NOTE

RULE OF LAW OR RULE OF PROTECTIONISM: ANTI-DUMPING PRACTICES TOWARD CHINA AND THE WTO DISPUTE SETTLEMENT SYSTEM

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I. INTRODUCTION

One of the great benefits coming along with China's new WTO membership card is the availability of the WTO dispute settlement proceedings. As former United States Trade Representative Charlene Barshefsky declared after U.S. Senate voted to approve the PNTR for China: "China ... will join the community governed by the rule of law."[1]

WTO rules are enforced through the WTO Dispute Settlement System (DSS), governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)[2], which is one cornerstone of the 1994 Marrakesh Agreement establishing the WTO. After the Uruguay Round, trade dispute settlement, through the DSS, has moved to the center stage of international economic diplomacy, and has been working reasonably well.[3] During the past seven years, the number of disputes submitted to the WTO had considerably increased to over 236 by August 31, 2001, ten times the number under the GATT.[4]

Despite the widespread enthusiasm toward China's accession, some had expected that the accession would overwhelm the DSS, especially if China would be slow in pushing through the hard reforms for which it has signed up, and if that slowness would prompt the European Union (EU)[5] and the United States (U.S.) to file a flood of complaints to the WTO's Dispute-Settlement Tribunal.[6] Three months after the accession, the expectation has so far not materialized. One potential WTO case, the eight-month anti-dumping dispute between China and Japan, ended with political and diplomatic maneuvering on both sides.[7]

However, what will happen after this initial harmonious honeymoon period? With China suddenly realizing that "wolves" are indeed on the horizon, and China's trade partners starting to worry about its reforming and restructuring industries and competitively priced

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1 *See* USA TODAY, September 20, 2000.

2 The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), available at <http://www.wto.org/wto/dispute/dsu.htm> (last visited March 1, 2002).

3 *See* John Jackson, *Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects.* In THE WTO AS AN INTERNATIONAL ORGANIZATION, Ed. Anne O. Krueger, 175-6 (1998).

4 *See* WTO Dispute Settlement Body, Annual Report (2001), *Addendum: Overview of the State of Play of WTO Disputes*, WT/DSB/26/Add.1 (12 October 2001).

5 The EU is the result of a process of cooperation and integration which began in 1951. *See* a Glossary of the European Communities and European Union, available at <http://www.abdn.ac.uk/pir/sources/euroguide.htm> (last visited March 1, 2002).

6 *See* Guy de Jonquieres, *Comment & Analysis: Beijing's Hard Bargain*, FIN. TIMES, May 26, 2000.

7 *See Japan and China Settle Trade Row*, BBC NEWS, December 21, 2001, available at <http//news.bbc.co.uk/hi/english/business/newsid_1723000/1723007.stm> (last visited March 1, 2002).

exports, both sides have much to do to adapt to this new trade environment. In this process of mutual discovery and accommodation, there will be inevitable disagreements and frictions. Any protectionistic move or overreaction could trigger a trade skirmish and result in a WTO dispute. What kind of disputes are likely to involve China in the first few years into the WTO? In this note, I will focus on one major category of WTO disputes, anti-dumping cases. The reason is obvious: anti-dumping practice is not only a hot spot in international trade, but an extremely problematic area for Chinese exporters.

Part II of this note summarizes the general development of anti-dumping disputes under the GATT and the WTO, and describes the current anti-dumping complaints and actions against China and the respective positions taken by China and its trade partners with regard to anti-dumping issues. Part III reviews the origin of anti-dumping laws and the subsequent major developments under the GATT and the WTO. Part IV first outlines the current WTO anti-dumping laws, including the major legal standards of adjudicating anti-dumping suits under the WTO DSS and how these standards have been evolved; it then summarizes the anti-dumping laws of the U.S. and EU toward China. Part V analyzes the anti-dumping provisions in the Protocol on the Accession of The People's Republic of China (the Final Protocol). Finally, Part VI discusses the probable development of anti-dumping disputes involving China under the WTO DSS.

II. ANTI-DUMPING DISPUTES: IMPORTANT WTO AREA FOR CHINA

A. Active Area under GATT and WTO

1. GATT Period

Dispute resolution concerning anti-dumping measures has been an active area under both the GATT and the WTO. Under the GATT, particularly in the decade before the completion of the Uruguay Round, largely as a result of successful tariff reduction, anti-dumping trade remedy measures became the trade "weapon of choice" against imports.[8] Twenty-four percent of the panels in the years 1990-1994 were involved in anti-dumping measures.

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[8] *See* Sylvia Ostry, THE THREAT OF MANAGED TRADE TO TRANSFORMING ECONOMIES, 9 (1993).

The most obvious problem in the anti-dumping area under the GATT was that very few of the panel reports (decisions by the Dispute Settlement Panels) had been adopted, and that even fewer had been implemented. Of seven panels brought under the Anti-dumping Code, only three have been adopted, and of those only two have actually been implemented.[9]

Robert Hudec has noticed the high percentage of legal failures in anti-dumping cases, the low rate of settlement and the sharp increase of cases. He regarded this phenomenon as the result of "the typical arbitrariness of anti-dumping criteria" and "the legal rigidity of the measures once taken."[10] Similar reasons were proffered by Ernst-Ulrich Petersmann: "blockage" of the adoption of panel reports, political interference into the dispute settlement process, the U.S. attempts to limit the "standard of review" and to "explicitly legalize protectionist abuses of anti-dumping laws."[11]

The failure of GATT members to implement panel reports adverse to their positions, even adopted ones, invited the re-litigation of many of the same issues under the newly created WTO DSS, which the U.S. and EU had sought in the Uruguay Round.

2. WTO Period

Since the establishment of the WTO, anti-dumping complaints have continually been registered. Of all 58 panel reports circulated before August 31, 2001, ten reports (more than 17%) are on anti-dumping disputes.[12] In the EU, between 1995 and 1999, the number of new anti-dumping investigations was rather significant. In 1999, there was a conspicuous increase of the number of new initiations of investigations in comparison with the previous year. In 1998, the EU initiated 29 new investigations; while in 1999, new initiations reached 86. Similarly, the U.S. initiated more investigations in 1999 than in 1998, with an increase from 36 to 46.[13]

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[9] *See* Gary N. Horlick & Peggy A. Clarke, *Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO*, in Ernst-Ulrich Petersmann (Ed.), INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, 315-24 (1997).

[10] *See* Robert Hudec, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM, 354 (1993).

[11] *See* Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948*, 31 C.M.L.R. 1157, at 1204 (1994).

[12] *See* 2001 Annual Report, *supra* note 4.

[13] It seems, however, that this surge of new cases should probably be taken as, at least partly, the result of very specific circumstances (i.e., the Asian Financial Crisis).

As countries are forced to decrease tariffs and phase out other trade barriers to comply with the WTO rules, reliance on the WTO AD Agreement is likely to increase.[14] In the global context, more and more countries (even developing countries) have started to introduce and develop anti-dumping instruments. This increasing use of anti-dumping measures has happened even under the background of increasingly "voluntary" restraints being adopted as solution to anti-dumping disputes. Often the actual results of anti-dumping (also countervailing duty) actions are some informal "voluntary" import or export restraints, usually in the form of "quotas." Examples of such arrangements include the U.S.-Japan and EU-Japan agreements "voluntarily" limiting the importation of Japanese automobiles.[15] Legally, such voluntary agreements were discordant with principles of the Uruguay Round agreement. However, many vociferous defenders of current anti-dumping practices give no sign of adapting to the changing legal frame work.

WTO Panel reports (and Appellate Body reports) already circulated and impending WTO cases in the pipeline will certainly provide much needed guidance over anti-dumping practices. At the recent Doha meeting, the ministers finally agreed to start negotiations on the AD Agreements, with the initial focus on locating provisions for further clarification and improvement.[16] However, anti-dumping will continue to be one major issue in international trade, and remain an active area in the WTO DSS in the foreseeable future.

B. Numerous Anti-Dumping Complaints Against China

Since China adopted the "opening door" policy, its international trade has expanded exponentially. At the same time, its trade partners have lodged numerous anti-dumping complaints against its trading practices. The first anti-dumping suit against a Chinese product was launched by the European Community (EC) in August 1979 against glucide and salt imported from China.

Since then, many complaints have been registered against China. China ranks first in the world for the number of anti-dumping suits lodged against it. By the end of 2001, more than 450 anti-dumping cases involving tens of billions of dollars were initiated against more than 4,000

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[14] *See* Christopher F. Corr, *Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures*, 18 NW. J. INT'L L. & BUS. 49, 55 (1997).

[15] *See* Claude E. Barfield, *(Mis)managed Trade*, in Edward L. Hudgins (ed.), FREEDOM TO TRADE: REFUTING THE NEW PROTECTIONS, 39-47 (1997).

[16] *See* World Trade Organization, THE DOHA DECLARATION EXPLAINED, available at <http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm> (last visited March 1, 2002).

categories of Chinese products.[17] According to the WTO anti-dumping statistics, there are 229 cases initiated against China between January 1, 1995 and June 30, 2001, with Korea the distant second with 127 cases.[18]

Moreover, according to Zhou Shijian, vice president of the Chinese Mining Chamber of Commerce, the number of anti-dumping complaints against Chinese export of steel products is currently on the rise. Between 1996 and July 2000, foreign countries' anti-dumping complaints against China had a financial value of at least $280 millions.[19] The suits dating from 1999 to the present constitute half of all the cases from 1996 to July 2000, and the number of such cases is growing swiftly. Of these suits, almost half were bought by the United States. Low price is the main reason that Chinese exporters have been accused of dumping.[20]

On December 31, 1998, the U.S. notified the WTO of fifty-three outstanding anti-dumping findings and orders pertaining to Japan. In comparison, there were forty-three outstanding cases pertaining to China. The contrast is actually more striking, since most of Japanese cases were ones predating 1990 (only nineteen since 1990), while most Chinese cases were ones registered after 1990 (thirty-three cases since 1990).[21]

The EC, a champion of China's WTO membership application since GATT days, nevertheless has filed many anti-dumping complaints against China in recent years. As of the end of 1999, the EC had 156 anti-dumping measures in force, covering 63 products and 35 countries. Of them, more than 20 percent (33 measures) concerned China.[22]

Japan and Korea, China's two important trade partners, have also engaged in more and more anti-dumping disputes with China.[23] The recent China-Japan dispute began on April 22, 2001 when Japan imposed temporary curbs on imports of Chinese leeks, shiitake mushrooms and tatami-mat rushes. It is the first time Japan has used such curbs since joining in the GATT, precursor to the WTO in 1955. China responded

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[17] *See, e.g., Anti-Dumping Lawsuits Rankle*, SOUTH CHINA MORNING POST, October 29, 2001; *Chinese Premier To Raise Anti-dumping Issue with Vajpayee*, THE PRESS TRUST OF INDIA, January 13, 2002.

[18] *See* WTO Anti-Dumping Statistics, available at <http://www.wto.org/english/tratop_e/adp_e/adp_stattab1_e.htm> (last visited March 1, 2002).

[19] *See* Caijing Shibao [FINANCIAL TIMES], September 15, 2000.

[20] *See* ChinaOnline, DAILY NEWS, September 19, 2000.

[21] *See* Terence P. Stewart, *U.S.-Japan Economic Disputes: The Role of Anti-dumping and Countervailing Duty Laws*, 16 ARIZ. J. INT'L & COMP. LAW 689, 691-92 (1999).

[22] *See* Commission Of The European Communities, *Report From The Commission: Eighteenth Annual Report From The Commission To The European Parliament On The Community's Anti-Dumping And Anti-Subsidy Activities, Overview Of The Monitoring Of Third Country Safeguard Cases And Of The Implementation Of The Trade Barriers Regulation*, Brussels, 11.07.2000, at 25-26.

[23] *See, e.g., Korea Lowers Anti-Dumping Rates on Chinese Lighters*, THE KOREA HERALD, February 9, 2002; *Anti-dumping Lawsuits Rankle, supra* note 17.

with 100 per cent tariffs on Japanese cars, mobile phones and air conditioners. Rounds of negotiations failed to result in any solution and both sides obviously considered taking the dispute to the WTO DSS.[24] The dispute was put to an end temporarily at the eve of the China's accession after much haggling.[25]

Furthermore, Chinese exporters have been slapped with anti-dumping suits by developing countries like India. According to the annual administrative report of the Directorate General of Anti-dumping and Allied Duties (DGAD) in the Commerce Ministry of India, China tops the list of anti-dumping cases initiated in India, with a total of 41 cases during 1992-2000, while the EU is a distant second with 21 cases.[26] Indian officers are concerned that because Beijing becomes a WTO member, the entire process of checking the entry of cheap Chinese imports is becoming even more problematic than past, particularly in view of the "determination of injury to domestic production units" requirement under the relevant WTO rules.[27] Mexico, fearful that Chinese products would seriously challenge its competitiveness on the North American markets, sought to retain anti-dumping measures on a long list of Chinese imports and was the last WTO member that reached a formal bilateral trade agreement with China.[28]

In short, many countries have come to the similar conclusion as reflected in the lamentation by Pat Buchanan, a former U.S. presidential candidate: "There are more dumping complaints against China [by the U.S.] than there are against all of our other trading partners put together."[29] And according to a senior legal advisor to the MOFTEC, the situation will continue for at least ten to fifteen years after China enters the WTO.[30]

C. *China's Position Toward Anti-Dumping*

Developed countries, represented by the U.S. and EU, seem to believe that part of the basic political bargain made at the founding of both the GATT and the WTO, was that dumping would be curbed. Hugo

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[24] *See Leek-Car Conflict Puts WTO Pressure on Beijing*, SOUTH CHINA MORNING POST, December 17, 2001.

