components v. United States*, above.

## 2 How to assess injury?

The final purpose of anti-dumping legislation is not to prevent or punish dumping, but to protect domestic industries from being damaged by foreign unfair competition. As a result, an antidumping measure is merely allowed in cases where the dumping results in injury to the domestic industry.

“However, in practice, how to test injury is a very controversial issue which involves various circumstances such as decline of market share, price undercutting, loss of profitability and so on.”<sup>109</sup> All of above results have to be demonstrated that they actually come from the dumped goods, not from some other reasons, such as an economic slump.<sup>110</sup>

### (a) The scope and degree of the injury

The Antidumping Agreement clearly stipulates the scope of the injury from dumped goods. It states that:<sup>111</sup>

[a]ll relevant economic factors and indices having a bearing on the state of the industry shall be evaluated. The list includes actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

Furthermore, the Antidumping Agreement calls for the national authorities to testify

<sup>109</sup> Lei Yu “RULE OF LAW OR RULE OF PROTECTIONISM: ANTI-DUMPING PRACTICES TOWARD CHINA AND THE WTO DISPUTE SETTLEMENT SYSTEM” (2002) *Colu L Rev* 293, 310.

<sup>110</sup> Lei Yu, above, 310.

<sup>111</sup> WTO Antidumping Agreement, art3.4.

that dumped goods are resulting in injury within the meaning of the Agreement.<sup>112</sup>

However, it is not acceptable to just show that the domestic industry is simply suffering injury regardless of what extent the injury is. Therefore, it is necessary for the investigating authorities to test the level of each injury. According to the WTO Antidumping Agreement article 3.1:<sup>113</sup>

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

The injury degree is evaluated in the following aspects:<sup>114</sup>

Whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.

The above illustrations show clearly that the WTO rules neither give an dispositive guidance on whether material injury occurs,<sup>115</sup> nor clearly provide an operational method on judging the injury degree, but just leaves the question of indicators open-ended, which could result in a country showing material injury and injury

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<sup>112</sup> WTO Antidumping Agreement, art3.5.

<sup>113</sup> WTO Antidumping Agreement, art3.1.

<sup>114</sup> WTO Antidumping Agreement, art3.2.

<sup>115</sup> It just simply points out a list relating to potential indicators of injury. "See Part IV A 2 (a) The scope and degree of the injury"

degree in any way that it likes for bringing an anti-dumping lawsuit.<sup>116</sup>

(b) Causal linkage between dumping and injury

That dumping causes injury should be demonstrated in all the anti-dumping disputes. However, dumping combined with other factors together cause the injury that makes the issue more complicated. In this situation,

[t]he authorities shall also examine any known factors other than the dumped imports, which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.<sup>117</sup>

The most contentious issue that should be highlighted here is what are the necessary requirements for this causal link? Whether the dumped imports must merely be “a” cause of injury among other factors, or the “only” cause of the injury?

(c) U.S.-Japan Steel case

In the U.S.-Japan Steel case, Japan alleged that the US not only inadequately analyzed other factors affecting the industry, but also failed to ensure that injury caused by these other factors was not attributed to the dumped imports.<sup>118</sup> In response, the U.S. argued that the Antidumping Agreement does not demonstrate that the dumped imports must be the “sole cause of injury”.<sup>119</sup>

The Panel held that the ITC was not obligated under the Antidumping Agreement to demonstrate that dumped imports alone have caused material injury by deducting the injury

<sup>116</sup>William Loehr *Dumping and Anti-Dumping Policy with Applications in Lithuania* (Discussion Paper, Harvard Institute for International Development, 1997)

<sup>117</sup> GATT art. VI 1(b).

Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

<sup>118</sup> US-Japan Steel, *supra* note 48, paras. 7.237 to 7.261.

<sup>119</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

caused by other factors from the overall injury found to exist, in order to determine whether the remaining injury rises to the level of material injury.<sup>120</sup>

Japan appealed. Eventually, the Appellate Body reversed. The Appellate Body clearly pointed out that "it may not be easy, as a practical matter, to separate and distinguish the injurious effects of different causal factors."<sup>121</sup> And it further stated:<sup>122</sup>

[A]lthough this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors.

The above interpretation apparently reveals: "the Antidumping Agreement requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors."<sup>123</sup>

In conclusion, U.S.-Japan Steel case is a good precedent for Chinese respondents to cite and apply in their antidumping lawsuit.

### **B Participating In The Case**

Pursuant to WTO Antidumping Agreement, if the exporters do not participate and provide the information required to conduct the investigation, the investigation authority has no option but to use the best information available to calculate the

<sup>120</sup> US-Japan Steel, supra note 48, para. 7.260.

<sup>121</sup> US-Japan Steel, supra note 48, para. 7.260.

<sup>122</sup> US-Japan Steel, supra note 48, para. 7.260.

<sup>123</sup> US-Japan Steel, supra note 48, paras. 7.237 to 7.261.

margin.<sup>124</sup> It is universally known that the only information provided is that of the petitioners in most of antidumping cases, which may or may not reflect the real figures. This is absolutely disadvantageous for the defendants. As a result, participation should be firstly stressed when facing all the antidumping charges.

One disastrous precedent of refusing to participate in antidumping charges can be illustrated here.

