WESTERN COUNTRIES' ANTIDUMPING LAWS AGAINST
NONMARKET ECONOMY COUNTRIES & CHINA'S REACTIONS

by

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ABSTRACT

Antidumping is one of the central issues of contemporary international trade. The use of antidumping laws to restrict competition from other countries' imports has increased tremendously in recent years, which signifies an alarming surge of protectionism in the world trade regime. It is evident that four Western powers, the United States, Canada, Australia and the European Union, have most actively used their antidumping laws as a means of protecting their domestic industries against the dangers (real or just perceived) of foreign dumping goods.

As regards the targets of Western countries' antidumping actions, there appeared an interesting trend during the past decade. Namely, more and more imports from non-market economy countries (NMEs) have been sued for dumping in Western countries. On the one hand, this tremendous expansion of antidumping proceedings against NMEs implies that some NMEs' foreign trade regimes are still not in line with the international practice. On the other hand, it suggests the increased competitiveness of NMEs' industries in the international market, which is driven by their comparative advantages in the world market and can be expected to continue in the future. Under these circumstances, to better protect powerful domestic interest groups, Western countries choose to apply their antidumping rules in a manner different from those applicable to market economies, especially when they calculate the normal value of the imports from NMEs. It is no exaggeration to say that in the context of antidumping, NMEs have long been facing a powerful circumstance that works against their interests.

My thesis therefore focuses on analyzing Western countries' antidumping laws and administrative practice against the imports from the NMEs, mainly from the United States, Canada and the European Union perspectives. It brings forward such questions as: what exactly is the economic rationale for antidumping? Do antidumping laws have trade-inhibiting effects that have become a roadblock to international trade? Is that fair for the Western countries' antidumping laws to divide the world into market/nonmarket economy countries and essentially only treat prices within the former as legitimate? Whether Western antidumping laws are informed by the development of the NMEs, if not, then how should they be modified so as to better accommodate the emerging transitional NMEs? Drawing on international relations, legal, and neoclassical free trade theory, the thesis critiques the protectionist bias of Western countries' antidumping laws against the NMEs in transition, pointing out the inhibiting effects of Western countries' special NME antidumping rules to the NMEs' export-led growth and consequently to the development of the global economy.

In short, the thesis on the one hand suggests that with the transition of some NMEs into market-oriented economy countries, it is time for Western countries to re-evaluate their antidumping laws so as to avoid creating a roadblock to the development of international trade. On the other hand, it also suggests, from both China's national development direction and foreign trade companies' export strategy perspectives, some
alternatives to China’s future export-led trade policy in the context of reactions to Western countries’ antidumping practice.
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INTRODUCTION

Since the promulgation of the first Antidumping law in Canada in 1904, antidumping has become one of the central issues of contemporary international trade. Especially in recent years, the use of antidumping laws to restrict competition from other countries' imports has increased tremendously, which signifies an alarming surge of protectionism in the world trade regime. Over thirty countries now have adopted antidumping laws (just counting the European Union as one country), and twelve more are reportedly preparing them.1 Among those countries, it is the four Western powers (the United States, Canada, Australia and the European Union) that most actively use their antidumping laws as a means of protecting their domestic industries against the dangers (real or just perceived) of foreign dumping goods. During the 1980s, at least 1,456 new antidumping investigations were initiated by the signatories of the Antidumping Code.2 Of that number, 421 cases were initiated by Australia, 395 by the United States, 294 by Canada, and 271 by the European Communities (EC).3 4

Western legal scholars have been interested in mainly two issues as regards antidumping. One is the problems facing Western countries’ legislative body,

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2 US General Accounting Office, *Use of the GATT Antidumping Code*, NSIAD-90-238FS, at 4 (1990). This number is actually understated because several countries did not report cases initiated against non-signatory countries. *Id.* at note (a).
3 *Id.*
4 EC has been replaced by the European Union (EU).
administering authority and litigants alike. For example, how to implement the Uruguay Round Antidumping Code, how to make antidumping proceedings more efficient, etc.. The other is the impact of antidumping actions on the international trade and domestic industries. In other words, what exactly is the economic rationale for antidumping, or rather, whether antidumping action has an economic rationale? Do antidumping laws have trade-inhibiting effects that have become a roadblock to international trade? Do antidumping actions provide more protection or less for domestic industries?

As regards the targets of the antidumping actions, there appeared an interesting trend during the past decade. Namely, more and more antidumping lawsuits have been brought against imports from non-market economy countries (NMEs). To take China as an example, recent GATT data suggests that China, as one of the NMEs, has emerged as the leading target of antidumping in the United States. Additionally, according to the Reports of European Community (now, European Union) between 1 January 1980 and 31 December 1990, of the 539 antidumping determinations, 247 involved imports from non-market economy countries. Until 31 December 1991, a total of 47 antidumping proceedings had been initiated against China's exports (see Appendix 1). More impressive is the fact that, of those forty-seven proceedings, twenty-three determinations were made between 1988 and 1991. A quite similar exponential increase in antidumping proceedings against China's exports has also taken place in the United States - eleven of a total of twenty-seven U.S. proceedings in only two years (1989--1991).

\footnote{See infra notes 17-20 and accompanying text.}

tremendous expansion of antidumping proceedings against NMEs implies that some NMEs’ foreign trade regimes are still not in line with the international practice. On the other hand, it suggests the increased competitiveness of NMEs’ industries in the international market, which is driven by their comparative advantages in the world market and can be expected to continue in the future.

Under these circumstances, to better protect powerful domestic interest groups, Western countries choose to apply their antidumping rules in a manner different from those applicable to market economies, especially when they calculate the normal value of the imports from NMEs. It is no exaggeration to say that in the context of antidumping, NMEs have long been facing a powerful circumstance that works against their interests. My thesis therefore focuses on analysing Western countries’ antidumping laws and administrative practice against the imports from NMEs, mainly from the United States, Canada and the European Union perspectives.

A. DEFINITIONS

a. What are Dumping & Antidumping Action?