[25] *See Japan and China Settle Trade Row*, supra note 7.

[26] *See, e.g., 41 Out of 89 Anti-dumping Cases Against China*, THE STATESMAN (INDIA), May 3, 2001; *Anti-dumping probe into imports from China*, THE STATESMAN (INDIA), November 30, 1998.

[27] *See India: No Silky Route*, BUS. LINE, August 10, 2000.

[28] The Protocol on the Accession of The People's Republic of China [hereinafter the "Final Protocol"], Annex 7, Reservations By WTO members.

[29] *See World Trade and Dumping*, JR. OF COM., April 19, 1996.

[30] *See Anti-dumping Lawsuits Rankle, supra* note 17.

Paemen, the EU's chief negotiator in the Uruguay Round, declared dumping "unfair by nature." And if a period of selling at a loss forms part of an export strategy aimed at wiping out the competition in the target market, GATT quite reasonably and quite properly allows countermeasures.

Thus, the attitude of the U.S. and EU toward anti-dumping is clear. It is predictable that the U.S. and EU trade officers, along with rent-seeking producers (e.g., uneconomical U.S. steel makers and EU farmers), policy analysts dedicated to managed trade, and their allies will tenaciously fight dumping from China.

On the other hand, although China is opposed to dumping as the means for promoting export, it has long expressed its displeasure over the frequent slapping of anti-dumping charges on its products. And it has loudly objected against trade protectionism in the name of anti-dumping.[31] Chinese officials believe that China is a developing country, therefore does not really have the economic strength necessary to dump its commodities overseas.[32] They emphasize that the low prices of Chinese export commodities were simply the result of the "relatively cheap labor" and "low production costs" in China. China's "market socialism" should not be interpreted to mean that the Government could interfere with the pricing system so much that it could set prices.[33] They hope that the "governments and industrial and commercial circles of the relevant countries will take a realistic attitude towards the selling prices of China's export commodities."[34]

China's opposition to the U.S. anti-dumping practices was one of the last and most serious disagreements in the WTO accession negotiations.[35] Although Chinese premier Zhu Rongji stepped in at the last moment and dramatically compromised the points necessary for agreement, U.S. NME anti-dumping rules are widely seen as being protectionist by Chinese trade officers, even by Americans.[36]

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[31] *See China Is Primary Target of International Anti-dumping Campaign*, CHINA ONLINE, February 23, 2001.

[32] MOFTEC Minister Shi Guangsheng recently said at a national conference on anti-dumping measures held in April 2001 that he does not think "the Chinese enterprises have the capability and capacity to dump their goods abroad," BBC WORLDWIDE MONITORING, April 15, 2001.

[33] *See* Supachai Panitchpakdi, *Keynote Address: The Evolving Multilateral Trade System in the New Millennium*, 33 GEO. WASH. INT'L L. REV. 419, at 445 (2001).

[34] *See Wu Yi's response on Anti-dumping*, BBC SUMMARY OF WORLD BROADCASTS, January 19, 1994.

[35] *See* Charles Tiefer, *Sino 301: How Congress Can Effectively Review Relations with China After WTO Accession*, 34 CORNELL INT'L L.J. 55, 78 (2001).

[36] *See, e.g., Review & Outlook, Dialogue with China*, WALL ST. JR., February 22, 2002, the commentator opinioned: "... it has to be said that the U.S. has a record of pursuing protectionist antidumping actions against..."

Currently, many domestic enterprises have been avoiding getting involved in anti-dumping cases, either because of the unawareness about the harm of anti-dumping, or of reluctance and lack of courage to confront foreigner governments, or of the ambiguities of related laws and the high expense of hiring American lawyers.[37] However, more and more Chinese enterprises, encouraged by the government and experts, have realized that failure to respond to the lawsuits will only lead to a chain of anti-dumping cases against China, thus paralyzing part of the country's export trade. The MOFTEC has called on Chinese companies accused of dumping by other countries to respond to the suits to protect their legitimate rights. Experts specializing in the WTO rules have said that China has become the biggest victim of unfair international anti-dumping accusations. Chinese companies' unwillingness to fact the accusations has resulted in loss of their oversea markets due to heavy anti-dumping tariffs.

It is thus foreseeable that conflicts may arise out of the different attitudes, and that disputes may be brought to the WTO DSS. Moreover, as mentioned above, the recent accession and the complicated process led to it have sensitized the Chinese producers and officials. China will clearly make more efforts to prevent anti-dumping charges. A quick-response mechanism are been established composed of government departments, import and export chambers of commerce, local foreign trade authorities and relevant producers. The MOFTEC has set up warning systems on foreign dumping charges in major markets such as the United States, the European Union, Australia and the Republic of Korea, said officials.

D. China's Own Anti-Dumping Investigations And Laws

China has started its own anti-dumping investigation and legislation in recent years. Since the Chinese Anti-dumping Regulations were enacted in 1997,[38] the MOFTEC, which is responsible for anti-dumping charges, has registered 13 dumping cases, of which Chinese manufacturers have already won five.[39]

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[37] *See China: Small Bee Leading Anti-dumping Crusade*, Zhongguo Shang Bao [CHINA BUSINESS NEWSPAPER], February 7, 2002.

[38] *See generally* Jianming Shen, *A Critical Analysis of China's First Regulation on Foreign Dumping and Subsidies and Its Consistency with WTO Agreements*, 15 BERK. J. INT'L LAW 295 (1997).

[39] In June 1997, the first anti-dumping charge made by Chinese manufacturers took place concerning newsprint imports. The Chinese Government decided that newsprint producers in the United States, Canada, and South Korea were guilty of dumping in China in its final judgment in June 1999. Newsprint from these three countries was levied at anti-dumping tariffs ranging from 9

China's revised Anti-dumping Statute became effective from January 1, 2002.[40] The statute, approved on October 31, 2001, includes regulations concerning dumping and damage, anti-dumping investigations, anti-dumping measures and an anti-dumping tax. The newly issued statute put forward three kinds of anti-dumping measures, namely, temporary anti-dumping measures, price promises and an anti-dumping tax. According to the statute, anti-dumping investigations will be conducted on the condition that imported products enter China at a price lower than their actual export value, and actually cause damage, or pose a potential danger, to domestic enterprises. The MOFTEC is responsible for conducting anti-dumping investigations and taking relevant measures. Temporary anti-dumping measures are valid for between four and nine months. The collection period for the anti-dumping tax and price promises should not exceed five years. However, if terminating the collection of anti-dumping tax will prolong losses caused by dumping activities, the period for the collection of anti-dumping tax may be extended.[41]

The Chinese Government has set up two entities to tackle dumping and subsidies from abroad in the wake of its WTO accession.[42] One entity, the Bureau of Industrial Injury Investigation under the State Trade and Economic Commission, conducts investigations into whether and how imported products harm domestic manufacturers. The other, the Fair Trade Bureau under the MOFTEC, handles anti-dumping and protective measures, and coordinates China's response to foreign dumping allegations. The two are expected to engage in close cooperation.

The development of Chinese anti-dumping laws will certainly increase the chance of future WTO disputes regarding anti-dumping issues.

III. HISTORICAL DEVELOPMENT OF ANTI-DUMPING LAWS

A. Origin and Justifications of Anti-Dumping

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per cent to 78 per cent. Besides the six cases which have received final rulings, Chinese authorities also registered seven other anti-dumping complaints, covering imports of carrene (an organic chemical), polystyrene, L-lysine monohydrocyloride (used in foodstuffs), polyester fibre and art paper. The other cases are still being investigated. *See, e.g., Nation Initiates First Anti-dumping Case*, CHINA DAILY, February 7, 2002; *Korea Bears Brunt of Anti-dumping Charges in China*, THE KOREA HERALD, December 13, 2001.

[40] Chinese Anti-Dumping and Anti-Subsidy Regulations 2002.

[41] *Id.*

[42] *See Nation Initiates First Anti-dumping Case, supra* note 39.

For almost 100 years, international trade policy rules have generally recognized dumping as a practice to be condemned, and have allowed an importing country to take certain countermeasures when the dumped goods cause "material injury" to competing industries in the importing country.[43]

Where did the right of imposing anti-dumping duties originate? It seems to start with the medieval notion that sales to different people at different prices is unfair.[44] In modern times, this is reflected in governmental concerns with predatory anti-competitive behaviors of big corporations. These companies, using their market leverage, drive small competitors out of business, and eventually raise prices and reap monopoly profits. However, rhetoric aside, neither legal nor economic analysis finds a definitive link between anti-dumping investigations and the detection of anticompetitive practices. The critics argue that the fear that some foreign industries, particular those of developing countries, may be attempting to destroy the domestic market through dumping, rarely, if ever, exists. One recent OECD study, for example, has found that imports posed no threat to the existence of competition in more than 90 percent of the cases in which the U.S. and EU imposed anti-dumping duties in the 1980s.[45]

Defenders of dumping, including some economists, argue that the interests of consumers should be paramount.[46] Since dumping serves the consumer's interests in obtaining cheaper goods, it should be allowed. Some even argue that an importing country should welcome the cheaper goods as they enhance overall welfare and release resources for more productive uses in the global economy. However, it is questionable whether the anti-dumping laws are simply consumer welfare statutes, or whether national welfare should also be considered. Another argument is that the anti-dumping laws should be dispensed because of the practical problems associated with anti-dumping investigations and the lack of accuracy of the results.[47]

But at least, respected economists have raised concerns that proliferating and undisciplined anti-dumping measures pose a serious

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[43] *See* Milton Friedman, *In Defense of Dumping*, INT'L TRADE REPORTER 4, 935 (1987).

[44] *Id.*

[45] *See* Guy de Jonquiers, *Report Counts Cost of Antidumping*, FIN. TIMES, September 2, 1995.

[46] *See* Friedman, *supra* note 43, at 936.

[47] *See* A. Paul Victor & Thomas S. Ehrgood, Jr., *Circumstances of Sale Adjustment in Antidumping Investigations: A Reevaluation*, in John Jackson et al. Ed., INTERNATIONAL TRADE POLICY: THE LAWYER'S PERSPECTIVE (1995).

problem for world trade.[48] If not properly disciplined, the application of anti-dumping measures will lead to a dangerous level of protectionism around the world.

Anti-dumping measures have become far more effective at shielding domestic markets in the United States from foreign competition than were the gray area measures employed in the 1980' s and 1990's or the tariff and non-tariff barriers that were eliminated in multiple rounds of multilateral trade negotiations over a five-decade period.[49] Consequently, many developing countries believe that the anti-dumping measures in Article VI of the GATT, carried over to the Uruguay Round agreements, are in reality sophisticated trade protection measures employed by developed countries against the exports of the developing countries.[50] Many WTO members, such as Japan, Korea, and Brazil, have campaigned to re-open the talk and to revise the AD Agreement. And we shall see how the current round of negotiation initiated at the Doha meeting develops.

B. History of Anti-Dumping International Laws

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[48] US Federal Reserve Chairman Alan Greenspan recently criticized the use of anti-dumping measures to erect trade barriers:

> "... [T]here are reasons to be concerned that the benefits of increasingly open trade may not be allowed to be as readily forthcoming in the future as they have been in the past half century.... Administrative protection in the form of antidumping suits and countervailing duties is a case in point. While these forms of protection have often been imposed under the label of promoting "fair trade," often times they are just simple guises for inhibiting competition. Typically, antidumping duties are levied when foreign average prices are below average cost of production. But that also describes a practice that often emerges as a wholly appropriate response to a softening in demand. It is the rare case that prices fall below marginal cost, which would be a more relevant standard. Antidumping initiatives should be reserved, in the view of many economists, for those cases where anticompetitive behaviour is involved. Contrary to popular notions about antidumping suits, under US and WTO law, it is not required to show evidence of predatory behaviour, or intention to monopolize, or of any other intentional efforts to drive competitors out of business."

Alan Greenspan, *Trade and technology: Remarks Before the Alliance for the Commonwealth*, CONFERENCE ON INTERNATIONAL BUSINESS, Boston, Massachusetts (2 June 1999) [cited in United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/R, (28 February 2001) [hereinafter US-Japan Steel], Annex 1, FN49].

[49] *See* I.M. Destler, AMERICAN TRADE POLITICS, PASSIM (3d ed. 1995); Gary Hufbauer *et al*, TRADE PROTECTIONISM IN THE UNITED STATES: 31 CASE STUDIES, 154-84 (1986); Gary Hufbauer & Kimberly Elliott, MEASURING THE COSTS OF PROTECTION IN THE UNITED STATES, 19-22, 103-05 (1994).