#### 1 *Garlic war between three countries and China*<sup>125</sup>

China's garlic export ranks number one in all over the world. Its annual output is 59 billion metric ton, which composes of 66% of the total world production. However, the garlic export produced major antidumping disputes between China and its trade partners such as the U.S., South Korea and Japan.

These three countries have files several antidumping litigations against China's garlic dumping.

In 1992, the U.S. imported 3 million pound of garlic from China. The volume of garlic import surged to 64 million pound in 1994, making up of 50% of the U.S. garlic market. Eventually, it caused a U.S. antidumping investigation.

Likewise, China's garlic export to South Korea grew up dramatically. The annual growth rates in 1997 and 1998 were 93.6% as well a 95.7% respectively. Korean garlic price dropped by 37.9% in 1999 due to the large volume of garlic import from China, which hurt the interest of the 30% domestic farmers. Therefore, they decided to start antidumping charges.

<sup>124</sup> WTO Antidumping Agreement, art6.

<sup>125</sup> "Qiao Bao" (15-21 February 2002) East America p. A9.

At the same time, Japan, Thailand, Canada, Mexico and European Union also felt the threat of China's garlic dumping. Then, they initiate the antidumping accusation.

## 2 *The disaster for China*

Since 1994 the Chinese garlic industry actually has been shut out of the U.S. market. This is the result of a 376 percent dumping margin imposed for 5 years. It should be noticed that the affirmative injury determination of this case based completely on the information provided by U.S. producers because Chinese exporters refused to participate. Afterwards, in the sunset review in 1999, no Chinese garlic firms attended the hearing again and the high import duty then automatically retained to date.

In November 1999, Korean government suspended the import of garlic from China and followed up with 315% import duty in Chinese garlic in June 2000.

Even worse, in 2002 the U.S. government suspects that the large volume of garlic imported from Thailand in the last two year might be originated from China. They began to apply the original product rule.<sup>126</sup> Which means they started its antidumping investigation on this.

The garlic war is becoming worse and worse.

## 3 *What is learned from "garlic case"*

The most important lesson from this case is to participate and actively fight for the China's benefits in every proceeding step.

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<sup>126</sup> Original product rule "see Part III A 4 How to respond antidumping charges against China"



In the "garlic case", if Chinese producers respond to the antidumping charges on time, and provide genuine information to calculate the margin, the dumping margin may not be as high as 376 percent. In particular, after the high dumping duty has been imposed, Chinese exporters also should take part in the antidumping sunset review investigation that is trying to get the dumping margin down low enough, so that they can begin to export again.<sup>127</sup>

Moreover, one should never hold the idea that losing only one export market is not important for China. The main reason is that failure to respond to the lawsuit will lead to a chain of anti-dumping cases against China in the future, accordingly paralysing the whole export trade.

After the US easily issued the 376 percent antidumping duty on China's Garlic export, the antidumping petition against China became more and more popular in US. For example, US and China "Honey" trading covered 20 million U.S. dollars of Chinese imports.<sup>128</sup> Just after the "garlic case", the US sued China for honey dumping, following that; the U.S. bicycle producers initiate the antidumping case on Chinese bicycles, which covered 180 million U.S. dollars of Chinese imports.<sup>129</sup> After these cases, the Mushrooms and Indigo antidumping cases against China were coming in turn.<sup>130</sup> After the little Garlic case, US antidumping charges against China covered almost 300 million U.S. dollars of Chinese imports.<sup>131</sup> "All in all, from little seeds, big trees grow."<sup>132</sup>

Therefore, Chinese exporters should recognize as long as they actively respond to dumping charges their probability of winning will increase. Otherwise, the only

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<sup>127</sup> Perry, William E. "U. S. Antidumping Cases Against China-Lessons Learned." July 10, 2001.

<sup>128</sup> "Qiao Bao" (15-21 February 2002) East America p. A9.

<sup>129</sup> "Qiao Bao" (15-21 February 2002) East America p. A9.

<sup>130</sup> "Qiao Bao" (15-21 February 2002) East America p. A9.

<sup>131</sup> <C:\Documents and Settings\Harvey Norman\Desktop\antidumping 1\U.S. Antidumping Cases Against China - Lessons Learned.htm> (last accessed 12 November 2003)

<sup>132</sup> Perry, William E. "U. S. Antidumping Cases Against China-Lessons Learned." July 10, 2001.

answer is definite failure.

**B A Good Start Predicts An Half of Successfulness<sup>133</sup>**

In order to obtain an antidumping order, petitioners must satisfy substantive requirements and procedural requirements, which refer to high dumping margins and injury or threat of material injury.<sup>134</sup> As long as petitioners are able to get this far, the antidumping order will be issued after the initial investigation, which means the only recourse left to Chinese defendants is to fight for a lower dumping margin in antidumping review investigations so that they can export again.<sup>135</sup>

Therefore, the most vital suggestion for Chinese defendants is trying their best to beat the petitioners in the first investigation. In order to win the charges, three methods could be pointed out here. If no injury can be found, if low antidumping margins can be calculated, or negotiating suspension agreements between the Chinese producers and petitioners can be reached which means China win the antidumping case.<sup>136</sup> Winning the cases indicates that the import countries market is still open to Chinese exporters. On the contrary, if the petitioners win, an antidumping order will be issued and stay in place with high dumping margins for a long while.<sup>137</sup> For instance, in 1983, US Commerce Department (DOC) issued an antidumping order on barium chloride from China; afterwards, seldom barium chloride has been exported to US for nearly twenty years.<sup>138</sup> In 1999, in the Sunset Review investigation the US International Trade Commission (ITC) determined to leave the antidumping order on barium chloride from China in place for another five years, beginning from 2000 to

<sup>133</sup> This is an old Chinese saying, which means the first win is vital for the final success.