As the subject of economic analysis, dumping is broadly defined as a “type of price differentiation in the form of price discrimination.” The core concept of dumping is

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7 More precisely, price discriminations are “the sale (or purchase) of different units of a good or service at price differentials not directly corresponding to differences in supply cost.” F. M. Scherer, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE, at 315 (Chicago: Rand McNally, 1980). See also,
expressed in GATT Article VI as the sale of products for export at a price less than "normal value." The preferred "normal value" is based on sales prices in the home market. However, where sales in the home market are inadequate, export prices are compared either to sales to third countries, or to constructed value (based on cost). The former (export sales price below home market or third country market price) signifies price discrimination while the latter (export sales price below cost) signifies loss-making sales. In other words,

<table>
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<th>Normal</th>
<th>minus</th>
<th>equals</th>
<th>Dumping</th>
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8 See General Agreement on Tariff and Trade, Article VI, Oct. 30, 1947, 61 Stat. (5) (6), TIAS No. 1700, 55 UNTS 194 (1948) as amended and Vol. IV BISD. See also, Agreement on the Implementation of Article VI of the GATT (the "1979 Antidumping Code"), Article 2.31 UST 4919, TIAS No. 9650, GATT, BISD 26 Supp. 171 (1980). For the purpose of Article VI of the GATT, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Id.

9 See infra note 14.

10 Whether sales below cost can be disregarded for the purpose of determining normal value still remains an open question under the GATT Antidumping Code, but some Code contracting parties insist that it is appropriate to regard sales below per unit average costs as "not in the ordinary course of trade." See Phedon Nicolaides, The Competition Effects of Dumping, 24 J. WORLD TRADE, at 116 (1990).

11 Sales-below-cost dumping is beyond the scope of this thesis. For a detailed discussion, see Nicolaides, id. The sales of products at a loss over the long term may be viewed as undesirable and irrational. In the short term, however, so long as marginal revenues are exceeding marginal cost, it is accepted as being economically rational.
For instance, an enterprise sells its products in a foreign country for $20 a piece, and the same products in the home market for $30 a piece. The price difference is deemed the "margin of dumping," which is $10 for a piece. Whenever such dumping "causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry," the importing country has the right to "levy on any dumped product an antidumping duty not greater in amount than the margin of dumping in respect of such product" so as to "offset or prevent such dumping."12

As defined this way, the concept of dumping seems relatively simple. However, as applied in trade practice, it is anything but simple. Each term of the equation involves very complicated and technical calculations. For example, a threshold question is how is the normal value determined? How is home market sales price calculated? What if the products are not sold in the home market, or too few are sold domestically to use as the basis of a valid home market average price?13 If we adopt other measures, such as the "constructed price" approach, which is composed of an evaluation of cost plus reasonable profit, matters can become extremely complex. For instance, the foreign country may have a quite different accounting system. The firm involved may produce many products at the same time or operate as an international company which produces different parts of

12 See supra note 9.
13 Uruguay Round Antidumping Agreement Article 2:2 permits the calculation of normal value on the basis of sales to third countries, or on the basis of constructed value, if the volume of home market sales is so low that it does not permit a proper comparison. A footnote to Article 2:2 provides that home market sales normally shall be considered adequate if they constitute 5 percent or more of the sales of the product under consideration to the importing country.
a product in different countries, such that the costs will have to be allocated. The home
country may be an NME at a transitional stage. While some of their products do not
represent full recovery of cost plus a reasonable profit, some other products really do.
Thus the problem of which products to be excluded from calculation arises. It is no
exaggeration to say that with all the Western countries, normal value determination is a
key issue, if not the core issue in their antidumping actions against the NMEs.

Antidumping action refers to the imposition of an additional duty on dumped
import, amounting to the equivalent of the price discrimination. According to the GATT
Uruguay Round Antidumping Agreement, two conditions have to be met before
antidumping duties may be imposed:

(a) the existence of dumping; and

(b) that material injury to the domestic industry is caused as a result.

b. Definition for Non-Market Economy Country (NME)

There is no exact definition for NME. Section 1316 of the United States Omnibus
Trade and Competitiveness Act of 1988, defines an NME for the first time as any
country that "does not operate on market principles of cost or pricing structures, so that

\[\text{Reference numbers and footnotes.}\]

14 Agreement on Implementation of Article VI of the GATT 1994 Final Act Embodying the Results of the
Uruguay Round of Multilateral Trade Negotiations (Uruguay Round Antidumping Agreement), was
formally completed on April 15, 1994, with the signing of the Marrakesh Declaration. See 145 GATT
Doc. MTN/FA, 15 April, 1994. The Uruguay Round agreements establish a new World Trade
Organization (WTO) to replace the GATT effective January 1, 1995.
15 Id.
sales of merchandise in such country do not reflect the fair value of the merchandise.\textsuperscript{17} Thus the comparison between the US price (which reflects market forces) and the NME price (which reflects non-market forces) is considered of little value.\textsuperscript{18} In recognition of the ambiguity of this definition, the Omnibus Act 1988 requires the Commerce Department, in characterising whether a country has a non-market economy, to take into account:

a) currency convertibility;

b) the extent to which wage rates are set by free bargaining between labour and management;

c) the extent to which joint ventures and foreign investment are permitted; and

d) the extent of government control over allocation of resources and over price and output decisions.\textsuperscript{19}

The subjectivity in Western countries' NME dumping determination definitely presents a difficult dilemma for NME producers whose products are the subject of an antidumping investigation. That is to say, when NME dumping determinations take place, NMEs' producers cannot predict their exposure to dumping charges, nor can they modify their practices to avoid such charges. Substantial debate has therefore long surrounded the special application of Western countries' antidumping laws to imports from NMEs,


\textsuperscript{19} Id. While some of the criteria have previously been utilised by the Department of Commerce in characterising countries as NMEs, the references to wage bargaining and foreign investment are new.
from which these questions arise: is it fair to use a special price comparison approach in calculating NMEs' home market prices? How can NMEs engage in dumping when the "dumping" determination is made without regard to the home market price? Does it actually inflate the dumping margin? What is the best methodology to apply in normal value determination? What makes matters more complicated is that, some NMEs are currently in transition toward market-oriented economies. They are adopting more and more market principles in their trade regimes. A question we may ask now is whether Western antidumping laws are informed by the development of the NMEs, if not, then how should they be modified so as to better accommodate the emerging transitional NMEs. This is a serious question for both Western legislatures and legal scholars. It is also important to meet the needs of NMEs, particularly China, by helping them adjust their foreign trade policies accordingly so as to better avoid antidumping suits or to take appropriate measures against them.