[50] *See* Ernesto M. Hizon, *Virtual Reality and Reality: The East Asian NICs AND THE Global Trading System*, 5 ANN. SURV. INT'L & COMP. L. 81, 96-97 (1999).

Jacob Viner discovered that in 1791, there were reports of "bounty" practices by Adam Smith and Alexander Hamilton, warning of foreign practices of underselling competitors.[51] Instances of allegations of "dumping" by British manufacturers into the new American market were also reported, with public discussion and legislative attempts to deal with it during most of the nineteenth century.[52] Indeed, one of the first U.S. laws relating to international trade, the Tariff Act of 1816, was concerned with practices we might identify as dumping today.[53]

During the early 20th century, dumping was widespread by firms in Germany.[54] During and after World War I, the U.S. Congress enacted several anti-dumping statutes.[55] During the 1930's, the U.S. included in many bilateral treatises some provisions of dumping and permitted the use of anti-dumping duties to offset dumping.[56]

When the GATT was negotiated in 1947, special provision was made for cases of dumping. Article VI of GATT allows GATT contracting parties to utilize anti-dumping duties to offset the margin of dumping of dumped goods, provided that it can be shown that such dumping is causing or threatens to cause "material injury" to competing domestic industries.[57]

As time passed, however, some contracting parties of GATT began to feel that other countries, in applying their anti-dumping laws, were doing it in such a way as to raise a new protectionistic barrier to trade. Some believed that anti-dumping procedures, such as delay, dumping margin calculations, and the injury test, were causing restrictions and distortions on international trade flows, therefore creating risks and uncertainties to traders. Consequently, during the Kennedy Round of GATT trade negotiations (1962-1967), the contracting parties of GATT negotiated the first international Anti-Dumping (AD) Code[58], which set forth a series of procedural and substantive rules regarding the

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[51] *See* Jacob Viner, DUMPING: A PROBLEM IN INTERNATIONAL TRADE, 37 (1966).

[52] *See generally* Edwin A. Veermulst, ANTIDUMPING LAW AND PRACTICE IN THE UNITED STATES AND EUROPEAN COMMUNITIES (1987).

[53] *See* Viner, *supra* note 51, at 44.

[54] *Id.*, at 51.

[55] *See, e.g.,* The Revenue Act of 1916 (commonly referred to as the "Antidumping Act of 1916," 15 USC §72 [1976]).

[56] *See, e.g.,* Article IX:2 of the 1938 Reciprocal Trade Agreement between the United States and United Kingdom (54 Stat. 1897), where a provision allowed the UK to take measures that it deemed necessary to act as an effective deterrent to the practice.

[57] General Agreement of Tariff and Trade, Article VI. 30 October 1947, 61 Stat. (5), (6), TIAS No. 1700, 55 UNTS 194 (1948) as amended and Vol. IV BISD.

[58] Agreement on the Implementation of Article VI (the "1967 Code") 651 UNTS 320, GATT, BISD 15 Supp. 24 (1968).

application of anti-dumping duties. The Code was intended to limit problematic anti-dumping practices damaging to international trade.[59]

In 1979, the Tokyo Round developed a new AD Code replacing the 1967 GATT AD Code. The Uruguay Round, building on the prior AD Codes, further modified the anti-dumping rules,[60] and created the WTO Anti-Dumping (AD) Agreement. The Uruguay Round text became a mandatory agreement in the WTO.[61] The current WTO AD Agreements and case laws are discussed, infra, Part IV.

C. *From GATT to WTO: Changes in Anti-Dumping Laws*

Article VI of the GATT 1947 provided its contracting parties a right to apply anti-dumping measures, i.e. measures against imports of a product at an export price below its "normal value" (usually the price of the product in the domestic market of the exporting country), if such dumped imports cause material injury to a domestic industry in the territory of the importing contracting parties.

Since then, considerable efforts have been made to harmonize the rules relating to trade policy instruments. Particularly during the last GATT round (the Uruguay Round), which led to the creation of the WTO and to the detailed AD Agreement, these efforts focused on the procedural rules as well as the material conditions to be fulfilled before protective measures can be taken.

In particular, the revised WTO AD Agreement provides for greater clarity and more detailed rules in relation to the *procedures* to be followed in initiating and conducting anti-dumping investigations, the *method* of determining that a product is dumped, the *criteria* to be taken into account in a determination that dumped imports caused injury to a domestic industry, and the *implementation* and *duration* of anti-dumping measures. In addition, the new Agreement clarifies the role of dispute settlement panels in disputes relating to anti-dumping actions taken by domestic authorities. These major changes are summarized in the following.

1. Procedural Changes

On the procedural side, the AD Agreement considerably strengthens the requirements to establish a good prima facie case. First,

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[59] *See* John W. Evans, THE KENNEDY ROUND IN AMERICAN TRADE POLICY: THE TWILIGHT OF THE GATT? 106-110, (1971).

[60] WTO Anti-Dumping Agreement [hereinafter the "AD Agreement"].

[61] For a review, *see* Corr, *supra* note 14.

clear-cut procedures have been established on how anti-dumping cases are to be initiated, and how such investigations are to be conducted. Conditions for ensuring that all interested parties are given an opportunity to present evidence are set out. Complainants are required to represent at least 25% of domestic producers of "like products" and have the tacit support of 50% of them.[62] The procedures are also speeded up somewhat and the conciliation steps removed to arrive more rapidly at multilateral resolutions. However, resort to the WTO procedures cannot take place until provisional duties are in place.[63]

Second, price undertakings (that is, raising export prices) are now given somewhat more encouragement, though it is still at governments' discretion as to whether to accept them.[64] In the U.S., for example, there has always been reluctance to accept undertakings because of their possible anti-competitive effects.

Third, provisional duties may only be levied after a preliminary determination of dumping and injury, and not at the start of an investigation as had been the practice of some countries. Imposition of the provisional duties must not exceed six or, in exceptional cases, nine months.[65]

Fourth, one significant addition is the so-called "sunset" provision which requires WTO members to revoke anti-dumping measures after five years unless "the [national] authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."[66] Anti-dumping measures will be revoked unless the sunset review concludes that the measures are necessary to ensure the non-occurrence of dumping.

Fifth, the AD Agreement requires the immediate termination of the anti-dumping investigation in cases where the authorities determine that the margin of dumping is *de minimis* (which is defined as less than 2 per cent, expressed as a percentage of the export price of the product) or that the volume of dumped imports is negligible (generally when the volume of dumped imports from an individual country accounts for less than 3 per cent of the imports of the product in question into the importing country).

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62 AD Agreement, *supra* note 60, Art. 5.4.
63 *Id.*, Art. 17.
64 *Id.*, Art. 8.
65 *Id.*, Art. 7.
66 *Id.*, Art. 11.3.

Sixth, the AD Agreement requires prompt and detailed notification of all preliminary or final anti-dumping actions to the Committee on Anti-dumping Practices. The agreement will afford parties the opportunity of consulting on any matter relating to the operation of the agreement or the furtherance of its objectives, and to request the establishment of panels to examine disputes.

Finally, the role of panels is substantially restricted in that a new standard of review was established,[67] which, along with relevant issues, is discussed below.

2. Substantive Changes

On the substantive side, specific provisions were added to the AD Agreement. On the issue of "constructed" normal value, a fair comparison is required to be made between the export price and the normal value of a product so as not to arbitrarily create or inflate margins of dumping. Constructed value should now be based on actual data, not on artificial calculations. Certain discretion is allowed, however, when actual data is not available.

The AD Agreement recognizes that sales below cost that occur during start-up operations do not always represent an exporter's true costs.[68] It allows 20% sales below cost to be taken into account.[69] Here, two of the most contentious issues are circumvention and country hopping. For example, one Chinese textile company sets up a wholly-owned subsidiary in Jamaica. Consequently, a related issue is the use of rules of origin.

In the calculation of dumping margins, there is now a provision in the AD Agreement that requires an averaging of the domestic and export prices. Some allowance is made for currency fluctuations, but after 60 days the exporter is deemed to have adjusted its prices.[70]

The AD Agreement strengthens the requirement for the importing country to establish a clear causal relationship between dumped imports and injury to the domestic industry. The examination of the dumped imports on the industry concerned must include an evaluation of all relevant economic factors bearing on the state of the industry concerned. The agreement confirms the existing interpretation of the term "domestic industry," which, subject to a few exceptions, refers to the domestic producers as a whole of the like products or to those of them whose

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67 *Id.*, Art. 17.6.
68 *Id.*, Art. 2.2.1 and Art. 2.4.
69 *Id.*, Art. 2.2.1.
70 *Id.*, Art. 2.4.1.

collective output of the products constitutes a major proportion of the total domestic production of those products.

The injury test is a fairly strict one that considers all the circumstances of the case, including such matters as loss of market share, price undercutting, loss of profitability and so on.[71] Above all it has to be demonstrated that it was the dumping that had actually caused the injury and not some other factors, such as economic recession.[72] However, many substantive legal issues still remain.

IV. WTO ANTI-DUMPING LAWS, EVOLVING LEGAL STANDARDS AND U.S./EU ANTI-DUMPING LAWS TOWARD CHINA

A. Basic Rules of WTO Anti-Dumping Laws

As established in Article VI of the GATT 1994 and the WTO AD Agreement, before an anti-dumping duty to be applied, three elements need to be satisfied: (1) there is dumping; (2) there is "material injury" (or threat) to the domestic industry of the importing country (or retarding the establishment of such an industry) and the causation between the dumping and the material injury must be shown; and (3) the importing country is obligated to keep its procedures and provisional remedies consistent with WTO rules.

1. Dumping

Dumping occurs when the imported goods are sold at a price below the comparable price by which they are sold in the home market (price discrimination), or below the cost of production (normal value). However, dumping is a concept that is easy to define but difficult to apply. First of all, calculating home market sales prices and export sales prices involves formidable tasks, including a complex series of adjustments, including packaging, advertising costs, warranty services, etc.

The calculation becomes even more complicated when the producer is not selling in the home market. To find some equivalent measure to the home market price or "normal value," investigators sometimes find it necessary to know the price of products being sold in

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[71] *Id.* Art. 3.4.
[72] *Id.* Art. 3.5.

some third markets. But if this is not happening, the value of the home market price has to be "constructed" on the basis of production costs.

An additional complication is raised by non-market economies (NMEs) including the economies in transition, where reliable and meaningful prices or costs often are not available to construct a home market price. In such cases, a "surrogate country" is often selected and the home market 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. This is the so-called "analogue price," one of the most controversial practices in anti-dumping.

It is noted that the AD Agreement sets a *de minimus* threshold of 2 per cent, expressed as a percentage of the export price, in calculating the dumping margin.[73] In addition, with certain exception, the volume of dumped imports is regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member.[74] Some scholars have recommended to increase the *de minimus* threshold for the dumping margin and the import share for developing countries.[75]

2. Material Injury and Causation

After a dumping has been found, determinations must be made regarding whether there is "material injury" to the domestic industries and whether the material injury has caused the dumping.

The AD Agreement stipulates that in examining the impact of the dumped imports, "all 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."[76] This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

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[73] *Id.*, Art. 5.8.

[74] *Id.*; The exception to the 3% threshold is "unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member."

[75] *See* Konstantinos Adamantopoulos & Diego de Notaris, *The Future of the WTO and the Reform of the Anti-Dumping Agreement: A Legal Perspective*, 24 FORDHAM INT'L L.J. 30, 58-59 (2000).

[76] AD Agreement, *supra* note 60, Art. 3.4.

The AD Agreement also requires the national authorities to demonstrate that dumped imports are causing injury within the meaning of the Agreement.[77] Article 3.5 stipulates how this demonstration shall be made:

> "The demonstration of shall be based on an examination of all relevant evidence before the authorities. The 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. 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."[78]

3. Anti-Dumping Measures

If dumping, material injury and causation are all established, then duties may be applied at the border up to the amount of the margin of dumping. But, WTO rules impose several limitations on the measures that can be taken.

The most important limitation, under Article VI:2 of the GATT 1994, provides that the function of anti-dumping measures is to "offset" dumping or "prevent" dumping in the case of threat of material injury, and that an anti-dumping duty may "not [be] greater in amount than the margin of dumping in respect of such product." The provision cannot be clearer. It sets precise maximum quantitative limits to the permissible level of the anti-dumping duty. This view is further emphasized in Article 9.1 of the AD Agreement, where it is suggested to limit the duty to the amount necessary to offset the injury suffered by the domestic industry, which may be less than the full dumping margin.

As the WTO Panel in the Act of 1916 case correctly pointed out, these limitations would be meaningless if "WTO Members were free to choose any other type of measure and then with no maximum limits as to

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[77] *Id.*, Art. 3.5.