<sup>134</sup> "See Part II D & E Substantive Requirements & Procedural Requirements"

<sup>135</sup> Nadeem M. Firoz & Ramón E. García *Antidumping War against China and the Effects of WTO Membership* (Montclair State University of USA)

<sup>136</sup> Nadeem M. Firoz & Ramón E. García, above.

<sup>137</sup> Perry, William E. "U. S. Antidumping Cases Against China-Lessons Learned." July 10, 2001.

<sup>138</sup> William E., above.

2005.<sup>139</sup> Although the antidumping provisions in the 1995 Uruguay Round Agreements Act provide for DOC and ITC sunset review investigations every five years in case after case, in Barium Chloride case, the DOC and ITC continue to leave antidumping orders in place so long, because the U.S. domestic industry fights to keep them in place.<sup>140</sup>

Now, this paper will focus on analyzing some key antidumping disputes between US and China. Through illustration of various cases, Chinese exporters will learn different experiences and lessons concerning how to increase the opportunities of winning the antidumping case in the initial investigation.

### 1 *US-China Sebacic Acid dispute*

#### (a) Background<sup>141</sup>

On July 19, 1993, Union Camp Corporation filed a petition with DOC and the ITC, alleging that sebacic acid was being sold at prices below fair market value to the damage of the US domestic industry.<sup>142</sup> After investigation, it was determined that Union Camp's allegations had merit and Commerce published an antidumping duty order on sebacic acid from the People's Republic of China (PRC).<sup>143</sup>

#### (b) Analysis

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<sup>139</sup> The World Trade Organization sunset measure requires the administrative authorities responsible for implementing anti-dumping laws -- in the United States, the Commerce Department and the U.S. International Trade Commission -- to review all outstanding anti-dumping orders after five years. The WTO instructs authorities to determine whether dumping and injury from dumping would likely recur if the anti-dumping order were terminated.

<sup>140</sup> Greg Mastel "The Sunset Review is Being Turned on Its Head" (2000) <<http://www.newamerica.net/index.cfm?pg=article&pubID=222>>

<sup>141</sup> *J.S. STONE, INC v THE UNITED STATES* (2003) 147 US 1,1.

<sup>142</sup> Initiation of Antidumping Duty Investigation; Sebacic Acid from the People's Republic of China, 58 Fed. Reg. 43,339 (Aug. 16, 1993).

<sup>143</sup> Antidumping Duty Order: Sebacic Acid from the People's Republic of China (PRC), 59 Fed. Reg. 35,909 (July 14, 1994).

In the above case, the Chinese exporters were able to win the ITC injury case, merely because the importers appeared and testified in person at the ITC hearing.<sup>144</sup>

Firstly, U.S. importers persuaded five U.S. manufacturers that used sebacic acid in their production process to give evidence on behalf of the Chinese.<sup>145</sup>

Furthermore, the US importers tried to find low surrogate values to apply in order to cut down the dumping margins. Eventually, the Chinese exporters have been able to drive the dumping margins down to 0%.<sup>146</sup> In this case, the U.S. importers argued strongly against the high surrogate values that the petitioner tried to persuade the authority to use. The hot debate was over the co-product and octanol.<sup>147</sup> The petitioner looked forward the DOC to choosing the petitioner's internal price for co-product. The reason is that once the internal price was used; the dumping margins for the Chinese exporters would triple.<sup>148</sup>

Union Camp, the petitioner, argued that the Indian surrogate value for octanol, was not for the octanol produced by the sebacic acid factories.<sup>149</sup> The importer and the distributor, however, were able to prove to the DOC that the Indian "octanol" quote was for a product that was comparable to the product produced in the sebacic acid production process.<sup>150</sup>

The importer's argument, therefore, saved the Chinese exporters and kept the dumping margins low.

Finally, if the Chinese exporters lose at the ITC, the importers can also agree to import for test sales so as to lower the dumping margins in the antidumping review investigations. This has significantly positive effect of opening up the U.S. market to the Chinese exporters.

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<sup>144</sup> William E., above.

<sup>145</sup> Nadeem M. Firoz & Ramón E. García *Antidumping War against China and the Effects of WTO Membership* (Montclair State University of USA)

<sup>146</sup> William E., above.

<sup>147</sup> William E., above.

<sup>148</sup> William E., above.

<sup>149</sup> *J.S. STONE, INC v THE UNITED STATES*, above.

<sup>150</sup> *J.S. STONE, INC v THE UNITED STATES*, above.

In the Sebacic Acid case, after the antidumping order was issued, an US importer in the allies also agreed to import a small amount of sebacic acid for Sinochem Tianjin so that it could do the first review investigation.<sup>151</sup> Sinochem Tianjin now has the lowest dumping margin and is one of two Chinese exporters that continue to export sebacic acid to the United States.<sup>152</sup>

(c) Lesson: working with the importers

This case clarifies that effort from either exporter or importers alone may not win the case. They should try to form allies to participate together in the antidumping case.