**B. METHODOLOGIES**

This thesis will focus on Western countries' antidumping laws against NMEs, particularly those actions that have been brought against China's exports. It suggest that, with the transition of some NMEs into market-oriented economy countries, it is time for Western countries to re-evaluate their antidumping laws so as to avoid creating a roadblock to the development of international trade. In order to clarify my opinion and reach certain conclusions, I plan to study the issue from the following perspectives:
a. Economic Perspective: Neo-classical Free Trade Theory

Economists have long associated dumping with international price discrimination arising from market power, separate national markets, and differential price responsiveness among markets.\(^{20}\) Thus, antidumping actions are aimed to offset the difference between sales prices.\(^{21}\) Taking this approach, economists presume that non-predatory dumping is basically harmless to the importing country, while real predatory dumping rarely occurs in the international trade regime.\(^{22}\) One of the main reasons is simply that predatory pricing in any market is quite difficult. To succeed, it requires not only that the predator be able to drive its competitors from the market, it must be able to keep them out as well by keeping the price fairly low, which would make the benefit to the monopolist fairly small.\(^{23}\) Recently, there appears a new economic theory about dumping. It defines dumping as sales below cost, which signifies kind of loss-making sales. So far, there has been no consensus yet as to why such behaviour occurs.\(^{24}\) In the context of economic perspective, the following questions will be discussed in this thesis: What is the welfare effects of dumping to consumers as well as to the economy of the importing countries?\(^{25}\) What

\(^{24}\) Id. at 24.
\(^{25}\) It is believed that dumping is generally beneficial to the importing country in that its distributive effects are favorable and its impact on the domestic economy is, except in the case of predatory discrimination, pro-competitive. See Dale, *supra* note 23, at 40.
exactly is the economic rationale for antidumping action? Whether the existing antidumping laws are in conformity with the economic rationale for an optimal allocation of resources with and between the trading countries? What are the possible economic approaches that could be used in assessing “normal value” related to NME dumping?

The neo-classical free trade theory posits that business firms, consumers, and workers all benefit most when states subject themselves to the competitive advantage. On the one hand, international trade is useful to provide jobs, wealth, and economic stability for most states, and states that do not prosper economically fall behind in the race for international power. On the other hand, to gain wealth through international trade, states must lower economic barriers and other protective barriers that are necessary.

b. Legal Perspective and International Relations Theory of Realism

A legal approach is of course indispensable to the study of antidumping. This thesis will mainly analyse the antidumping legislation from the national antidumping laws of US, Canada and EC, and also from the approach taken under Article VI of the GATT. It will show that the welfare implications and pro-competitive effects of dumping are not reflected in Western countries’ laws relating to international price discrimination.

Under the international relations theory of realism, nations always protect their vital interests against possible aggression from power-seeking rivals. Antidumping policy
and its application provide a fertile terrain for those who lobby for the protection of special interests and those who have the power to provide - or deny - it.\textsuperscript{26} International trade systems assume that a state will comply with international trade regulations only when it is in the state's immediate self-interest to do so. Thus, the international trade systems actually leave the nations legally free to exercise discretion based on their national interests. Although the GATT legal system has many points in common with domestic models, the thing which sets it apart from others is the overriding concern for "flexibility" - the insistence that the law's coercive pressures be applied in a controlled fashion which allows room for manoeuvre at every state of the process. Additionally, under the realist theory, trade also means that nations must cooperate in ways that expose them to potential economic security threats. This thesis will conclude that, in the context of political economics, antidumping laws are essentially protectionist in nature.

c. Other Perspectives

Trade and development have always been linked. Today, the issue of trade and development has taken on new importance as the world economy grows increasingly and intensely interdependent and therefore mutually vulnerable.\textsuperscript{27} Western policy-makers must be aware of the needs and concerns of the NMEs and other developing countries. Though in the past, these countries have challenged the legitimacy of the international

trade order dominated by Western developed countries, only in recent years, especially with the successful conclusion of the Uruguay Round of multilateral trade negotiations, are they being brought into the mainstream of international trade to a greater extent than ever before. This thesis therefore will also study the antidumping issue from the dependency theory and the New International Economic Order (NIEO) approaches. It will analyse the relationship between protectionist bias in Western countries’ antidumping laws and growth prospects in the NMEs, giving special attention to moral issues of global equity and justice among nations. The thesis will conclude that the failure of the present international trade regime to protect the legitimate interests of the NMEs and growing protectionism in Western countries’ foreign trade policies, especially their special antidumping rules against NMEs’ products, have threatened current efforts by the NMEs to restructure their economies and achieve their growth targets.

Since Western countries’ antidumping laws were not developed from a vacuum, the historical background and development of Western countries’ antidumping laws will also be discussed first. The comparative method will then be used to examine those national antidumping legislation and GATT antidumping provisions. By using the historical and comparative methods, the study will eventually centre around those vital points of Western countries’ antidumping laws as concerned with the aim in view, and points of difference as well as similarity will come more and more to the fore.

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C. STRUCTURE

The thesis is divided into six chapters: Chapter One outlines the background and development of Western countries' antidumping laws, in particular, their rules concerning NME dumping. Chapter Two examines Western countries' methods of determining normal value of products from NMEs, pointing out that the free market ideology underlying the Western countries' antidumping laws is actually in conflict with the ideology of development in those "peripheral" countries. Chapter Three critiques the protectionist bias of Western countries' antidumping laws, in particular, of those special rules against NME dumping. This chapter seeks to analyse the antidumping issue from the dependency and the New International Economic Order (NIEO) perspectives, pointing out the inhibiting effects of Western countries' special NME antidumping rules to the NMEs' export-led growth and consequently to the development of the global economy. Chapter Four explores the challenges for Western antidumping regime brought forward by the transitional nature of NMEs. It mainly evaluates the non-applicability of the current Western antidumping laws to the NMEs in transition, as well as possible alternatives that accommodate such transition. This chapter also discusses the attempts by the United States to reconcile protectionism of its current antidumping laws against NMEs and its free trade commitment to the international society. It discusses NME dumping in general, and China--U.S. antidumping practice in particular. Chapter Five analyses China's foreign trade system. It then suggests, from both China's national development direction and
foreign trade companies' export strategy perspectives, some alternatives to China’s future export-led trade policy in the context of reactions to Western countries' antidumping practice. Finally, Chapter Six concludes that Western countries' antidumping is a bad policy, whether viewed from economic, social, political economy, utilitarian or rights perspectives. This chapter also recommends that Western antidumping laws should be re-evaluated to accommodate NMEs in transition.
Chapter One