[78] *Id.* and GATT Art. VI 1(b).

amount and impact."[79] Upon appeal, the Appellate Body endorsed the view of the Panel. It declared that, when Article VI:2 of DSU is read in the context of Article VI:1, it is clear that the word "may" simply means that the imposition of duties is optional, and that the amount of any such duty may not be greater than the margin of dumping.[80]

4. Existing Problems of WTO AD Agreement

Although the AD Agreement clarified many issues unresolved in the pre-WTO period, it is still widely believed that the Agreement should be further revised. Particularly, many WTO members and scholars have expressed concerns that the anti-dumping investigation is such a powerful and damaging device that the AD Agreement should provide more protection to exporters.[81]

The initiation of an anti-dumping investigation, or even rumors of possible initiation, often causes grave damages to the exporting industries. It is a signal calling the importers to switch to other sources of supply. The cost of replying to the investigation are often prohibitive, particularly for small and medium sized exporters from developing countries.

B. Legal Standards in GATT/WTO Anti-Dumping Cases

Until August 31, 2001, ten panel reports and five appellate body reports had been circulated. These reports have greatly enhanced our understanding of rights and responsibilities under the AD Agreement. They have provided certainty much needed to participants of the international trade. In the following, I will discuss three legal standards that have been involved in all anti-dumping disputes. The evolution of these standards under the WTO is of great importance for understanding WTO anti-dumping disputes and litigations.

1. Burden of Proof

Burden of proof is a crucial issue in reaching conclusions of law and fact. When the panel sits down to determine whether one country acted in accordance with the AD Agreement, the first issue confronted is

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[79] United States – Anti-Dumping Act of 1916, Panel report, WT/DS136/R, (21 March, 2000) [hereinafter "Act of 1916"], *para.* 3.213.

[80] United States – Anti-Dumping Act of 1916, Appellate report, WT/DS136/AB/R, WT/DS162/AB/R, (28 August, 2000), *para.* 28.

[81] *See* Admantopoulos & de Notaris, *supra* note 75, at 32-34.

who bears the burden: Whether the importing country (the country imposing the anti-dumping duty) is required to demonstrate its anti-dumping practices complying with the AD Agreement, or whether the exporting country shall demonstrate a lack of compliance on the side of the importing country.

GATT Standard Outside of the anti-dumping and countervailing duties context, GATT practice was to put the burden on the complaining party to demonstrate either violation or infringement. However, dumping was not unfair trade practice per se. It was the anti-dumping, rather than the dumping, that was the target of disciplinary action under the GATT (as well as the WTO).[82]

This is because the imposition of anti-dumping duty is contrary to the fundamental principles of "tariff bindings" (by raising import duties above the bound rates) and Most Favorite Nation (MFN) (by applying different tariff rates to different GATT Members). Most scholars considered and still consider GATT Articles VI (anti-dumping) as a permitted exceptions to the basic GATT principles and concepts.[83] When an accused party claimed reliance on one of the exceptions to the basic GATT principles (e.g., Article XX), therefore, it should be required to bear the burden of demonstrating that its actions are consistent with that exception.

The GATT Panel in the Canada Pork case endorsed this position. It found that GATT Article VI:3 was an exception to basic principles of the General Agreement, so that the importation must not be subject to charges other than ordinary customs duties (Article II:1(b)), and that charges of any kind imposed in connection with importation must meet the MFN standard (Article I:1). [84] The Panel continued to rule that Article VI:3, as an exception to basic principles of the General Agreement, had to be interpreted narrowly and that it was up to the United States, as the party invoking the exception, to demonstrate that it had met the requirements of Article VI:3.[85]

However, in both Salmon[86] and Audio cassettes[87] cases, the Panels not only refused to rule on whether Article VI is an exception, but they

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[82] AD Agreement, *supra* note 60, Art. 1. *See also* Admantopoulos & de Notaris, *supra* note 75, at 32-34.

[83] *See* Bierwagen, GATT ARTICLE VI AND THE PROTECTIONIST BIAS IN ANTI-DUMPING LAW, 1990, Vol. 7, at 21-50.

[84] United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, DS7/R, (11 July 1991), *para.* 4.4.

[85] *Id.*

[86] United States – Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon From Norway, ADP/87, (27 April 1994) [hereinafter "Salmon"].

placed burdens of proof on the complaining parties (Norway and Japan, respectively), albeit only the defending parties had access to relevant facts.

In the Salmon case, Norway (the exporting country) argued that since it had demonstrated that there was a likelihood that the U.S. methodology would result in overstating the dumping margins, the burden should be on the U.S. (the importing country) to demonstrate that it had not, in fact, overstated the margins. Moreover, the U.S. had the necessary confidential information to demonstrate the soundness of its methodology, while Norway did not have access to such information. Nevertheless, the panel rejected Norway's argument. It reasoned that although Norway had presented a hypothetical case of overstating margin with the U.S. methodology, no evidence was proffered to show that the U.S. methodology had in fact overstated the margins.[88]

In the Audio cassettes case, Japan argued that the EC overstated the dumping margins by comparing an average normal value to individual transactions when combined with the practice of zeroing out above normal value sales. Similar to the Salmon case, this Panel rejected Japan's argument on the grounds that Japan had not shown that there would have been no dumping but for the average normal value to individual transaction and zeroing.[89] However, the burden of proof should have been on the EC to demonstrate its calculation was correct, since Japan had absolutely no access to any of the relevant factual information.

WTO Standard The U.S. has routinely argued in those cases in which it is the defending party that Article VI of the GATT is not an exception. On the contrary, it argues that Article VI and the AD Agreement confers a right to impose anti-dumping duties. To diminish this right, by characterizing Article VI and the AD Agreement as "derogations," would constitute an impermissible failure to respect this balance.[90] For example, in the Korean DRAMS case, the U.S. argued that the Panel in the Canada Pork case was "conclusory in nature" and that aspect of the Panel's decision was only "*dicta*."[91] Similarly, in the US-Japan Steel case, the U.S. argued that anti-dumping measures do not constitute exceptions from the rest of the WTO framework, that these

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[87] *EC – Anti-Dumping Duties on Audio Tapes and Cassettes Originating in Japan*, Panel Report, ADP/136, (28 April 1995) (unadopted) [hereinafter "Audio Cassettes"].

[88] Salmon, *supra* note 86, at *para.* 483.

[89] Audio Cassettes, *supra* note 87.

[90] *See, e.g.*, WTO Panel Report, United States – Anti-Dumping on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, WT/DS99/R, (Jan. 29, 1999) [hereinafter "Korea DRAMS"], *paras.* 4.77-4.80.

[91] *Id.*

measures are subject to the same rules of interpretation as any other provision of the other WTO Agreements, except that they enjoy a more deferential standard of review.[92]

On the other hand, some other WTO members have endorsed, either explicitly or implicitly, the position that, although anti-dumping measures are authorized under international trade rules, WTO members have tried to constrain the use and abuse of anti-dumping measures to protect the trade liberalizing principles that underlie other WTO obligations. As a result, the WTO permits only anti-dumping measures that comply with a specific and detailed set of legal disciplines.[93] In the US-Japan Steel case, Japan forcefully argued that the threshold of the U.S. for application of anti-dumping measures is becoming lower and lower, while the anti-dumping measures themselves are erecting higher and higher barriers to trade. Therefore the Panel should reject the result-oriented and economically dubious determinations of dumping, injury, and causation by the U.S. in that case.[94]

The WTO cases seem to have adopted a relatively middle ground. The Panels have generally required the complaining party (the exporting country) to present a "prima facie case" of violation of the AD Agreement. The WTO Appellate Body has defined a prima facie case as "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favor of the complaining party presenting the prima facie case."[95] Where the complaining party presents a prima facie case in respect of a claim, it is for the defending party to provide an "effective refutation" by submitting its own evidence and arguments in support of the assertion that the challenged activities are consistent with its obligations under the AD Agreement.[96]

However, in the Act of 1916 case, the EC challenged that the U.S. Act of 1916 violated various provisions of the GATT 1994 and the WTO AD Agreement. The EC, as the complainant, should normally adduce sufficient evidence to raise a *prima facie* case that each of its claims has merit. However, the Panel ruled: "This rule however is only applicable to determine whether and when a party bears the burden of proof. Once both parties have submitted evidence meeting those requirements, it is up to the Panel to weigh the evidence as a whole."[97]

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92 US-Japan Steel, *supra* note 48, Annex A-2, *para.* 52.

93 *Id.*, Annex A-1, *paras.* 43-45.

94 *Id.*, para. 45.

95 European Communities – Measures Concerning Meat and Meat Products, WT/DS26/AB/R–WT/DS48/AB/R, (16 January 1998) [hereinafter "Hormones"], *para.* 104.

96 *Id.*

97 Act of 1916, *supra* note 79, *para.* 6.38.

A more important case on the burden of proof is the Poland Steel case. There, Poland argued that, under the AD Agreement, anti-dumping duties are an "exception" to the otherwise applicable freedom to trade between WTO members.[98] It reasoned that anti-dumping measures may be levied only "in order to offset or prevent dumping,"[99] since WTO Members have agreed that anti-dumping measures may be applied only (1) "under the circumstances provided for in Article VI, and pursuant to investigations initiated and conducted in accordance with AD Agreement";[100] (2) "where all requirements for the imposition have been fulfilled," including a proper determination of both dumping and injury;[101] and (3) "shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."[102]

The Panel seemed to agree with Poland.[103] It stated:

> "We believe that just as the extensive discretionary authority of a panel to request information from any source (including a Member that is a party to the dispute) is not conditional upon a party having established, on a *prima facie* basis, a claim or defence, so also a panel's extensive authority to put questions to the parties in order to inform itself of the relevant facts of the dispute and the legal considerations applicable to such facts is not conditional in any way upon a party having established, on a *prima facie* basis, a claim or defence. We view this authority as essential in order to carry out our mandate and responsibility under the DSU and the AD Agreement."

The Panel claimed that it "must examine *whether* and *how* [emphases added] the Thai investigating authorities evaluated all the relevant factors having a bearing on the state of the industry under Article 3.4."[104] The Panel further stated: "the complaining party bears the burden of establishing a violation of a provision of a covered agreement does not 'freeze' a panel into inaction."[105]

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98 Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, WT/DS122/R, (28 September 2000) [hereinafter "Poland Steel"], Poland argument *para.* 48.

99 *Id.*

100 AD Agreement, *supra* note 60, Art. 1.

101 *Id.*, Arts. 2, 3, 9.1 and Article VI:1, VI:6 GATT 1994.

102 *Id.*, Art. 11.1.

103 Poland Steel, *supra* note at 98, at *para.* 7.239.

104 *Id.*

105 *Id.*

Thailand appealed to the WTO Appellate Body and challenged the Panel decision under the "burden of proof."[106] Specifically, it alleged that the Panel did not make specific and explicit findings whether Poland, as a claimant, had established a *prima facie* case of violation, and that the panel improperly made Poland's case for it.[107] The Appellate Body upheld the Panel decision. It cited its ruling in the Korea Dairy case:

> "We find no provision in the DSU ... that requires a panel to make an explicit ruling on whether the complainant has established a *prima facie* case of violation before a panel may proceed to examine the respondent's defence and evidence."[108]

The Appellate Body also stated, citing its ruling in India Textile case, that "[W]e do not consider that a panel is required to state *expressly* which party bears the burden of proof in respect of every claim made."[109]

The Appellate Body also cited approvingly its ruling in Canada Aircraft case,[110] where it dismissed the view that a panel has no authority to ask a question relating to claims for which the complaining party had not first established a *prima facie* case, and stated that such an argument was "bereft of any textual or logical basis."[111]

The Appellate Body concluded that a WTO panel is not required to make a separate and specific finding, in each and every instance, that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a *prima facie* case.

In conclusion, it seems that some WTO panels are sympathetic to the "exception" argument, while some others tend to be more strict in demanding a showing of "*prima facie*" case by the complaining party.

2. Standard of Review

When evidence and arguments are presented on both sides, the panel will proceed to weigh and assess those evidence and arguments, so that to determine whether the importing country indeed acted

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[106] Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, Appellate Body Report, WT/DS122/AB/R, (12 March 2001) [hereinafter "Poland Steel AB Report"].

[107] *Id.*

[108] Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R, (14 December 1999), *para.* 145.

[109] India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/AB/R, (23 August 1999), *para.* 137.

[110] Canada – Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R, (20 August 1999).

[111] *Id.*, *para.* 185.

inconsistently with its obligations under the AD Agreement. Thus, the question of standard of review arises: What is the standard that a WTO panel should adopt in reviewing the decisions of the national authorities? Whether the authorities should be given any deference?

GATT Standard In the late 1980s, GATT panels began to issue decisions adverse to the U.S., particularly in anti-dumping and countervailing duty cases.[112] In those anti-dumping duty cases that the U.S. lost under the GATT, the panels accorded the U.S. national authorities much less deference that they would like to see, and considered information that was not part of the administrative record.[113] This less deferential standard certainly did not satisfy the U.S., the most frequent user of anti-dumping duties.

WTO Standard During the Uruguay Round, the U.S. negotiators tried to ensure that the WTO standard of review would give substantial deference to decisions of the DOC and ITC.[114] But at the same time, the standard of review problem was also a matter of great interest in intellectual property. If the U.S. wanted to secure WTO protection of intellectual property rights, panels reviewing matters arising under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) could not defer to national governments, many of which lacked rigorous administrative processes. The compromise resulted from this dilemma was the establishment of two standards of review: one particular to the AD and Subsidies Agreements, and the other, less deferential standard in Article 11 of the DSU, to all disputes arising under non-AD Agreement violations.