The reason is that Chinese exporters are interested in bringing their products to the export countries; the importers are interested in buying those products. It makes sense that they both work together to fight dumping charges. In particular, when Chinese companies are not familiar with the situation in the foreign market, the necessary help from insiders is needed. Finally, Chinese exporters should understand that the importers are the parties that are liable for any increase in antidumping margins in the antidumping review investigations.

In conclusion: Chinese defendants should try to make close allies with importers and fight together against unfair charges.

## 2 *US-China Silicon Carbide dispute*

(a) Background

In 1991, the US DOC first permitted different Chinese export companies in the same

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<sup>151</sup> *J.S. STONE, INC v THE UNITED STATES*, above.

<sup>152</sup> Sinochem Tianjin refers to a Chinese sebacic acid exporter.

antidumping case can apply separate dumping margins.<sup>153</sup> In 1993, however, the DOC reversed course in Compact Ductile Iron Waterworks Fittings from China (CDIW).<sup>154</sup> As the Department stated in the Silicon Carbide case:<sup>155</sup>

In CDIW, we took the position that state-ownership (ownership by all the people) provides the central government the opportunity to manipulate the exporter's price whether or not it has taken advantage of that opportunity during the period of investigation. Thus, we concluded in CDIW that state-owned enterprises would not be eligible for separate rates.

In the Silicon Carbide case, however, the DOC reversed the direction and resume the Chinese exporters separate dumping margins because of the following reasons:<sup>156</sup>

However, based upon further analysis and information developed in the course of the investigation, we find that ownership: by all the people, in and of itself, cannot be considered as dispositive in determining whether those companies can receive separate rates. At verification. . . MOFTEC. . . explained that the designation on these respondents business licenses that they are "owned by all the people" does not mean that the central, provincial, or local governments control these companies. Instead, "ownership by the people" signifies that "no individual can take the company; it cannot become a private company." The company "belongs to the community" and the company's employees are entrusted with the management of the company.

(b) Analysis

The separate rates issue allows different Chinese exporters involved in the same antidumping charge to have separate dumping margins. Silicon Carbide case reflects this issue clearly. In this case, the Department established certain legal and factual

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<sup>153</sup> Sparklers From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review < <http://ia.ita.doc.gov/frn/0004frn/00-406t.txt> > (last accessed 13 November 03)

<sup>154</sup> *SHAKEPROOF ASSEMBLY COMPONENTS DIVISION OF ILLINOIS TOOL WORKS, INC. v THE UNITED STATES* (2000) 97 US.

<sup>155</sup> Silicon Carbide from China, 59 Fed. Reg. 22586 (May 2, 1994).

<sup>156</sup> Silicon Carbide from China, above.

criteria, which are used to judge whether the Chinese accused were entitled to applying their own dumping margins.<sup>157</sup> However, they must satisfy the certain criteria.

Four key questions are usually asked to assess whether or not the Chinese exporters' arrive at the criteria.<sup>158</sup> Firstly, whether the prices of the exporters are made or influenced by Chinese government approval? Secondly, Whether the Chinese exporters have the right to negotiate and sign contracts with their trade partners? Thirdly, whether the exporters have power to make their own decisions concerning the selection of management? "Finally, whether the companies are entitled to retain the proceeds from their own export sales and make independent decisions regarding the disposition of profits or financing of losses?"<sup>159</sup>

Since the Silicon Carbide case, the US DOC has routinely permitted almost every Chinese exporter to apply its own dumping margins.<sup>160</sup> However, one requirement is necessary that they must provide sufficient evidence to prove that they are not owned or dominated by the Chinese government. This is a big improvement for US and China trading relationship.

(c) Lesson: restructure of enterprises

Through the above analysis, it is apparent that as long as the Chinese enterprises can testify that the Chinese government is not their real boss, they will apply the separate rate in the antidumping cases. In reality, the most effective way to prove a company not controlled by the government, but by themselves, is that they are stock companies. Because once they own the more stock of a company, which definitely means they take control of that company. As a result, the suggestion can be provided here is that Chinese enterprises should issue stock and buy up that stock.<sup>161</sup> Once the stock is

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<sup>157</sup> The certain criteria "see Part IV B 2 (b) How to respond to antidumping charges against China"

<sup>158</sup> Perry, William E. "U. S. Antidumping Cases Against China-Lessons Learned." July 10, 2001.

<sup>159</sup> William E., above.

<sup>160</sup> Firoz & García, above.

<sup>161</sup> Firoz & García, above.

issued and the company buys a controlling interest of the company they will be the acknowledged bosses.

In conclusion: the stock company will be an ID card of applying separate rate in the antidumping cases.

### 3 *US-China Crawfish dispute*

#### (a) Background<sup>162</sup>

In September of 1996, the US domestic crawfish producers filed an antidumping petition with the DOC, alleging that freshwater crawfish tail meat from China was sold in the United States at less than fair market value in its home country. With respect to the petition, the DOC initiated an investigation. It sent questionnaires to various Chinese freshwater crawfish tail meat exporters as well as producers.

The DOC still adopted a presumption that the People's Republic of China was a non-market economy country in this proceeding, requiring companies desiring an individualized antidumping duty margin to so request and to demonstrate an absence of state control.<sup>163</sup>

On August 29, 1997, the US ITC made a decision that the Chinese exporters were in fact dumping crawfish in the U.S. and then, imposed the dumping duty ranging from 91% to 200%.