WESTERN COUNTRIES' ANTIDUMPING LAWS AGAINST NMES:
BACKGROUND AND DEVELOPMENT

A. Western Antidumping Legislation: A Brief History and Overview

Legislation providing for controlling dumping behaviour in international trade was not enacted until the turn of this century. Prior to that, countries just acted against dumping through the use of general barriers and countervailing duties. In 1904, Canada became the first country in the world to enact antidumping legislation as an alternative to permanently raising tariffs. Soon after that, New Zealand followed in 1905 and Australia in 1906. According to Jacob Viner's theory, smaller countries were the first to introduce antidumping measures to their trade instruments, because they were afraid of the perceived predatory business behaviour of some big companies in the United States. However, just before World War I, the United States also promulgated antidumping laws in 1916 so as to protect itself from the perceived threat of predatory pricing by industrial cartels in Germany. In 1947, twenty-three countries signed the General Agreement on Tariffs and Trade (GATT). Given the long history of national and international concern with "dumping," it is not surprising that a special provision - GATT Article VI was made

29 See generally, Viner, supra note 22.
30 Till 1969, Canadian antidumping legislation had been comprised in section 6 of the Customs Tariff Act.
31 See generally, Viner, supra note 22.
for cases of dumping. Thus, the first international legal framework for antidumping actions had been established.\textsuperscript{32}

In the 1967 Kennedy Round, GATT Article VI rules were strengthened by the adoption of the Antidumping Code 1967, which set forth a series of procedural and substantive rules regarding the application of antidumping duties, partly due to the desire to limit antidumping duty practices and governmental procedures which were damaging international trade.\textsuperscript{33} During the 1973-1979 Tokyo Round negotiation, the GATT parties developed a new Code dealing with antidumping issues, which replaced the 1967 Antidumping Code in 1979.\textsuperscript{34} To comply with Article VI of GATT and the 1979 Tokyo Round Antidumping Code, most GATT contracting parties have more or less revised their domestic antidumping laws. Moreover, in 1994, the 1979 Antidumping Code was replaced again by the Uruguay Round Antidumping Agreement,\textsuperscript{35} which made some key changes to the 1979 Code by providing greater procedural transparency in antidumping actions. For example, Article 3.3 of the 1994 Uruguay Round Antidumping Agreement for the first time expressly provides that if more than one country is subjected to an

\textsuperscript{34} The 1979 Code had a number of significant alterations. First, the injury test was arguably weakened since the causation standard was reduced. Article 3 of the 1967 Code talked of the dumped imports being "demonstrably the principal cause of material injury" whereas the 1979 Code did not give such a provision, merely stating in Article 3(4) that the dumped imports through the effects of dumping are causing the injury. Second, the criteria for assessing what amounted to injurious effects on a domestic industry were made more explicit. Third, the rules on price undertakings were expanded. Fourth a provision on dispute-settlement was added (Article 15), Fifth, signatories were obligated under Article 16(6) (b) to notify any changes in its laws or regulation to the Committee on Antidumping Practices. Finally, there was a new Article (Article 13) inserted concerning developing countries.
\textsuperscript{35} Supra note 15.
antidumping investigation of a product, authorities may cumulatively assess the effects of the imports in question from the countries involved.\textsuperscript{36} Article 5.4 of the Antidumping Agreement specifies who is qualified to file an antidumping petition. It provides that such petitions must be submitted on behalf of an industry, and no investigation will be initiated if those supporting the complaint constitute less than 25 percent of the entire domestic industry.\textsuperscript{37} Article 5.8 establishes \textit{De Minimis} margins, i.e., new thresholds in terms of both size of the dumping margin and the volume of imports that must be met in order for there to be an affirmative antidumping determination. It requires that an antidumping case be immediately terminated where the authorities determine that the margin of dumping is \textit{de minimis}, which is defined as a margin of less than two percent of the export price. This Article also provides that the investigation should also be terminated if the volume of dumped imports from a particular country is less than three percent of the importing country’s total imports of a like product. However, the importing country need not terminate such a case if countries charged with dumping collectively account for more than seven percent of the importing country’s total imports of the like product, even though such countries individually account for less than three percent.\textsuperscript{38} Article 11.2 provides for the first time the expiration time limit of antidumping orders, which is five years after its imposition, or five years after the date of the most recent sunset review,\textsuperscript{39} unless national authorities determine that “that expiry of the duties would be likely to lead to the continuation of recurrence of dumping and injury.”\textsuperscript{40} All the above revisions of the

\textsuperscript{36} See id. Art. 3.3.
\textsuperscript{37} See id. Art. 5.4.
\textsuperscript{38} See id. Art. 5.8 and Art. 3.3.
\textsuperscript{39} See id. Art. 11.2.
\textsuperscript{40} See id. Art. 11.3.
1979 Antidumping Code will subsequently lead to certain changes to national antidumping legislation.

At present, the international commitments concerning dumping are mainly set forth in the GATT Article VI and the 1994 Uruguay Round Antidumping Agreement. The basic goal of the GATT is to promote international trade by eliminating or reducing barriers to such trade. In the context of antidumping, the Article VI just provides that dumping,

"... is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry." (emphasis added)

That is to say, "material injury" has been put as a prerequisite for contracting parties to impose antidumping duties. The wording of the GATT Article VI is far short of a binding obligation to prevent dumping. As a matter of fact, although the GATT Article VI does not encourage contracting parties to dump their products into other countries' markets, it does not require contracting parties to refrain from dumping either. The GATT firmly established the international acceptance of the principle that injurious

41 The preface to the GATT states, in pertinent part, that the contracting parties are, “desirous of...entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”
42 GATT Article VI(1), supra note 9.
43 Material injury in the United States is defined as “harm which is not inconsequential, immaterial or unimportant.” Section 771 (7) (A), Tarriff Act of 1930.
44 This has sometimes been overlooked or misrepresented by politicians of contracting parties, who takes it for granted that dumping is anti-free trade and is illegal under the GATT. Actually, as regards dumping issue, it is in contrast with the international obligations concerning subsidies and countervailing duties, which require some commitment against certain types of uses of subsidies by member states.
dumping was to be condemned but that *non-injurious dumping was not to be prohibited.* This is provided in a special way, namely, by setting obligations constraining the use of antidumping duty by contracting parties. GATT Article VI requires contracting parties to include detailed rules about the following issues in their national antidumping legislation:

a) what facts can constitute "dumping";

b) the "injury requirement"; and

c) procedures under which governments determine and apply these antidumping duties.\(^{45}\)

These rules outline the basic overall pattern of antidumping laws. Namely, if, and only if two conditions are met - dumping plus material injury, the importing country may apply antidumping duties.