Article 17.6 of the AD Agreement sets out a special standard of review for both *factual* issues and *legal* (interpretation) issues. With regard to factual issues, Article 17.6(i) provides:

> " ... in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was

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[112] *See* Paul C. Rosenthal & Robert T.C. Vermylen, *Part II: Review of Key Substantive Agreements: Panel II E: Antidumping Agreement (AD) and Agreement on Subsidies and Countervailing Measures (SCM): The WTO Antidumping and Subsidies Agreements: Did the United States Achieve Its Objectives During the Uruguay Round?* 31 LAW & POL'Y INT'L BUS., 875-76 (2000).

[113] *See, e.g.*, GATT Dispute Panel Report on United States – Anti-Dumping of Imports of Stainless Steel Plate from Sweden, ADP/117, 1994 GATTPD LEXIS 6 (Feb. 24, 1994) (unadopted).

[114] *See* Steven P. Crowley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193-95 (1996).

> unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned."[115]

If a panel concludes that the establishment of the facts with regard to a particular claim is proper, it may proceed to consider legal issues. With regard to legal issues, Article 17.6(ii) provides:

> "... the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."[116]

It is noted that the terms of the legal prong are nearly identical to those of a leading United States Supreme Court decision, Chevron.[117] The Chevron Court held that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[118] The U.S. argues that the language reflects an evident recognition that the task of panels would be similar to that of domestic courts reviewing the actions of administrative agencies.

The WTO decisions to date have raised questions whether the U.S. negotiators really got what they wanted by this special standard of review. These decisions seem to suggest that the WTO panels are conscious of the tremendous power held by the national authorities in anti-dumping actions, and are willing to limit the degree of the deference to the decisions of the national authorities.

On the factual prong of the standard, Guatemala argued, in the Mexico cement case, that its administrative authority had considered all the facts that was "reasonably available" to it and made the factual determinations according to Article 17.6(i). However, the Panel rejected Guatemala's argument and hold that in addition to the factors in Article 17.6(i), Guatemala needed to look at Article 5.3, which requires the

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115 AD Agreement, *supra* note 60, Art. 17.6.

116 *Id.*

117 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984).

118 *Id.* at 843.

investigating authority to examine the "accuracy and adequacy" of the evidence when determining whether there is "sufficient evidence to justify the initiation of an investigation."[119] The Panel made it clear that the standard for factual determination is the "objective sufficiency" of the evidence, not any subjective standard adopted by the investigating authority.

More importantly, in the Poland Steel case, the Panel agreed with Thailand (the importing country) that factual evaluation by the national authority could be limited to non-confidential facts. On appeal, the Appellate Body reversed and held that, in order for a panel to properly determine whether the investigating authorities' establishment of the facts was proper, it must "evaluate all of the facts made available to it by the defending party; these may include confidential facts that were part of the administrative record."[120]

On the legal prong of the standard, there seems to be some tension between the two sentences of Article 17.6(ii).[121] The first sentence requires a panel to interpret the AD Agreement in accordance with customary rules of treaty interpretation. The panel considers the interpretation of the WTO Agreements, including the AD Agreement, in accordance with the principles set out in the Vienna Convention on the Law of Treaties. The rules of treaty interpretation set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention") have achieved the status of a rule of customary international law and are customarily used by the panels.[122] The panel may also consider the legislative (negotiation) history to divine the original intent of the provision.[123]

The second sentence leads the panel to uphold "permissible interpretation" by the national authorities. If the panel determines that the provisions allow more than one interpretation, it shall proceed to consider whether the national interpretation is within the set of permissible interpretations. If so, the Panel must defer to the interpretation given to the provision by the national government.

In the Korea DRAMS case, the Panel made it clear that it had the power under Article 17.6(ii) to determine the set of "permissible"

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[119] Guatemala – Definitive Anti-dumping Measures on Grey Portland Cement from Mexico, WT/DS156/R, (24 October 2000), *Para.* 7.49.

[120] Poland Steel, *supra* note 98.

[121] United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, WT/DS179/R, (22 December 2000) [hereinafter "US-Korea Steel"], Annex 1-1.

[122] *See, e.g.,* Korea DRAMS, *supra* note 90, at *para.* 6.21.

[123] EC – Anti-dumping Measures on Imports of Cotton-type Bed-linen from India, WT/DS141/R, (30 October 2000) [hereinafter "India Linen"], *para.* 6.46.

interpretations of a provision of the WTO Agreements. With that power, WTO panels are capable of overturning an authority's decision by declaring that the member's interpretation of the WTO provision is not within the set of "permissible" interpretations.[124] The Panel rejected the U.S. argument of "permissible interpretation" on the basis that they were not consistent with the AD Agreement and, in reaching such a view, it applied the customary rules of interpretation of public international law. The Panel there concluded that the DOC's "not likely" criterion was not a "permissible" interpretation of Article 11.2 of the AD Agreement.[125]

Similar results are found in other Panel reports.[126] The India Linen case is a typical one. There, the Panel did not accept the interpretation given by the EC of Article 2.4.2 of the AD Agreement as a "permissible interpretation" within the meaning of Article 17.6(ii).[127] On appeal, the Appellate Body affirmed and stated:

> "... the Panel was not faced with a choice among multiple 'permissible' interpretations which would have required it, under Article 17.6(ii), to give deference to the interpretation relied upon by the European Communities. Rather, the Panel was faced with a situation in which the interpretation relied upon by the European Communities was, to borrow a word from the European Communities, 'impermissible'. We do not share the view of the European Communities that the Panel failed to apply the standard of review set out in Article 17.6(ii) of the Anti-Dumping Agreement."

In conclusion, the WTO cases to date seem to suggest that the WTO Panels and the Appellate Body are suspicious of the high level of deference to the national authorities as favored by the U.S. The Panels and the Appellate Body have used more rigorous standards, and have been willing to scrutinize the decisions of national authorities. Consequently, it might become more difficult for the national authorities to defend their decisions in the future,[128] which certainly is a good news for many challengers of the U.S. anti-dumping practice.

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[124] *See* Rosenthal & Vermylen, *supra* Note 112, at 881-2.

[125] Korea DRAMS, *supra* note 90, at *pp.* 6.48-6.51; *See generally* Myles S. Getlan, *WTO Dispute Settlement: Issues in Antidumping and Countervailing Duty Law*, 1075 PLI/CORP 799, 843-49 (1998).

[126] *See, e.g.*, US-Korea Steel, *supra* note 121; US-Japan Steel, *supra* note 48.

[127] India Linen, *supra* note 123.

[128] *See* Paul C. Rosenthal, Richard Cunningham, Victor Luiz do Prado, & Angela Ellard, *Part II: Review of Key Substantive Agreements: Panel II E: Antidumping Agreement (AD) and*

3. Causation of Material Injury

Under the AD Agreement, beside analyzing the materiality of injury, the national authority has to assess whether the material injury established is caused by the dumped imports. Determination of causation is still another contentious issue in anti-dumping disputes.

GATT Standard Most scholars and many GATT parties have interpreted relevant provisions in the Tokyo Round AD Code to require that national authorities separate the injury caused by the dumped imports from the injury caused by other factors, and then determine whether the effect of those imports is such as to constitute injury within the meaning of the Code. The U.S., when acting as defendant, does not support this interpretation. The GATT panels gave different interpretations from panel to panel. Indeed, as in the Salmon case, several different interpretations were enunciated in the same report.[129]

WTO Standard Under Article 3.5 of the WTO AD Agreement, before making an affirmative determination of injury, the importing country (through its national authority) must demonstrate that dumped imports are, through the effects of dumping, as set forth in Article 3.2 and 3.4, causing injury within the meaning of the Agreement.[130] The following sentences of this provision clarify how this causal link is to be established. First, Article 3.5 requires that the demonstration of a causal relationship be based on an examination of all relevant evidence. Second, Article 3.5 provides that the authorities shall examine any known factors other than the dumped imports which are at the same time injuring the domestic industry. Third, the authorities are to make sure that injuries caused by these other factors are not attributed to the dumped imports.[131]

Article 3.5 clarifies the previous GATT Code language and supports the interpretations espoused by the scholars and many GATT parties. However, national authorities such as the ITC of the U.S. read this provision to require that dumped imports must merely be "a" cause of injury among other factors, not the only cause.[132] Certain commissioners

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Agreement on Subsidies and Countervailing Measures (SCM): Presentation Summary and Comments, 31 LAW & POL'Y INT'L BUS. 907, 908-10 (2000).

[129] Salmon, *supra* note 86.

[130] AD Agreement, *supra* note 60, Art. 3.5.

[131] *Id.* and GATT Art. VI 1(b).

[132] *See, e.g.*, Certain Brake Drums and Rotors, USITC Pub. No. 3035, Inv. No. 731-TA-744, at 15 n.87 (April 1997); Melamine Institutional Dinnerware USITC Pub. No. 3016, Inv. No. 731-

at the ITC do not separately analyze the causation question. Instead, they consider material injury and causation together as part of a "unity" econometric analysis.[133]

In the U.S.-Japan Steel case, the WTO Panel considered the question whether the ITC established a causal relationship between the dumped Japanese steel imports and the injury to the domestic industry consistently with Article 3.5 of the AD Agreement.[134] Japan alleged that the ITC (1) inadequately analyzed other factors affecting the industry, and (2) failed to ensure that injury caused by these other factors was not attributed to the dumped imports.[135] In response, the U.S. pointed to the various paragraphs in the ITC report in which other factors affecting the industry are discussed. It argued that: (1) the ITC was not required under the AD Agreement to establish that dumped imports are the "sole cause of injury" and (2) its analysis did ensure that any injuries that were caused by other factors were not attributed to dumped imports.[136]

The Panel observed that the operative language at issue, the injunction that "the injuries caused by other factors must not be attributed to the dumped imports," is unchanged in Article 3.5 of the WTO AD Agreement from Article 3:4 of the Tokyo Round AD Code. Thus, the Panel found the decision of the Panel in Salmon, a GATT decision under the Tokyo Round AD Code, to be useful and persuasive on this issue.[137] There, the Panel held that the ITC was not required by the AD Code to identify the extent of injury caused by other factors in order to determine the injury caused by the imports from Norway.[138]

Based on the Salmon and another WTO case where Article 4.2(b) of the Safeguards Agreement (similar language as Article 3.5 of the AD Agreement) was considered,[139] the Panel held that the ITC was not obligated under the AD Agreement to demonstrate that "dumped imports alone have caused material injury by deducting the injury 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."[140]

Japan appealed. The Appellate Body reversed. It completely rejected the Salmon reasoning, holding it "at odds" with the interpretive

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TA-741, at 23 n.148 (Feb. 1997); Bicycles from PRC, USITC Pub. No. 2968, Inv. No. 731-TA-731, at 12 n.88 (June 1996).

133 *Id.*

134 US-Japan Steel, *supra* note 48, *paras.* 7.237 to 7.261.

135 *Id.* at *para.* 7.238.

136 *Id.*

137 *Id.* at *para.* 7.252.

138 Salmon, *supra* note 86, *para* 555.

139 United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, (19 January 2001).

140 US-Japan Steel, *supra* note 48, *para.* 7.260.

approach for Article 3.5 of the AD Agreement.[141] The Appellate Body clearly recognized that "it may not be easy, as a practical matter, to separate and distinguish the injurious effects of different causal factors," but stated:

> "[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. Article 3.5, therefore, 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."[142]

There has been no WTO case has directly hold on the issue whether all factors listed in Article 3.5 of the AD Agreement must be evaluated by the investigating authorities before the causal relationship can be established. However, the Panel in the India Linen case rejected the EC's assertion that not all factors listed in Article 3.4 need to be evaluated in examining the impact of the dumped imports on the domestic industry.[143] The Panel concluded that "each of the fifteen factors listed in Article 3.4 of the AD Agreement must be evaluated by the investigating authorities in each case in examining the impact of the dumped imports on the domestic industry concerned."[144] The same logic of the India Linen decision should apply to Article 3.5. It seems reasonable to expect an affirmative answer if the above issue is confronted by a future WTO panel. Indeed, some scholars have recommended the exact same answer.[145]

C. U.S. and EU Anti-Dumping Laws Toward China

The U.S. and EU are two of the most important trade partners of China and are especially concerned about China's accession. For example, the U.S. legislators have passed laws related to China's accession and these laws are unprecedented in many aspects and calls for

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141 *Id.* at *para.* 226.
142 *Id.* at *para.* 228.
143 India Linen, *supra* note 123.
144 *Id.* at *para.* 6.159.
145 *See* Adamantopoulos & de Notaris, *supra* note 75, at 50-52.

the creation of various institutions and programs to monitor the trade and non-trade related aspects of China's behavior.[146] In the following, the anti-dumping laws of the U.S. and EU toward China will be analyzed in detail.