#### (b) Analysis

In the first investigation, Chinese exporters and producers did not appear at the ITC

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<sup>162</sup> *Huaiyin Foreign Trade Corp. (30) v. United States DOC*, (2002) US 201 F. Supp. 2d 1351

<sup>163</sup> US-China Crawfish Dispute <<http://www.american.edu/projects/mandala/TD/craychin.htm>> (last accessed 20 November 03)



hearing so they lost a good chance to actively defend that the freshwater crawfish tail meat exports would not injure or threaten injury to the U.S. producers. It should be pointed out that just because the Chinese exporters and producers did not show up at the ITC hearing and make their views known, eventually, the dumping margin was imposed 201.63 percent ad valorem for all crawfish tail meat imported from China as a whole and by exporters that failed to demonstrate independence from governmental control.<sup>164</sup> However, when the China-wide rate applied by default, one exporter (Huaiyin-5)<sup>165</sup> trading in crawfish tail meat stood up and effectively testified an absence of state control. It met the requirements for an individualized duty margin. As a result, it merely received a company-specific 91.5 percent ad valorem duty margin.

(c) Lesson: Paying attention to hearing

In this case, one of common mistakes those Chinese exporters often make is revealed clearly, they are often absent in the ITC hearing.

Once the dumping case is filed, the DOC hearing and the ITC hearing will happen in turn. The DOC hearing is not as important as the ITC hearing because usually by the time of the DOC hearing, the investigative authority has already made its decision with respect to whether dumping exists.<sup>166</sup> Therefore, even appearance at the hearing will usually not affect the result of the case. "In direct contrast, however, testimony by the Chinese exporters and producers at the ITC hearing can make the significant difference between winning and losing the injury case."<sup>167</sup>

At the ITC hearing, the Commissioners appear in person to listen to the parties' arguments.<sup>168</sup> In particular, they are interested in the defence on threat of material

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<sup>164</sup> *Huaiyin Foreign Trade Corp. (30) v. United States DOC*, above.

<sup>165</sup> Huaiyin-5 refers to one of Chinese freshwater crawfish tail meat producers which is involved in the US and China antidumping dispute in 1996.

<sup>166</sup> William E., above.

<sup>167</sup> William E., above.

<sup>168</sup> About the ITC Hearing < <http://www.moldanddiefairtrade.org/AboutITC.htm> > (last accessed 20 November 03)

injury to their domestic industry in the near future.<sup>169</sup> There are two absolutely distinguished reactions between the defendant's appearance and absence. The presence and testimony of the Chinese producers and exporters can reassure the ITC Commissioners that their export activities will not threaten the U.S. industry in the future.<sup>170</sup> "If the Chinese exporters and producers even are afraid of appearing at the hearing, to an ITC Commissioner, this action in and of itself can indicate a threat of material injury."<sup>171</sup>

In conclusion, Chinese defendants should take part in the hearing, particularly, paying great attention to the ITC hearing.

### *C Balancing Gain and Loss*

The above statement sufficiently expresses the disaster from failure in an antidumping lawsuit. On the contrary, as an old saying goes there is a price for every victory. This means, in the antidumping cases, even win also need pay the price.

For instance, if Chinese defendants win the lawsuit because they prove no injury or threat of injury existing at all; then the problem will come from the "free rider" in China.<sup>172</sup> If the Chinese exporters win the case because they are only imposed extremely low dumping duty, they will face annual antidumping review investigations in the future.<sup>173</sup> Finally, if the Chinese exporters successfully obtain a suspension agreement, they must cut down export volumes under quota and increase the price of the merchandize over the price floor, undoubtedly, which will lose the competitive

<sup>169</sup> About the ITC Hearing < <http://www.moldanddiefairtrade.org/AboutITC.htm> >(last accessed 20 November 03)

<sup>170</sup> About the ITC Hearing < <http://www.moldanddiefairtrade.org/AboutITC.htm> >(last accessed 20 November 03)

<sup>171</sup> Perry, William E. "U. S. Antidumping Cases Against China-Lessons Learned." July 10, 2001.

<sup>172</sup> Free rider "See Part IV C 1 *Free rider*"

<sup>173</sup> William E., above.

ability in the international market.<sup>174</sup>

Therefore, when Chinese producers face antidumping charges, they have a wolf by the ears. The key point is how to balance gain and loss.

### *1 Free rider*

In this paper, a free rider problem exists whereby after some Chinese exporters entirely win their antidumping case, their victory will be shared with other Chinese exporters, who did not pay any of the litigation fees and even refused to participate in the antidumping case.

As a result of free rider, many Chinese exporters prefer to partly win the lawsuit, which means they will accept low dumping tariff.

However, when one compares the outcomes between the above two different victories, it can be found that the former do have the notable effect of increasing Chinese exports. No antidumping duty will broadly raise the export market share for all Chinese enterprises, but the actual companies that spend a lot of money and time in the case can lose their exclusive right to export the product. In fact, that is unfair for them.

Therefore, this paper suggests that the like and the same product industry in China should form a special union or business association to suppress free riders. The Chinese government also can adjust the profits between the free riders and the winners of the lawsuit through tax in order to encourage more and more Chinese enterprises ally together to respond the antidumping charges.