Despite the nonprohibition of dumping underlying the GATT, there nonetheless is an antidumping provision in the GATT Article VI. Antidumping duties are justified by the rationale that although dumping itself may not be violative of the GATT, there should be defence mechanisms available to countries that find their domestic industries harmed, not by competition based on superior efficiency, but by attempts to "injure or destroy competition." Obviously, the GATT Article VI was trying to create and maintain a balanced framework which provides governments with the ability to defend domestic

industries against unfair trade practices while not falling into the protectionist trap. However, this balance just deceives itself as well as others, because in the course of implementing antidumping laws, the defensive measure cannot help going too far, it may itself become a protectionist mechanism.

Article VI reflects a tension between GATT aims - trade without discrimination - and the interests of contracting parties. To solve the tension, GATT chooses to condemn certain dumping without prohibiting it. On the one hand, the drafters of GATT wanted to give countries the freedom to use their existing legislation to counter dumping, because dumping is regarded as something undermining the framework of international competition. On the other hand, the drafters were also anxious to prevent an abuse of sovereignty for protectionist purposes. Article VI of the GATT set out, only in the broadest terms, what constituted dumping but was silent on the more important matters of administrative procedures. Therefore, over the years, many differences arose in the procedures used by different contracting parties. The antidumping laws have been treated by many national legislators as inherent rights of their constituents, rights that should be regularly "improved" by making relief more readily available. It is evident that antidumping has been used by Western countries less as remedies and more as protectionist device. This realisation paved the way for the creation of the Antidumping

48 This perception was inevitably influenced by the long existing tradition within which dumping was thought to be striking to the core of "fair competition," and threatening to undermine the foundations of a free market economy.
Code during the Kennedy Round in 1967, the Tokyo Round in 1979, and the Uruguay Round in 1994. The purpose of these Codes was to define more precisely the conduct expected of contracting parties in their investigation and assessment of dumping practices so that unfair usage would not jeopardise the free flow of goods.\(^{49}\)

**B. Western Antidumping Provisions for NME Dumping**

Western countries' antidumping legislation has been categorising a country as either a market economy country or an NME. There seems no grey area in between.\(^{50}\) As regards international obligations on antidumping, neither Article VI of the GATT nor the 1994 Uruguay Round Antidumping Agreement make any special provision for NME

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\(^{50}\) This dichotomy is based upon simplistic theoretical distinctions defined by Kennededy in *The Accession of the Soviet Union to GATT* (21 J. WORLD TRADE 23, 25-28 Apr. 1987) as follows:

"[I]n a market economy international trade is driven by the independent decisions of buyers and sellers acting out of economic self-interest. Prices set by the market are used for allocating scarce resources. These scarce resources are in turn channelled into their most efficient uses by the market forces of supply and demand. Consequently, prices act as rationing and signalling mechanisms by which goods are traded consistently with buyer preferences. In non-market economies ... international trade is regulated by state planning and control which set the prices and output of goods, with scant consideration given to factors such as cost and efficiency. Resources are not regulated by a market, but instead by central planning; the NME government does not interfere with the market process, but instead replaces it ... Prices do not reflect relative scarcity nor are they related to market forces ... Productive resources are allocated in accordance with the central plan, with incentives encouraging compliance with the plan. Profit does not have the same meaning in an NME economy ... given that NME enterprises are not profit-maximizing. Instead, through central planning and the incentive structure, NME enterprises carry out the central planners' directives ... Finally, NMEs conduct foreign trade through state trading organizations which have a trade monopoly over product groups. This bureaucratic shield hinders manufacturers' ability to respond to demands from foreign purchasers for their products."
dumping. The second interpretative note to paragraph 1 of the Article VI merely said that,

"[I]t is recognised that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the state, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate."51 (emphasis added)

There is no alternative method of price comparison proposed in the GATT Article VI. Therefore it has been left to individual contracting parties to decide how best to deal with this problem.

a. United States' Antidumping Legislation

The United States' antidumping provisions concerning NME dumping used to be in Section 773 of the 1930 Tariff Act52 and Section 353.8 of Regulations. These previous laws required the Department of Commerce to look first to the price of the like product in a surrogate market economy country.54 This practice could lead to varied results, especially when the two products being compared were of different quality or attractiveness to consumers. That approach also required the co-operation of producers in

51 See GATT Ad Article VI, in Bierwagen, supra note 22, at 220.
52 Section 773 of the Tariff Act of 1930 was amended as 19 U.S.C. Section 1677(c) (1982).
53 19 C.F.R. Section 353.8.
54 For details of surrogate country approach in normal value determination, see infra notes 58-76 and accompanying text.
those market economy countries, which dried up substantially in the 1980’s. One of the main reasons is that, if those producers cooperate with the United States by providing their cost and price data, they will run a high risk of becoming the next antidumping target. In the absence of a third country producers’ sales information, the Department of Commerce would either use the prices in the United States of imports from market economy countries as a benchmark to determine the normal value of NME exports, or use the “factors of production” approach, calculating the actual constructed value by taking the volume of inputs in the imported product and finding their value in a market economy. The results of the United States NME antidumping cases were perceived as so random that a consensus was reached that a change was necessary in the application of the antidumping legislation against NME dumping. Numerous proposals had been made addressing this issue.