1. U.S. Anti-Dumping Laws Toward China: Bubbles of Capitalism

The first U.S. anti-dumping statute was promulgated as part of the Revenue Act of 1916.[147] Because it proved to be difficult for the injured domestic industry to obtain relief from dumping under the 1916 Act, the U.S. Congress enacted the Anti-dumping Act of 1921, which dropped the intent requirement of the 1916 Act and required only that dumping had occurred and injury to domestic industry had resulted.[148] The 1921 Act's basic framework remains in operation under the Tariff Act of 1930, as amended by the Trade Agreement Act of 1979 and the Uruguay Round Agreement. Collectively, these laws are the legal basis of current U.S. anti-dumping practice, which is a bifurcated system which consists of two administrative agencies. A complaint must be filed simultaneously with the Department of Commerce (DOC), which is responsible for examining whether there is a "margin of dumping," and the International Trade Commission (ITC), which is responsible for examining whether the dumping or dumped goods is causing "material injury" (or threat thereof) to the competing industry within the U.S.[149]

The procedure includes the following six steps: (1) filing of the complaint with both the DOC and the ITC; (2) within 45 days, an ITC preliminary determination of whether any reasonable chance exists of finding of injury (a negative finding would halt the procedure); (3) a preliminary determination by the DOC whether dumping margins exist (if finding is negative, it would halt the procedure; if affirmative, then customs-entry "liquidations" are suspended); (4) a "verification" by the

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[146] *See* Leo Wise, *Recent Development: Trading with China*, 38 HARV. J. ON LEGIS. 567, 567-80 (2001).

[147] Ch. 463, section 801, 49 Stat. 756, 789-99 (1921) [codified at 15 U.S.C. §72 (1988)]. For a historical overview, *see* Joseph A. Laroski, Jr., *NMES: A Love Story Nonmarket and Market Economy Status Under U.S. Antidumping Law*, 30 LAW & POL'Y INT'L BUS. 369, 371-74 (1999).

[148] Anti-dumping Act of 1921, Ch. 14, 201-12, 42 Stat. 9, 11-15 (codified in 19 U.S.C. 1303). However, the 1916 Act was not repealed and was challenged, after a recent U.S. decision, *Geneva Steel Co. v. Ranger Steel Supply Corp.*, 980 F. Supp. 1209 (D. Utah 1997), before the WTO DSS (*See* Act of 1916, *supra* notes 79 and 80) and was held to be in violation of the international trade obligations under the WTO.

[149] 19 U.S.C. § 1673(1) (1994); 19 U.S.C. § 1677(1) (1994). *See also* Laroski, Jr., *supra* note 147, at 371; Staff of House Comm. On Ways And Means, 105th Cong. 1st. Sess., Overview and Compilation of U.S. Trade Statuts 65 (1997).

DOC of the dumping (negative finding would halt the procedure; if affirmative, the case proceeds to the ITC); (5) final determination by the ITC of the existence of "material injury" or "threat" caused by dumping; and (6) if both the ITC and the DOC have affirmative final determinations, the DOC will issue anti-dumping order.[150]

The critical issue involving China has been the appropriate methodology to be used in determining "dumping." Under the U.S. anti-dumping laws, in order to determine the existence of "dumping," comparisons usually would be made between the price of goods sold in the U.S. and that in the exporting country.[151] However, since China is regarded as a non-market economy (NEM), the rules of determination are different.[152] The U.S. determines the margin of dumping for NMEs by either of the following two methods: (1) the "factors of production" method: The NME manufacturers supply cost data on each input in the manufacture of certain product, and the costs of each factors are then calculated from a comparable market economy; (2) the "surrogate country" method: All data, in cases where input data from NMEs are not available, are drawn from a surrogate country of comparable economic development.[153]

China has relentlessly protested the use of "surrogate country, arguing that this practice results in unfair and inaccurate comparison with the Chinese market. The Chinese point out that India and Pakistan, two countries often chosen as surrogates, both have more expensive raw materials than China has. Developed countries such as Norway, Austria, and France have also served as surrogates, resulting in greatly distorted price calculations. There have been tremendous disputes as to the soundness of the practice.[154] It is criticized as a "bureaucrat's Nirvana"

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150 Tariff Act of 1930, 19 U.S.C. § 1673 (1994 & Supp. III 1997).

151 *Id.*

152 The determination of market economy status is made by the DOC and not subject to judicial review. 19 U.S.C. §1677(18). *See generally* Sanghan Wang, *U.S. Trade Laws Concerning Nonmarket Economies Revisited for Fairness and Consistency*, 10 EMORY INT'L L. REV. 593 (1996) (argued the arbitrariness of the statutory criteria).

153 19 U.S.C. §1677b(c)(1).

154 *See generally* Williams P. Alford, *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*, 61 S. CAL. L. REV. 79 (1987), and Mark A. Groombridge & Claude E. Barfield, TIGER BY THE TAIL: CHINA AND THE WORLD TRADE ORGANIZATION, 95-96 (1999). *See also* James Bovard, THE FAIR TRADE FRAUD: HOW CONGRESS PILLAGES THE CONSUMER AND DECIMATES AMERICAN COMPETITIVENESS, 132 (1991) (statements by Bary Horlick, former Deputy Assistant Secretary of Commerce for Import Adminstration, describing the surrogate-selection process to the Senate Finance Committee as: "... it is usually done about ten at night when one has run out of any reasonable alternative. Just take an example, for Chinese shop towels we went through in order: Pakistan, Thailand, Malaysia, Hong Kong, the Dominican Republic, Colombia, and wound up with a hypothetical Chinese factory in India. It just doesn't make any sense").

because "dumping often occurs as a result of American bureaucrat's manipulation of numbers, rather than actual foreign business practices."[155] However, this selection practice by the U.S. national authorities has been upheld by the U.S. courts.[156] For example, in Sigma Corp. v. United States, the Court justified the DOC's decision to use Philippines as the surrogate even it was merely a choice of "convenience" and required the Chinese exporter to "affirmatively demonstrate" an absence of central government control, both de jure and de facto, with respect to the product.[157] A find of de jure absence of central government controls includes: (1) an absence of restrictive stipulations associated with its business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies.[158] A de facto absence of governmental control includes: (1) whether the prices are set by or subject to the approval of governmental authority; (2) whether the exporter has authority to negotiate and sign contracts and other agreements; (3) whether the exporter has autonomy from the government in making decision regarding the selection of management; and (4) whether the exporter retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.[159]

In the early 1990's, the DOC briefly showed signs of flexibility and of an awareness that the prices and markets in rapidly transforming economies created a shifting target. The DOC and Congress attempted several approaches to cope with NMEs such as China and to make more accurate, fair, and predictable value determination. In a series of U.S. anti-dumping cases related to China, the DOC experimented with new methods of calculating prices, costs of production, and ultimately dumping margins.[160] The Chinese companies in each case argued that the Chinese government had no control over the type or volume of production, price charges, distribution of profits, or the company's right to obtain, use, or dispose of capital.[161]

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[155] *See* Bovard, *supra* note 154, at 115.

[156] *Sigma Corp. v. United States*, 841 F. Supp. 1255 (Ct. Int'l Trade 1993); *UCF America Inc. v. United States*, 870 F. Supp. 1120 (Ct. Int'l Trade 1994). *See generally* Wang, *supra* note 152 (argued the surrogate selection process is clearly unfair).

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *See* Sparklers from the PRC, 56 Fed. Reg. 20, 588 (DOC 1991); Oscillating Fans and Ceiling Fans from the PRC, 56 Fed. Reg. 25, 664 (DOC 1991); Chrome-plated Lug Nuts from the PRC, 55 Fed. Reg. 46, 153 (DOC 1991); and Oscillating Fans and Ceiling Fans from the PRC, 55 Fed. Reg. 55, 271 (DOC 1991).

[161] *Id.*

Under the "bubbles of capitalism" approach, the DOC used the statutory "factors of production" method and held that since all costs of factor inputs were market driven, the Chinese exporters were operating in a "bubble of capitalism."[162] Thus, in the Fans case, the DOC did not value all factors based on surrogate country prices. Rather, actual costs of factor inputs, whether from domestic or foreign sources, was used.[163]

Under the "mini-bubbles" approach, applied in the lug nuts case, it is not necessary for all of the exporter's costs to be market driven. If the exporter can demonstrate that some of their costs are market driven, then those NME values will be used along with the surrogate market values for the remaining costs. In the lug nuts case, the Chinese exporters attempted to prove that certain inputs were market-driven and thus eligible for inclusion in later anti-dumping calculations. Finally, the DOC found that the prices paid for two key inputs to the manufacture of lug nuts – steel and chemicals – were market-driven.[164]

These changes showed that the U.S. was at least aware of some the complexities of the evolving Chinese economy. But the problem is how to distinguish those firms that are truly operating according to market principles and those which have some state ownership or subsidy. One way of dealing with this is through individual inspection of firms, but this has certain limits given the bureaucratic burden it would pose.[165]

Around 1995, however, the DOC retreated from the "bubbles of capitalism" concept, and renounced the partially market-based analysis.[166] In the Sulfanilic Acid case and in a reversal of the original Lug-nuts decision, the DOC introduced a new concept, the "market-oriented industry approach."[167] The concept established a much more stringent set of rules for a finding that a manufacturer in a NME was actually a market-economy producer. Reversing its previous open-mindedness, the

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[162] Oscillating Fans and Ceiling Fans from the PRC, *supra* note 160.

[163] *Id.*

[164] Chrome-plated Lug Nuts from the PRC, *supra* note 160. *See generally* Robert H. Lantz, *The Search for Consistency: Treatment of Non-market Economies in Transition under United States Antidumping and Countervailing Duty Laws*, AM. U. J. OF INT'L L. & POLICY, 993-1073 (1995).

[165] In Pure Magnesium and Alloy Magnesium from the Russian Federation, 60 Fed. Reg. 16, 440 (1995) (The DOC granted the request of a Russian exporter and conducted an individual company market orientation examination, rather than the usual examination of the entire industry, as in the China cases discussed in this part. But the DOC found that the Russian exporter did not demonstrate the absence of both de jure and de facto governmental control over its export operations). *See also* Brian McDonald, THE WORLD TRADING SYSTEM: THE URUGUAY ROUND AND BEYOND, 94 (1998).

[166] *See* Greg Mastel, ANTIDUMPING LAWS AND THE U.S. ECONOMY, 55 (1998).

[167] Sulfanilic Acid from the PRC, 57 Fed. Reg. 9409 (1992) (preliminary determination of sales at less than fair value); Chrome-plated Lug Nuts from the PRC, 57 Fed. Reg. 15, 052 (1992) (amendment to final determination of sales at less than fair value and amendment to anti-dumping duty order).

DOC expressed its skepticism that "bubbles of capitalism" could indeed exist in NMEs. The DOC stated affirmatively that in order for it to find that a NME producer was acting as a market-economy producer, it would have to be persuaded that "all prices and costs faced by the individual producer are market-determined."[168] To be determined a market-oriented industry, the DOC must find that: (1) there is virtually no government involvement in setting prices and setting volume of production for the subject merchandise; (2) the entire industry is characterized by private or collective ownership; and (3) all but an insignificant portion of all material and nonmaterial inputs have been purchased at market-determined prices.[169] The DOC may use the normal method to calculate normal value if all above three factors are met and enough relevant information is available.[170]

Now, with China's accession, in addition to the U.S. national laws, the WTO anti-dumping laws and China's accession documents also become part of the legal source governing the anti-dumping practices of the U.S. Many scholars believe that the China's accession protocol contains measures appears at odds with the spirit of the principle of the MFN status that underlies the WTO framework.[171] It will be discussed in detail, infra, Part V.

2. EU Anti-Dumping Laws Toward China: New Changes

The first EU anti-dumping legislation was enacted in 1968. Since the first Trade Agreement between China and the EU (then the European Economic Community) was signed on April 3, 1978, anti-dumping has become one of the key issues in the EU-China trade relationship.[172]

The current EU anti-dumping laws entered into force between March 1995 and April 1998.[173] The EU legislation defines "dumping" as price discrimination between national markets, or selling a product in the

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168 *See* Wang, *supra* note 152, at 644; *See also* Lantz, *supra* note 164, at 1048.

169 Sulfanilic, *supra* note 167, at 9,411.

170 Tariff Act of 1930, 19 U.S.C. §1677b(B) (1994).

171 *See* Wise, *supra* note 146.

172 *See* Olivier Prost & Song Li Wei, *China's Accession to the WTO: How Will This Benefit European Undertakings?* 24 FORDHAM INT'L L.J. 554, 570 (2000).

173 EC Regulations on Protection against Dumped Imports from Countries Not Members of the European Community: Council Regulation (EC) No 384/96 (OJ L 56, 6.3.1996), as amended by Regulation (EC) No 2331/96 (OJ L 317, 6.12.1996), Regulation (EC) No 905/98 (OJ L 128, 30.4.1998), and Regulation (EC) No 2238/2000 (OJ L 257, 11.10.2000). *See also* EC Decisions on Protection against Imports from Countries Not Members of the European Coal and Steel Community: Commission Decision No 2277/96/ECSC (OJ L 308, 29.11.1996), as amended by Decision No 1000/1999/ECSC (OJ L 122, 15.5.1999), and Decision No 435/2001/ECSC (OJ L 63, 3.3.2001).