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<sup>174</sup> William E., above.

## 2 Low antidumping duty

As mentioned above, some scholars hold the opinion that they would rather have imposed the low dumping duty instead of free rider problem. Therefore, two things may happen. Either the Chinese exporter can get a dumping margin less than 2%, which is the best situation because the exporter is excluded from the dumping order.<sup>175</sup> It means that the case is not subject to annual review investigations.<sup>176</sup> Or if the dumping margin is over 2%, the authority will reach an affirmative determination, which predicts that the problems have started.<sup>177</sup> Once the antidumping order is issued, a year later, the antidumping review investigation will initiate.<sup>178</sup> In order to keeping the low dumping duty, the Chinese exporters must continue to take part in the annual review investigations.

As a result, although without the free rider problem, even worse, the price of a victory through low dumping duty is yearly review investigations.<sup>179</sup> This means Chinese exporters need to keep on paying the legal fees year-by-year and continue to risk of losing the export market.

In conclusion, it is wise for all the Chinese enterprises to give up this costly method as soon as possible.

## 3 Suspension Agreement

A suspension agreement is a negotiated agreement between the interested parties,

<sup>175</sup> "See Part II D 2 *De minimis dumping margin*"

<sup>176</sup> "See Part II D 2 *De minimis dumping margin*"

<sup>177</sup> Compendium of Antidumping and Countervailing Duty Laws in the Western Hemisphere <<http://www.ftaa-alca.org/Wgroups/WGADCVD/english/050100.asp>> (last accessed 20 November 03)

<sup>178</sup> Compendium of Antidumping and Countervailing Duty Laws in the Western Hemisphere, above.

<sup>179</sup> William E., above.

which indicates the halt of the antidumping lawsuit with issuing a quota and a price floor.<sup>180</sup>

Suspension agreements firm a price floor. Sometimes, the price floor is so high that it will lead to substantial influence of decreasing the export volume. Moreover, the floor price can be revised yearly based on historical data.<sup>181</sup> In a whole year, the market conditions are varying all the time, however, once the reference price is fixed, it will be kept on one year. One simple example can be mentioned here to illustrate this rule is unpractical. The prices of seasonal fruit automatically change in different seasons. It is supposed that the price in summer is the lowest. So, if in reference to the winter's price, the fruit's price floor is made, this means the exporters will be definitely driven out of the summer market due to unbelievably high price. In fact, this rule artificially sets up an obstacle for the exporters.

#### *D Establishing Quicker-response System*

In order to efficiently respond to the dumping charges before they become lawsuits, the Chinese government should set up a quicker-response mechanism as soon as possible. Simultaneously, the old antidumping early warning system, which was set up by the Chinese government for dumping charges in major markets such as the United States, the European Union, Australia, and South Korea, should be improved in support of quicker-response system.<sup>182</sup> Chinese authorities need try their best to prevent from the increasing of dumping charges in the future.

<sup>180</sup> < <http://www.exim.gov/products/policies/proposal.html> > (last accessed 20 September 2003)

<sup>181</sup> William E., above.

<sup>182</sup> "More effort needed to fight anti-dumping charges" (16 September 2003) *China Daily Hong Kong*

### *1 Function*<sup>183</sup>

First of all, this system should be able to accurately and closely monitor all the Chinese exporters' price and quantity.

Secondly, it can provide timely and proper suggestions on adjusting the prices or export destinations to avoid the possible antidumping disputes.

Finally, the systems can also keep a tab on anti-dumping moves in import countries and help Chinese enterprises react rapidly.

### *2 Composition*

The quicker-response system will be composed of government departments, import and export chambers of commerce, local foreign trade authorities and professional law firms. It is supposed to invite some foreign importers to join in the system.

## *E Acknowledgement Of Market Economy*

"Although a market economy status is not the trump card that will overcome anti-dumping charges, but it will still be important in making the anti-dumping actions against Chinese products fairer."<sup>184</sup>

### *1 Past*

In every anti-dumping case, Chinese company had to demonstrate that their business

<sup>183</sup> "More effort needed to fight anti-dumping charges" (16 September 2003) *China Daily Hong Kong*

<sup>184</sup> Li Xiaoxi, a famous economics professor at Beijing Normal University in China.

operations are fully market-oriented in order to getting rid of extra antidumping tariffs. To do so, they had to have their cost structures recognized in anti-dumping investigations, incurring legal fees of up to US\$200,000 in the process.<sup>185</sup> These expenses are the huge burden for most of Chinese enterprises. Therefore, the Chinese government took advantage of every opportunity for China to seek recognition as a market economy.

## 2 *Now*

According to a World Bank report, the price of more than 90 percent of Chinese products are determined by the market rather than by the government.<sup>186</sup> Thus, the World Bank, the International Monetary Fund and some other important international organizations all recognize China is a market economy. This is a good beginning.

## 3 *Future*

It is necessary to urge Chinese government to step up more pressure on foreign governments through negotiations to grant Chinese enterprises full market economy status as soon as possible.

### ***F Advantages From WTO Membership***

WTO membership will bring three main aspects of positive impact to China in dealing with dumping charges issue.