Current US antidumping legislation is embodied in Title VII of the Tariff Act of 1930 and Section 1316 of the Omnibus Act 1988. The latter for the first time defined NME. Additionally, Section 1316 changed previous law to make the “factors of production” approach the preferred method, as it has the advantage of avoiding the quality adjustment problem. However, this approach was based on the assumption that

55 See e.g., Carbon Steel Plate from Romania, 47 Fed. Reg. 35,666 (Affirm. Prelim.) (1982); Carbon Steel Plate from Finland, 49 Fed. Reg. 8973, (1984). In these two cases, the Finnish steel producers which had made its information available as a surrogate for a case on Romanian steel later faced US antidumping against themselves.

56 For details of the benchmark approach, see infra notes 98-107 and accompanying text.

57 For details of the factors of production method, see infra notes 108-115 and accompanying text.

58 See supra notes 17-20 and accompanying text.

59 See infra notes 108-115 and accompanying text.
the unit volume of inputs used by the NME producers would be the same if the costs of those inputs were market-driven, which is an unlikely occurrence in the NMEs where energy, labour or capital are often made available at prices lower than world prices. In addition to amending the method of calculating normal value for the NME exports, Section 1316 also provided the Department of Commerce the authority to enter into an agreement to suspend an NME antidumping investigation based on quotas, provided that the agreement was in the public interest, effective monitoring was practicable and suppression or undercutting of domestic price levels would be prevented. It is also worth noting that the determination of the Department of Commerce concerning whether a country is to be classified as an NME is not subject to judicial review.

b. Canadian Antidumping Legislation: Special Import Measures Act (SIMA)

Canada was the first country to introduce specific antidumping legislation in 1904. At the time Canadian government was seeking an alternative to a general increase in the tariff as a means of controlling imports which were adversely affecting local industries. The solution was the incorporation into Section Six of the Customs Tariff of antidumping provisions providing protection against dumping to producers of all goods of a class or

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60 This practice are not permitted for suspension of other regular antidumping cases. See Ominibus Act 1988, supra note 18.
61 Id.
kind made in Canada.\textsuperscript{64} Obviously, the law of 1904 was in essence an answer to a campaign of Canadian manufacturers for higher import protection for new industries,\textsuperscript{65} not to secure competition.

To comply with the 1967 GATT Antidumping Code, Canada enacted the Antidumping Act on 1 January 1969 at which date Section Six of the Customs Tariff lapsed.\textsuperscript{66} About fifteen years later, the 1969 Antidumping Act was replaced again by the Special Import Measures Act 1984 (SIMA) so as to comply with the 1979 GATT Antidumping Code.\textsuperscript{67} SIMA makes special provisions for the determination of NME dumping.\textsuperscript{68} The criteria for classification as an NME under the SIMA are:

(a) the government of that country has a monopoly or substantial monopoly of its export trade; and

(b) domestic prices are substantially determined by the government of that country and there is sufficient reason to believe that they are not substantially the same as they would be if they were determined in a competitive market ...\textsuperscript{69}

Under the SIMA, there are mainly three approaches for determining the normal value of goods exported from the NMEs, which include:

\textsuperscript{64} \textit{Id.} Under the law of 1904, it was not necessary to establish injury in order for dumping duty to be imposed. \textit{Id.}


\textsuperscript{66} \textit{See} Gottlieb, \textit{supra} note 64, at 10.

\textsuperscript{67} Special Import Measures Act (SIMA), ch. 25, 1984 Can. Stat. 739.

\textsuperscript{68} \textit{Id.} ch. 25, Section 20, 1984 Can. Stat. 758.

\textsuperscript{69} \textit{Id.} In Canada, the designation of the nature of a country's economy is made by the Deputy Minister who has broad discretion under Section 20 of the SIMA. \textit{Id.}
(1) using the domestic price of like goods in the surrogate country;\(^7^0\)

(2) using an aggregate of costs plus profit for like goods in the surrogate country;\(^7^1\) and

(3) when the information for these two methods is not available, constructing a price by using a Canadian importer’s resale price of like goods from a surrogate country, and working backwards, adjusting to reflect differences in terms and conditions of sale to the point of shipment in the surrogate country.\(^7^2\)

Obviously, all of the above three methods require the designation of a market economy country as a surrogate for the NME dumping determination. If these methods are still not workable, the Deputy Minister prescribes any alternative method he deems appropriate.\(^7^3\)

c. EU Antidumping Legislation against the NMEs

The EU antidumping law comprises rules laid down in the newly adopted European Council Regulation No. 3283/94 of 22 December 1994, which purports to implement the GATT Uruguay Round Antidumping Agreement. As regards NME dumping, the new antidumping law does not change much from the old legislation, European Council

\(^7^0\) Id. Section 20 (c) (i).

\(^7^1\) Id. Section 20 (c) (ii).

\(^7^2\) SIMA, ch. 25, Section 20(d), 1984 Can. Stat. 759.

\(^7^3\) SIMA, ch. 25, Section 29(1), 1984 Can. Stat. 766.
Regulation No. 1765/82\textsuperscript{74} and 1766/82.\textsuperscript{75} The Union's basic Regulation just issues a non-exhaustive list of NMEs, to which a separate antidumping legislation should apply by referring to the European Council Regulations No. 3283/94. According to the Regulations, identification of NMEs is quite different from those of the United States and Canada. The following countries will be considered as State-controlled for the purpose of antidumping action: Bulgaria, Czechoslovakia, Hungary, Mongolia, North Korea, People's Republic of China, Poland, Romania, the USSR and Vietnam. On the one hand, this enumerative list has the advantage that it relieves the Commission from the burden of having to determine whether a country is an NME on a case by case basis as the US Department of Commerce does. On the other hand, it is not as flexible as its United States counterpart in reflecting the changes in the economic status of those NMEs. The Council Regulations No. 3283/94 provides special methods to determine the normal value of NME dumping, including mainly the surrogate country methodology.\textsuperscript{76}

C. Comparative Analysis of Western Countries' Antidumping Procedures

(See Table 1)


\textsuperscript{75} On common rules for imports from PRC, O.J. L195/2 (1982).