EU markets at a price below its "normal value," which is usually the actual sales price on the domestic market of the exporting country. However, if sales on the domestic market are not representative, for instance because the domestic economy is not considered market economy, the "normal value" may be established on other bases. In the case of imports from NEMs such as China, normal value was determined on the basis of: (1) the price or constructed value in a market economy third country; (2) the price from such a third country to other countries, including the Community; or where the first two not possible, (3) any other reasonable basis (including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin).[174]

The EU legislation contains a number of provisions aimed at ensuring a balanced application for all interested parties of the EU's anti-dumping rules, for example, the "community interest test" and the "lesser duty rule."[175] The European Commission (the "Commission") does not have exclusive control over the EU's anti-dumping policy.[176] Responsibility for the enforcement of anti-dumping policy is shared between the EC and the Council of Ministers (the "Council"), which is composed of representatives from the Member States. The Commission carries out the investigations and has authority to impose provisional duties. The Member States acting in the Council has sole responsibility to impose definitive measures and collect provisional duties.[177] At the Council meeting in December 1993, a simple-majority voting system was installed so that eight Member States (out of 15) can block a Commission proposal to impose definitive duties.[178] This is essentially a political solution which is based on the principle that anti-dumping measures must be in the interests of a majority of the Member States, which is termed the "community interest test."

The Commission now conducts a separate in-depth study of Community interest in each anti-dumping investigation. When applying the Community interest test, the Commission ordinarily presumes that the anti-dumping measures are in the Community interest, if dumping, injury

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[174] *Id.* Regulation (EC) No 384/96 Art. 2. A. 7. ("An appropriate market economy third country shall be elected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time limits; where appropriate, a market economy third country which is subject to the same investigation shall be used").

[175] *Id.*

[176] Council Regulation 17/62, 1962 OJ Special Edition 1959-1962, *p.* 87.

[177] Regulation (EC) No 384/96, *supra* note 173.

[178] The previous system required weighted voting under which a qualified majority was needed. *See* Corr, *supra* note 14, at 81.

and causality are all found. If the imposition of anti-dumping measures would injure the complaining Community industry, another Community industry, or another party in the Community substantially more than such measures would benefit the complaining industry, then the imposition of measures is deemed not to be in the best interest of the Community. However, the weight given to the interests of the complaining industry is excessive. In part, this arises from having to apply the two overriding considerations, i.e., that the trade-distorting effects of dumping should be eradicated, and that effective competition be restored. It is in the public interest for the Community to make every effort to ensure that regulatory interventions are proportionate, yet limited to what is strictly necessary to achieve the intended common-policy goal.[179] In addition, the Community interest is not considered a relevant factor during reviews of existing anti-dumping measures.[180] The "lesser duty rule" allows the measures imposed by the EU to be lower than the dumping or subsidy margin, if such a lower duty rate is sufficient to protect the EC industries adequately.[181]

The EU has adopted specific rules for protection against dumped imports from non-EC Member States.[182] For China, the first set of rules were introduced in Regulation (EEC) No 3421/83, which laid down certain detailed rules for the implementation of the Trade Agreement between China and the EU.[183] The Regulation decided that imports from China into the EU be subject to two Regulations: (1) Regulation (EEC) No 1766/82: for "products falling within that Regulation, namely, products liberalized at the Community level; or (2) Regulation (EEC) No 3420/83: for "other products." The second set of rules are laid out in Regulation (EC) No 519/94 which repealed the two above Regulations and adopted a single set of rules with respect to imports originating in China and other transitional economy countries.[184]

Until 1996, the EC applied the "analogue country" approach to all products from China, which was regarded as a "non-market-economy country." However, the expansion of the market economy elements in

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[179] *See* Marc Wellhausen, *The Community Interest Test in Antidumping Proceedings of the European Union*, 16 AM. U. INT'L L. REV. 1027, 1082 (2001).

[180] *Id.*

[181] *Id.*

[182] The first set of rules are in Council Regulation (EC) No 2423/88 on Common Rules for Protection against Dumped or Subsidized Imports from Countries Not Members of the EC; the second set of rules are in Council Regulation (EC) No 3283/94 on Protection against Dumped Imports from Countries Not Members of the EC.

[183] Council Regulation (EEC) No 3421/83 (OJ L 345, 8.12.1983, p. 91) laying down certain detailed rules for the implementation of the Trade Agreement between the Community and China.

[184] *See* Council Regulation (EC) No 519/94 (OJ L 067, 10.3.1994, p. 89) on Common Rules for Imports from Certain Third Countries and Repealing Regulations (EEC) Nos 1765/82, 1766/82 and 3420/83.

China had led the EC to shift its anti-dumping policy toward China to more flexible terms.[185] So finally, three amendments by the Commission declared that market economy status should be granted on a "case by case" basis to Chinese producers (see also the Commission's November 28, 1996 Decision and subsequent amendments regarding the imports from countries not members of the European Coal and Steel Community).[186] Specifically, this individual market economy status will be granted if the producers under investigation can show that "market economy conditions prevail ... in respect of the manufacture and sale of the like product concerned."[187] The showing has to be based on "properly substantiated claims" and "in accordance with certain criteria and procedures."[188] Basically, this means that the following five criteria are met: (1) decisions of applicant firms related to prices, costs, inputs, sales, investments are made in response to market signals and without significant State interference; (2) firms have one clear set of basic accounting records independently audited in line with international accounting standards; (3) the production costs and financial situations of firms are not subject to any significant distortions carried over from the former NEM system; (4) firms are subject to bankruptcy and property laws which guarantee legal certainty and stability, and (5) exchange rate conversions are carried out at the market rate.[189] If the Chinese producers cannot make the requisite showing, the normal value will be determined according to rules applying to NEMs, as outlined in this section, supra.[190] In addition, another recent amendment abolished the exhaustive nature of the list of factors for adjustment for the purpose of the comparison between the normal value and the export price.[191]

However, since the adoption of the new rules, the market economy status has been granted only in a very limited number of cases, mostly foreign-owned Chinese companies or joint ventures.[192] Most early applications failed because the conditions set in the basic Regulation were violated. Particularly, most of the applicant companies did not have a clear set of accounting records, sometimes no accounting records at all, which clearly violates the second criteria set forth in the Amendment. Another important factor is the capacity of a company to sell on the domestic market. When the company is prevented by its government

185 *Id.*; *See also* Prost & Song, *supra* note 172, at 563-64.
186 *Id.*
187 *Id.*
188 *Id.*
189 *Id.*
190 *Id.*
191 *Id.*
192 *Id.*; *See also* Eighteenth Annual Report, *supra* note 22, at *para.* 1.3.2.

from doing so, such a restriction is understood as a clear infringement of the first criteria as set forth in the Amendment, that is, the requirement that decisions by firms regarding, inter alia, sales are made in response to market signals reflecting supply and demand, and without significant state interference in this regard.[193]

Similarly, in addition to these EU laws and regulations, the WTO anti-dumping laws and China's accession documents have also become part of the legal source governing the anti-dumping practices of the EU. Thus, it is important for Chinese companies to study these conditions, to adjust their business practices (such as the opaque accounting practice) and to assert their legitimate rights before various tribunals.

V. ANTI-DUMPING PROVISIONS IN CHINA'S WTO ACCESSION PROTOCOL

In November 1999, the Chinese and U.S. negotiators concluded a bilateral agreement concerning China's accession to the WTO.[194] This agreement actually served as the template of China's bilateral arrangement with other key WTO members. Provisions of the agreement found their ways to the various drafts of China's WTO Accession Protocol, and ultimately the Final Protocol.[195] The section 15 of the Part I of the Final Protocol will be the critical section for Chinese producers involved in anti-dumping disputes in the years to come. The section deals with the basic issue of price determination in anti-dumping cases against China.[196] Since the above section in the Final Protocol is peculiar to China and deviates from the normal WTO rules of price determination, a review of these normal rules of price is helpful to understand the full impact of the section.

Under the normal WTO rules which apply to all WTO members, the importing country shall generally use the price of sales in the domestic market of the exporting country as the comparable price.[197] However, if the sale price in the domestic market of the exporting country does not permit a "proper comparison," the importing country has two alternative methods: either to use a "comparable price of the like product

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[193] *Id.*

[194] *See* Sino-U.S. Accession Agreement, available at <http://www.usa-china.org> (last visited March 1, 2002).

[195] *See* Sean Leonard, THE DRAGON AWAKENS: CHINA'S LONG MARCH TO GENEVA (1999), Appendix 2 Redraft of Protocol, at 160-75; *See also* Final Protocol, *supra* note 28.

[196] Final Protocol, *supra* note 28, Part I, Section 15.

[197] The comparable price is the price for the like product when destined for consumption in the exporting country, in the ordinary course of trade. *See* AD Agreement, *supra* note 60, Art. 2.1., and GATT Art. VI 1(b).

when exported to an appropriate third country, provided that this price is representative," or to use the "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits."[198] These two alternative prices are often higher than the sale price in the domestic market of the exporting country. When the importing country uses one alternative price that is higher than the ordinary domestic price, the exporting country can challenge the calculation and try to establish that the ordinary domestic price should be the proper comparable price.[199] The Final Protocol seems to show that, however, China would not be given the same opportunity given to all other members to argue that its domestic prices are a proper basis for comparison. Instead, China would be bound by some discriminatory rules applying only to it.[200]

Under these China-specific rules, when determining the comparable price of imported Chinese products, the importing country (WTO member) has two options: (1) to choose Chinese prices or costs for the industry under investigation; or (2) to use a methodology that is not based on a strict comparison.[201]

According to the Final Protocol, the first option *shall* be used if the Chinese producers under investigation can "clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product."[202] This "clearly show" standard could substantially raise the burden of proof for the Chinese producers.

The second option *may* be used by the importing country if the Chinese producers cannot make that "clearly" showing.[203] That is, when the producers fail to "clearly show" that market conditions prevail, the importing country may use a different methodology to decide the comparable price. The Final Protocol did not define the "methodology that is not based on a strict comparison." The importing country may try to argue that it means the methodology adopted by the country toward Chinese products before China's WTO accession. However, China can argue that, even the "methodology" is not clearly defined in the Final Protocol, it should only mean the two alternative methods that are allowed under the AD Agreement and the GATT Article VI 1(b).

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198 AD Agreement, *supra* note 60, at Art. 2.2.

199 The standard of review under Art. 17(6) of the AD Agreement is relatively biased toward importing country. *See* Part IV D. 2., *supra*. However, the exporting country is entitled to dispute the importing country's determination of the comparable price.

200 Final Protocol, *supra* note 28, Section 15.

201 *Id.* at Section 15(a).

202 *Id.* at Section 15(a)(i).

203 *Id.* at Section 15(a)(ii).

Otherwise, garden-variety of methodologies not conforming to the two alternative methods would be used and make it more difficult for the Chinese producers to challenge.

There is a further limitation on the use of the second option. That is, its use shall be terminated with respect to all Chinese products, if China has established, pursuant to the "national law of the importing WTO Member," that it is a market economy, or with respect to products of a particular industry or sector, if that market economy conditions prevail in that industry or sector.[204] The "national law" is not defined in the Final Protocol. But the concept is clarified in the Report of the Working Party on the Accession of China (the "Report") to mean not only "laws but also decrees, regulations and administrative rules" of the importing country.[205]

Thus, China has agreed to be treated as a NEM, which basically means that the prices quoted by Chinese producers/exporters may not necessarily reflect the true cost of the relevant product. Therefore, an importing WTO member, when it believes that a product under investigation does not meet market economy conditions, may use a different methodology to determine whether China's behavior constitutes dumping and therefore whether to levy anti-dumping charges.[206] These measures, together with the special product-specific safeguard mechanism described above, have never before applied to any GATT/WTO applicant and could severely constrain China's ability to increase its share of world export markets.

However, some of China's trade partners have begun to recognize the enormous transformation taking place in the Chinese economy. Korea, for example, decided in February 2002 to recognize the domestic Chinese sale price of disposable plastic lighters as the normal price to be used as a reference price in determining whether the imports are dumped in the Korean market.[207] The decision is in line with China's Accession Protocol that accepts the domestic Chinese price as the normal price if the products are sold in China's domestic market based on the market economy system. The Korean Trade Commission indicated that in future anti-dumping rulings, the Commission would apply more and more China's domestic prices.[208] Depending on the reactions from other

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[204] *Id.* at Section 15(d).

[205] *See* Report of the Working Party on the Accession of China, WT/ACC/CHN/49, (1 October 2001), *para.* 149.

[206] *See WTO: Specific WTO Commitments On Goods And Services*, CHINA ECO. REV., December 23, 2001.

[207] *See Korea Lowers Anti-dumping Rates on Chinese Lighters*, THE KOREA HERALD, February 9, 2002.

[208] *Id.*

countries, the Korea case has the potential to become a turning point in anti-dumping investigations against China.