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<sup>185</sup> "Commentary: Anti-dumping cases use flawed data" (11 August 2003) *China Daily Hong Kong*

<sup>186</sup> "Commentary: Anti-dumping cases use flawed data" (11 August 2003) *China Daily Hong Kong*

### 1 Promote market economic structure

First of all, WTO membership will speed up China's economic reforms and opening-up. At the same time, it will further expedite the establishment and improvement of a socialist market economic structure.<sup>187</sup> Therefore, it is expected that Chinese exporters can get more market economy treatments in future antidumping proceedings.

### 2 Improve judicial standard

Following that, China as one of WTO members can not only take part in the development of WTO rules and procedures, but also can protect its national interests through active participation in the new round of talks.<sup>188</sup> Thus, this will give China a good opportunity to gain some advanced experiences for improving its own legislation standard, more importantly, learning how to better implement the law.

Since 25 March 1997 China has already established its antidumping system.<sup>189</sup> China's State Council issued administrative regulation, which is named Dumping Prevention and Offset Tariff Regulations as the fundamental antidumping rule.<sup>190</sup> Afterwards, in December 2001, the Chinese Antidumping Law was enacted by People's congress Council.<sup>191</sup> The antidumping remedy set out in this Law is strengthened consistently with WTO entitlement and obligations. This is a big development in China's international trade law area.

However, so far, neither of them has been sufficiently implemented yet. In particular,

<sup>187</sup> Xiang Liu & Hylke Vandenbussche *EU Antidumping Cases Against China: An Overview and Future Prospects With Respect To China's WTO Membership* (Catholic University of Leuven, 2002)

<sup>188</sup> Leonard K. Cheng *China's Accession to the World Trade Organization and Its Effects on the Chinese and Hong Kong Economies* (Hong Kong University of Science and Technology, 2001)

<sup>189</sup> John Magnus & Dewey Ballantine *China's Antidumping Laws and Regulations: What do they say? How do they affect U.S. exports? Are they consistent with WTO Agreement?* (ABA Panel, 2002)

<sup>190</sup> Magnus & Ballantine, above.

<sup>191</sup> Magnus & Ballantine, above.



one element involved in China's anti-dumping regulation is that 'when foreign countries take discriminatory anti-dumping action against Chinese products, China can take retaliation action'.<sup>192</sup> This article was not used properly and effectively to fight against numerous dumping charges against China in the past. It can be expected that in future China will actively learn how to use its antidumping regulations for protecting its trade interest.

In the end, the WTO non-discrimination principle will insure China can respond to the dumping charges under a multilateral equal and mutually beneficial trade environment.<sup>193</sup>

### 3 Use WTO Dispute Settlement Mechanism

Thirdly, China will more successfully fight discriminatory dumping charges because the WTO Dispute Settlement Mechanism would be used to resolve the upcoming antidumping disputes.<sup>194</sup> China is entitled to equally resolve and handle economic and trade disputes among WTO members.<sup>195</sup>

Nevertheless, regardless of which kind of impact that China would have on WTO, it still cannot shake off one question: "WTO membership would not help in its most difficult issue with antidumping actions -- the non-market economy standard."<sup>196</sup>

WTO membership still leaves China in the same place to defend against dumping

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<sup>192</sup> <<http://www.google.co.nz/search?q=cache:keIQKHXdMk8J:www.econ.kuleuven.ac.be/tew/academic/account/members/Hylke/INTERNATIONAL%2520PUBLICATIONS/EU-CHINA%2520JULY%252002002VERSIE2%255B1%255D.DOC+%22when+foreign+countries+take+discriminatory+anti-dumping+action+against+Chinese+products,+China+can+take+retaliation+action%22&hl=en&start=1&ie=UTF-8>>(last accessed 13 November 03)

<sup>193</sup> Leonard K. Cheng *China's Accession to the World Trade Organization and Its Effects on the Chinese and Hong Kong Economies* (Hong Kong University of Science and Technology, 2001)

<sup>194</sup> Dongsheng ZANG, S.J.D. Candidate "Seeking Transparency in Antidumping Actions through Procedural Review: The GATT/WTO Jurisprudence and Its Implications for China" (Conference on China and the World Trade Organization, Australia, 16-17 March, 2001)

<sup>195</sup> Leonard K. Cheng *China's Accession to the World Trade Organization and Its Effects on the Chinese and Hong Kong Economies* (Hong Kong University of Science and Technology, 2001)

<sup>196</sup> ZANG, above.

charges. As a result, China may more successfully confront foreign companies suspected of dumping in Chinese market in the future.<sup>197</sup>

## V CONCLUSION

The key issue involved in antidumping measure is whether the protection of local industry is more important than the benefits of increased worldwide fair competition and economic integration. If the answer is no, it should be realized that the importance of a fair trade environment would contribute to promoting the economic development of both trading parties but not to subsidize either of them. In other words, attempting to establish the global fair trading relationship should be regarded as the final goal of all the countries. Antidumping is just a tool to achieve this effort.