\textsuperscript{76}See infra notes 126-132 and accompanying text.
### TABLE 1

**COMPARISON OF WESTERN COUNTRIES’ ANTIDUMPING PROCEDURES**

<table>
<thead>
<tr>
<th>Procedure</th>
<th>European Union</th>
<th>United States</th>
<th>GATT Antidumping Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Initiation of investigation</td>
<td>Article 7, Sec. 1 Searching informal and formal review by the European Commission before launching</td>
<td>Low threshold to establish justification for investigation, which may cost half to one million dollars excluding subsequent annual reviews.</td>
<td>Article 5(1) establishes only minimal standard</td>
</tr>
<tr>
<td>B. Industry representation</td>
<td>Article 5, Sec. 1 Any natural or legal person acting on behalf of a Community industry</td>
<td>Sec. 732 (b) Petition has to be on behalf of an industry</td>
<td>Article 4</td>
</tr>
<tr>
<td>C. Prospective exporters</td>
<td>Residual duties imposed on new exporters not included in original antidumping determination at highest level</td>
<td>Newcomers or those not investigated would receive the weighted average of the dumping margin of the individual companies investigated in the original investigations.</td>
<td>Not covered</td>
</tr>
<tr>
<td>D. Anti-absorption procedure</td>
<td>Article 13 11(a) Possibility of additional duty if first duty “absorbed” by exporter</td>
<td>Not covered</td>
<td>Not covered even under retroactive provision of Article 11</td>
</tr>
<tr>
<td>E. Settlement and undertakings</td>
<td>Can include VERs in addition to price undertakings and cessation of exports</td>
<td>Sec. 734(b) and (c) Undertakings by exporters to cease dumping and/or eliminate injury. Rarely used in practice; rather Qrs agreed to following “public interest” assessment</td>
<td>Article 7</td>
</tr>
<tr>
<td>F. Refunds</td>
<td>Article 17, Sec. 7 Rarely given and subject to substantial delay and no interest</td>
<td>Sec. 737(a) Disregard deficit if cash deposit collected is lower than the duty order, and refund if in excess; with interest</td>
<td>Article 1</td>
</tr>
</tbody>
</table>

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Chapter Two

NORMAL VALUE DETERMINATION OF IMPORTS FROM NMES:
A CHALLENGE FOR WESTERN COUNTRIES' ANTIDUMPING REGIME

It is no exaggeration to say that with all the Western countries, normal value determination, which usually takes volumes to explore in depth, is a key issue if not the core issue in their antidumping actions against the NMES. The real challenge with respect to NME dumping is how to appropriately calculate the normal value. Recently, the transitional nature of some NMES has presented a unique dilemma in Western countries' antidumping regime. i.e., while some of their products do not represent real market value, others do. So, which products should be excluded from the special normal value calculation?

Under most of Western countries' antidumping laws, the NMES are distinctly disadvantaged compared to other countries. Article 2:4 of the 1994 GATT Uruguay Round Antidumping Agreement provides that,

"[A] fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time... If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph." 77

Obviously, with respect to normal value determination, GATT Antidumping Code only offers a broad guideline, leaving a lot of space for contracting parties to play in their domestic antidumping laws.

A. THE UNITED STATES’ APPROACH:

DESIRE FOR REFORM

The legislative history of the United States’ first antidumping law, passed in 1921, indicates that:

“[T]he antidumping law protects our industries and labour against a now common species of commercial warfare of dumping goods on our markets at less than cost of home value if necessary until our industries are destroyed, whereupon the dumping ceases and prices are raised at above former levels to recoup dumping losses. By this process while temporarily cheaper prices are had our industries are destroyed after which we more than repay the exaction of higher prices.”

Although the approaches taken by the United States against foreign dumping were repealed again and again during the past seven decades, the centre focus of the original legislation - the sale of imported merchandise in the United States below the higher of its home market price or cost of production - remains little changed in the current antidumping law.

a. Surrogate Country Methodology

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Under Western countries’ antidumping laws, the regular method for establishing normal value is the use of prices of sales transactions in the home market of the foreign producer. This method, however, is considered inappropriate to determine the fair value of imports from NMEs because “country from which the merchandise is exported is state-controlled [to the extent that] the supply and demand forces ... do not operate to produce prices ... which can be relied upon for comparison purposes.” It is considered that the comparison between the export prices which reflects market forces, and the NMEs home market prices which reflects non-market forces, is of little value. Thus, the NME’s home market prices and production costs are ignored and replaced with the prices and costs of a market economy country of the United States Department of Commerce’s choosing as if they were the actual prices and costs of the NME being investigated.

In the United States, the first express statement of special criteria for measurement of normal value in NMEs can be traced back to the Bicycles from Czechoslovakia case, which was an antidumping practice of the Department of Treasury in 1960. During the fair value (US named normal value) investigation of imported Czechoslovakian bicycles in

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82 See supra note 80, §1677b(c). There exists a dilemma here. How can a NME be considered dumping when the “dumping” determination is made without regard to its home market price? If antidumping laws are constructed primarily to deal with the problem of dumping from market economy countries, why should it apply to a problem for which it is so ill-designed? For a detailed discussion, see Joseph P. Hornyak, Treatment of Dumped Imports from Non-market Economy countries, 15 MD. J. INT’L L. & TRADE, at 23-43 (Spring 1991); see also, Michael Kabik, The Dilemma of “dumping” from Non-market Economy Countries, 6 EMORY INT’L L. REV., at 339-447 (Fall 1992); Grace M. Kang, Solving the Non-market Economy Dumping Dilemma, COLUM. BUS. L. REV. 705, 732 (Fall 1987).
that case, the US Treasury rejected the home market prices or costs of Czech due to its state-controlled economy. Instead, the US Treasury determined the fair value by means of the price of similar products exported from Western European countries. It found dumping in this case because the US prices of the Czech products were lower than the Western European home market prices.\(^{84}\)

Plenty of antidumping investigations followed the above case, adopting the surrogate country approach in determining the normal value of NME exports. Between 1980 and 1987, there were at least fourteen antidumping cases brought against China’s exports, (see Table 2) among which *Natural Menthol from the People’s Republic of China case*\(^{85}\) was the first antidumping case involving exports from the People’s Republic of China. In 1980, Haarmann & Reimer Corporation, a major United States menthol producer at the time, filed the antidumping petition with both the United States Department of Commerce and the United States International Trade Commission (ITC), a semi-independent agency whose members are appointed by the President,\(^ {86}\) alleging that imported menthol from the People’s Republic of China and Japan were sold in the United States at less than fair value, causing material injury to the domestic industry. The United