VI. PROSPECT OF CHINA'S WTO ANTI-DUMPING SUIT

China's entry into the WTO late last year means that the various tariff and non-tariff trade barriers against competitive Chinese goods will be removed or reduced significantly in accordance with WTO rules. Therefore, it is expected that importing countries would rely more on anti-dumping (and anti-subsidy measures) than ever before to protect their domestic sectors.[209]

Bringing China into the WTO has been described as attempting to fit a "square peg into a round hole."[210] If so, China's "dumping practice" is obviously a sharp angle of the square peg. It has been predicted that China will need 10 to 15 years to reach market level prices, and that after China's entry, the number of anti-dumping suits against China will greatly increase.[211]

Both China and its trade partners are paying increasing attention to anti-dumping issues. For the partners, they will carefully study the current legal regime including the Final Protocol, scrutinize the imports from China, and try their best to obstruct any surge of Chinese imports. For example, the U.S. Government is spending $22 million to hire trade experts who will monitor China's trade related practices after the WTO accession.[212]

For China, being a new force in international trade and a representative of the developing nations, it should uphold the true spirit of free trade and challenge the protectionism of those aged free-economy preachers. There is no doubt that it will actively participate in the ongoing new round of multilateral trade negotiations initiated at the Doha Ministerial Conference. It will continue to negotiate with foreign governments on their recognition of China as a market economy.[213] To meet the probable rise of anti-dumping suits, China is trying to strengthen

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[209] The temptation to erect barriers may be hard to resist. As Nicholas Lardy of the Brookings Institution put it, "I fear we will see protection, not just in the U.S. and EC, but in some larger developing countries, such as India and Mexico." *See* Guy de Jonquieres, *Enter the Dragon*, FIN. TIMES, December 10, 2001.

[210] *See* Greg Mastel, *China and the World Trade Organization: moving forward without sliding backward*, LAW AND POL'Y IN INT'L BUS., March 22, 2000.

[211] *See Anti-dumping Lawsuits Rankle*, *supra* note 17.

[212] *See Will China Follow WTO Rules?* BUS. WEEK, June 5, 2000, at 42.

[213] *See Firms Helped to Respond to Foreign Dumping Charges*, CHINA DAILY, April 12, 2001.

its anti-dumping capability and train lawyers, economists and accountants to challenge, investigate and better fight the suits.[214]

According to the MOFTEC, although 60 to 70 per cent of Chinese enterprises have responded to foreign anti-dumping investigations, and 36 per cent enterprises won their cases, companies are still not eager to react for the lack of financial and legal resources. Many Chinese companies have lost their cases in the past because surrogate countries were chosen as substitutes in computing the normal values of their exports.[215] Usually the third country to be used is the one proposed by the injured country, so the Chinese enterprises had only ten days to reply and most of them find out only after a week.[216]

But it has become clear to Chinese enterprises that whether to participate will have great impact on the final judgment. In April 2000, the DOC decided to impose an average import taxation rate of 14.88 per cent for the ten Chinese apple juice producers who participated in the lawsuit, but to impose a much higher 51.74 per cent to the remaining Chinese producers who did not participate in the suit.[217] In another case, the China Chamber of Commerce for Import & Export of Metals, Minerals & Chemicals organized the enterprises concerned to answer for the EU anti-dumping action to China's granite export in 2001. On account of China's rapid and active responses and tenacious efforts, the EC side was finally forced to withdraw the action.[218]

In addition, as reflected in recent speeches by many of Chinese officers, China intends defend its rights in the WTO and would not hesitate to use the WTO DSS to challenge any violation by other members. There are, of course, many unpredictable and complicated political mathematics involved in a country's decision whether to bring a complaint to the WTO DSS, as exhibited in the recent trade dispute between China and Japan. But China's position is clearly shown by its first complaint to the WTO filed on March 15, 2002, regarding the 30 per cent tariffs imposed by President Bush on imported steel.[219]

Therefore, there is real probability that one of China's first WTO cases, or maybe its first case, would be related to anti-dumping issues. Particularly, the tension between Chinese exporters (target of the largest

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[214] *See Anti-dumping Lawsuits Rankle, supra* note 17.

[215] *See Firms Helped to Respond to Foreign Dumping Charges, supra* note 213.

[216] *See Anti-dumping Lawsuits Rankle, supra* note 17.

[217] *See* Ying Z. White & Katherine M. Jones, *The Sun Sets on US Antidumping Orders*, THE CHINESE BUS. REV., May-June 2000, *pp.* 34-39.

[218] *See China Wins Lawsuit of EU Granite Anti-dumping Case*, CHINA CUSTOMS TIME, June 25, 2001.

[219] *See U.S. Steel Tariffs Prompt China to Lodge Complaint with WTO*, THE WALL ST. JR., March 15, 2002.

number of anti-dumping suits) and foreign national authorities have been building for years, as we discussed in Part II.

A. China's Most Likely Opponent

If so, who would be the most likely candidate involved in the case? In light of the history, the U.S. is the more frequent party involved in the anti-dumping cases. It is probably one of the leading members of the WTO and has a large trade deficit with China. Moreover, it is important to note that the WTO dispute settlement process is not automatic. Experience in bringing human rights resolutions against China in the United Nations has demonstrated that the U.S. is willing to use its influence. Given this reality and the likely scope of the problem, the U.S. is the most likely opponent under the WTO DSS for virtually any country.

On the other hand, if China would want to insist on its own viewpoint on the anti-dumping matters, and would attack on the anti-dumping practices which are considered unfair by China, it probably has no choice but to confront the U.S. Thus it will not be surprising if, in the future, Beijing takes recourse in the WTO DSS and try to block the imposition of punitive measures on its imports.[220]

The U.S. certainly hopes that its exports to China will grow faster than its imports from it, even not fast enough to make up the existing bilateral trade deficit. And the truly big pay-off is expected to be in services, such as banking, insurance, telecommunications and distributions. However, the politics of trade are not that simple. As U.S. steel-makers and EC farmers have demonstrated, even economically small sectors can sometimes wield strong influence when it comes to seeking protection.

B. Consultation Stage

Assume China's AD complaints are actually registered at the WTO, what would be their development under the current WTO DSS? First of all, the history of the WTO DSS seems to suggest that the case is very likely to end up in the consultation stage, like the majority of the cases bought to the WTO in the past seven years.

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[220] On the other hand, China has already started developing its own anti-dumping measures, which would cause other countries to challenge its practice. *See generally* Jianming Shen, *A Critical Analysis of China's First Regulation on Foreign Dumping and Subsidies and Its Consistency with WTO Agreements*, 15 BERK. J. INT'L LAW 295 (1997).

Settlement during the consultation stage is even more likely for at least three other reasons. First, a full fledge confrontation between the parties is likely something that both would try to avoid. Second and more importantly, the DSU requires that other WTO Members "give special attention to the particular problems and interest of developing country Members" during consultations over a dispute, prior to the appointment of a DSB panel.[221] Although Article 15 of the AD Agreement is drafted in an extremely vague and laconic fashion,[222] at least, the normal DSU time limits for consultation can be extended by developing country Members.[223] China is certainly free to employ any of those to work out a deal with the U.S. Finally, the use of the special rules specifically designed for China appears at odds with a global trading system predicated on MFN status enjoyed by all WTO members. The dissonance, if overly emphasized, would undermine the U.S. leadership in the WTO and paint a parochial, self-interested, and quasi-protectionist picture.[224]

C. Panel Stage

Even the dispute fails to stop at the consultation stage, and a DSB Panel is finally established, according to the DSU, the Panel must accord to a developing country member "sufficient time" within which to "prepare and present its argumentation."[225] The member may request assistance from the WTO Secretariat,[226] and request at least one panel member be from a developing country.[227]

During the panel stage, it can be expected that the parties will fight for legal standards, as discussed in Part IV, and will wrangle on China's accession agreements, as discussed in Part V. It is noted that, under the current WTO Panel and Appellate Body practices, there has been a probable trend that WTO panels may examine more rigorously than before the anti-dumping decisions by national authorities.

First, on the burden of proof, it seems that at least some WTO panels are sympathetic to the "exception" argument, and would apply a loose standard on the showing of "*prima facie*" case by the complaining party.

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221 DSU, *supra* note 2, Art. 4.10.

222 *See* Admantopoulos & de Notaris, *supra* note 75, at 59-62; AD Agreement, *supra* note 60, Art. 15.

223 *Id.*, Art. 12.10.

224 *See* Wise, *supra* note 146.

225 AD Agreement, *supra* note 60, Art. 15.

226 *Id.*, Art. 27.2.

227 *Id.*, Art. 8.10.

Second, on the standard of review, the Uruguay Round agreements and the WTO cases to date seem to suggest that the WTO Panels and Appellate Body are careful about interpreting the standard of review set out in Article 17.6, and suspicious of the version of interpretation favored by the U.S. The Panels have been using more rigorous standards, and have been more willing to scrutinize the decisions of national authorities.

Third, on causation, the Appellate Body, in the U.S.-Japan Steel case, plainly rejected the Salmon analysis long favored by the U.S. under which the ITC was not obligated under the AD Agreement to demonstrate that it was the dumping rather than other factors that caused the material injury to the domestic industries.[228] Moreover, as exemplified by the India Linen case, the Panels tend to look closely at every possible AD violation of the party imposing the anti-dumping duty. The Panels would at least examine whether the investing authorities have evaluated each of the fifteen factors listed in Article 3.4 of the AD Agreement, and examine the impact of the dumped imports on the domestic industry concerned.[229]

Overall, as shown by the WTO cases, the edge that the U.S. gained during the Uruguay Round may have already been eviscerated by the WTO dispute settlement process. Panels are paying less and less deference to the investigating authorities than the U.S. would like to see. If this trend is corroborated by future decisions, it would certainly encourage China to initiate the WTO DSS procedure to assert its legitimate interest.

Finally, both the U.S. and China would surely fight over the meaning of the provisions in the Final Protocol. It is foreseeable that the U.S. would emphasize the continuance of its anti-dumping practices since the GATT days, particularly in light of the 15-year grace period. On the other hand, China will emphasize its development toward the market economy, and try to exploit the benefit of "bubble of capitalism" to its fullest extent.

D. Enforcement

After the panel report gives the word, there remain the issues of enforcement. One major issue, which has been of concern to the members, is what recourses are available, in case the final approved decisions cannot be enforced. Fortunately, there has been no real case

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228 *See supra* Part IV, C. 3.

229 *Id.*

where such a situation has arisen so far, even though there are some close ones, particularly among disputes between the EC and U.S.

The current DSU provides for two possible procedural recourses if the losing party fails to come into full compliance, but fails to specify the relationship between those two procedures.

The first is set forth in DSU Article 21.5, which provides that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel."[230]

The second is set forth in Article 22, which stipulates the consequences if the losing party has neither implemented the WTO ruling within the compliance period nor negotiated mutually acceptable compensation within twenty days after the "reasonable period" expires.[231] Article 22.6 provides that, under those circumstances, "the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period," unless there is a consensus otherwise or the losing party refers the requested suspension amount to arbitration.[232] How the DSU drafters intended that timetable to be reconciled with the timetable of a potentially protracted compliance review pursuant to Article 21.5 is not clarified in the text.

One important enforcement issue is the bite of Article 11.1, which imposes a clear, substantive obligation upon all members. The Article provides that "an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." In the Korea DRAMS case, the Panel stated that Article 11.1 contains a general necessity requirement, whereby anti-dumping duties "shall remain in force only as long as and to the extent necessary" to counteract injurious dumping, and that authorities shall "review the need for the continued imposition of the duty" and to "examine whether the continued imposition of the duty is necessary to offset dumping."[233]

Finally, it can be said that unilateral trade sanction is a double-edge saw that may hurt domestic consumers and high-end producers. The threat of an imminent trade war with major trade partners is probably not economically justifiable under the current international trade environment.

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230 DSU, *supra* note 2, Art. 21.5.

231 *Id.*, Art. 22.

232 *Id.*

233 Korea DRAMS, *supra* note 90.

The WTO DSU has become more and more indispensable for the resolution of international trade disputes. China's accession is to have huge impact, particularly in view of the fact that its accession process (including agreements) will serve as a template for the accession of some 14 transforming economies (including Russia) whose applications are pending. Likewise, the development under the DSU after China's accession will be carefully look at by both members and non-members of the WTO.

As some scholars correctly pointed out, we must be aware that MFN is the backbone of the WTO and China's accession should be an opportunity to bolster rather than to derogate the MFN principle.[234] China's accession requires significant adjustments on both China and other WTO members. For those WTO members who had previously limited Chinese exports, the adjustments required to align their practices with the basic WTO principles may be very substantial. However, the temptation is large for these members to seek pragmatic solutions and to defer the necessary adjustments. At this critical junction of principles versus pragmatism, resort to pragmatism should be prevented for the benefit of a long term stable international economic order.[235]

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[234] *See* Brett Williams, *Global Trade Issues in the New Millennium: The Influence and Lack of Influence of Principles in the Negotiation for China's Accession to the World Trade Organization*, 33 GEO. WASH. INT'L L. REV. 791, 811-12 (2001) (Author warned that the deviation of these China-specific rules from the MFN clause might make it harder to gain the support of China in defending the fundamental pillar of the WTO system).

[235] *Id.* at 845-46.