Therefore, it does not matter who either the import or export country is, both need perfectly comply with the following rules:

### A Initiator: To Use But Not To Abuse Antidumping Measures

It is obvious that WTO antidumping agreement has not been implemented as it was intended to: temporarily offset unfair competition arising from price discrimination and to provide remedy to the related injury.<sup>198</sup>

In practice, it has been used as safeguard to protect domestic producers from open competition. Sometimes, it is really confusing as to whether anti-dumping has been transferred into anti-competition. For example, most of US antidumping charges

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<sup>197</sup> Xiang Liu & Hylke Vandenbussche *EU Antidumping Cases Against China: An Overview and Future Prospects With Respect To China's WTO Membership* (Catholic University of Leuven, 2002)

<sup>198</sup> "See Part I Introduction"

against China were initiated just when Chinese exports to the U.S. increased substantially and the related U.S. producers met the strong competition.<sup>199</sup> In response, the U.S. government resorts to antidumping measures against China more than any other countries because antidumping does seem to be the most effective method to help US to block and stop imports. However, this is actually discriminating against developing economies. This antidumping action should be justified.

### ***B Respondent: To Defend But Not To Give Up The Proceedings***

Attendance at the defense of antidumping proceeding is very important for winning the lawsuits. When faced antidumping charges, some defendants such as Chinese exporters often choose not to respond.

“The reasons come from several aspects such as cultural aversion to litigation, unfamiliarity with the antidumping proceedings, the concerns of legal costs, the burdensome questionnaires, and confidentiality of information.”<sup>200</sup> Moreover, Some enterprises are scared off by the possible prolonged proceedings.<sup>201</sup>

And yet under current WTO jurisprudence and structure, to some extent, defendant's silence likely means confessing to dumping. They will be direct victims of antidumping actions.

Therefore, active defense is always required in the antidumping lawsuits. In order to better response, the export country's governments should provide efficient antidumping-related legal and administrative service to the domestic producers and

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<sup>199</sup> Jason Z. Yin, Ling Li *Antidumping War and Northeast Asian Economies (NEAE): Issues and Strategic Options* (PHD Research Paper Department of Management Hong Kong Polytechnic University, 2002)

<sup>200</sup> Z. Yin & Ling Li, above.

<sup>201</sup> Z. Yin & Ling Li, above.

exporters.<sup>202</sup> The government should set up proper system such as early warning system and quicker response system to help the enterprises better cope with the antidumping charges.

### *C Exporters: To Cooperate But Not To Fight Alone*

The accused exporters can cooperate with the entire domestic like producers and the importers to fight together against the antidumping charges. This not only reduces the legal cost for each individual party, but also can obtain more useful suggestions and wise information. In addition, this paper suggested that various industries could set up different non-governmental trade associations, which is composed of professional experts in charge of the antidumping lawsuits, in addition to the manufacturers or exporters themselves.<sup>203</sup> "These trade associations or their counsels keep a close contact with the investigating authorities in the importing country, answer questions and contest their legal positions or procedural defect."<sup>204</sup> The functions of the trade association could be further institutionalized and expanded.

### *D WTO Members: Reform Of Antidumping Agreements.*

"...it is often seems that just when developing countries begin to efficiently operate and become more competitive in a particular markets, industrialized countries shut down those precise markets..."<sup>205</sup>

As mentioned above, in practice, antidumping laws fail to further their objectives. In

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<sup>202</sup> Z. Yin & Ling Li, above.

<sup>203</sup> Dongsheng ZANG, S.J.D. Candidate "Seeking Transparency in Antidumping Actions through Procedural Review: The GATT/WTO Jurisprudence and Its Implications for China" (Conference on China and the World Trade Organization, Australia, 16-17 March, 2001)

<sup>204</sup> ZANG, S.J.D., above.

<sup>205</sup> This is said by Thomas Prusa in the article "On the Spread and Impact of Antidumping" (NBER Working Paper 7404, NBER). Thomas Prusa is an economist of Rutgers.

their current format, a growing tendency of antidumping turns out to be a policy of anti-competition against developing economies.

The developing countries' governments should actively promote and participate in the Antidumping Agreement reform to eliminate its negative effect. This paper suggests the following changes:<sup>206</sup>

First of all, the Antidumping Agreement should give a uniform standardised questionnaire, which merely asks for the certain necessary information to conclude the investigation. This questionnaire should be universally applied among all the WTO members.

Following that, unfair antidumping investigations should be eliminated. A stricter examination of injury will be conducted before an investigation is initiated. Moreover, the injury determination should be individually different, based on enterprise's kind and size. "It should also have a necessary regulation in respect with considering the influence of factors, such as price range in normal business conduct, quality difference, and exchange rate fluctuation."<sup>207</sup>

Then, the transparency standard should be further improved. It should be ruled clearly that before provisional or final determination is ordered, the interested parties should be notified and given sufficient time to defend their interests.

Finally, duration of the final measures should be reduced. The present maximum duration is five years, which does not consider technological developments and the cycle of many products. "For example, many IT-products are out-of-date after two

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<sup>206</sup> European Commerce *PROPOSALS FOR A REFORM OF THE WTO ANTI-DUMPING AGREEMENT* (submission to International Trade Commerce 2001)

<sup>207</sup> European Commerce *PROPOSALS FOR A REFORM OF THE WTO ANTI-DUMPING AGREEMENT* (submission to International Trade Commerce 2001)

years.”<sup>208</sup> Therefore, the proposed duration could be decreased to two or three years.

In conclusion, it should be expected that every individual state, as one interested party, could bring down national barriers and promote establishing a justified and freedom international trading relationship.

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<sup>208</sup> <<http://www.cato.org/new/12-02/12-11-02r.html>>(last accessed 20 November 03)

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