\(^{84}\) *Id.*


\(^{86}\) According to 19 U.S.C. § 1673 (1982), antidumping petitions must be filed with both the Department of Commerce and the ITC between which the responsibilities for determining dumping and injury are divied. The Department of Commerce determines whether and to what extent sales below fair value have occurred, while the ITC determines whether those sales below fair value have caused or are threatening to cause material injury to the domestic industry, or are materially retarding the establishment of an industry in the United States that might produce the item in question. If affirmative final determinations are reached by both the Department of Commerce and the ITC, the Department of Commerce shall order the United States Customs Service to assess an antidumping duty equal to the dumping margin.
States Department of Commerce then started investigating whether the PRC’s economy was non-market oriented to the extent that its home market prices could not be used in a fair value comparison. Although at the time menthol had already been sold in China under what might be described as market conditions,\(^{87}\) the United States Department of Commerce decided that despite those “compelling” evidence, Chinese home market prices for menthol remained state-controlled as a whole thus could not be used for antidumping comparison.\(^{88}\) Having determined that Chinese home market prices could not be used, the Department of Commerce undertook, as specified in its regulation,\(^{89}\) to find a surrogate market economy country whose home market menthol prices could be used instead. However, the existing regulations offered little if there was any guidance as to how such a surrogate should be selected.\(^{90}\) Even worse to that, the range of candidates was so limited since at the time only the United States, the People’s Republic of China, Brazil, Japan, South Korea, Thailand and Paraguay had viable menthol industries.\(^{91}\) Finally Paraguayan export prices to the US served as surrogates because Paraguay’s economic development level was considered more closely resembling that of China.\(^{92}\) In so deciding, China easily


\(^{89}\) See 19 C.F.R. § 153.7 (1979). For the newest regulation concerning the definition of NMEs, see supra note 20 and accompanying text.

\(^{90}\) See id.


\(^{92}\) See Fed. Reg. 46 (1981) 3258, 3260. Actually, the United States industries preferred choosing Brazil as surrogate in this case, but the Department of Commerce eliminated both Brazil and Japan from consideration without any explanation. See id.
became Paraguay, at least in the eyes of the United States Department of Commerce. By comparing Paraguay home market pricing data and the selling prices of Chinese menthol in the United States market, the Department of Commerce decided in the preliminary phase of the investigation that Chinese menthol was being sold in the United States at prices 13.5% below fair value. As a result of such a big initial dumping margin determination, the United States importers inevitably became reluctant to continue sales or purchases of Chinese natural menthol, which subsequently leaded to a sharp drop of exports from China. Before long, still using Paraguay as surrogate, the Department of Commerce found in its final determination that Chinese menthol was being sold in the United States at a price only 2.5% below fair value. On June 5, 1981, however, the United States ITC found that imported menthol from China had neither caused nor threatened material injury to the United States industry. Then, as required by the law, the whole investigation was terminated.

Following the Chinese menthol case, the United States Department of Commerce continued to employ surrogate country approach to determine dumping concerning Chinese exports. In Greige Polyester/Cotton Printcloth From the People's Republic of

94 Fed. Reg. 46 (1981) 3258. Under the U.S. Law, the importers could still bring Chinese menthol into the United States, but only after posting bond equal to 13.5% of its F.O.B. value. See id.
97 See Menthol from the People's Republic of China: Determination of the Comm'n in Investivaiton, supra note 92.
China case,\textsuperscript{98} after an analysis of countries which produced printcloth, the Department of Commerce determined that Thailand was the most appropriate surrogate. Thus, third country sales prices of Thai Printcloth were used as surrogates in the determination of foreign market value for the Chinese printcloth.\textsuperscript{99} In Canned mushrooms case,\textsuperscript{100} Indonesia's home market prices were used as surrogate; in Chloropicrin case,\textsuperscript{101} India's factor's prices were used as surrogate; in Potassium permanganate case,\textsuperscript{102} Thailand's factor prices were used as surrogate. Besides, countries that the Department of Commerce used as China's surrogate from 1980 to 1987 include Sri Lankan, South Korea, Malaysia and Argentina. There were also some other countries, such as Dominican Republic, Colombia, Pakistan, Singapore, Hong Kong and Spain, that the Department of Commerce has sought to use as China's surrogate in its dumping investigation, but was just unable to obtain sufficient information on any of them.\textsuperscript{103}

\textsuperscript{99} Id. at 34,313. Third country sale prices of the Thai producer were used in the determination of foreign market value because the Thai producer made no home market sales in Thailand.
\textsuperscript{100} Fed. Reg. 48 (1983) 22,768.
\textsuperscript{101} Id. at 41,799.
\textsuperscript{102} Id. at 36,175.
\textsuperscript{103} See id. at 37,055.
### TABLE 2

**U.S. ANTIDUMPING PROCEEDINGS AGAINST PRC**

*(1980-1987)*

<table>
<thead>
<tr>
<th>Product</th>
<th>FMV</th>
<th>Weighted Average Dumping Margin</th>
<th>Injury (Y/N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Menthol</td>
<td>Paraguay’s export prices</td>
<td>13.5</td>
<td>2.5</td>
</tr>
<tr>
<td>Cotton shop towels</td>
<td>Indonesia’s factor prices</td>
<td>32.0</td>
<td>36.0</td>
</tr>
<tr>
<td>Greige polyester cotton printcloth</td>
<td>Thailand’s export prices</td>
<td>31.4</td>
<td>22.4</td>
</tr>
<tr>
<td>Canned mushrooms</td>
<td>Indonesia’s home prices</td>
<td>7.4</td>
<td>0</td>
</tr>
<tr>
<td>Potassium permanganate</td>
<td>Thailand’s factor prices</td>
<td>90.6</td>
<td>39.6</td>
</tr>
<tr>
<td>Chloropicrin</td>
<td>India’s factor’s prices</td>
<td>222.0</td>
<td>58.0</td>
</tr>
<tr>
<td>Barium chloride</td>
<td>Thailand</td>
<td>20.0</td>
<td>14.0</td>
</tr>
<tr>
<td>Natural bristle paint brushes</td>
<td>Sri Lankan home prices</td>
<td>211.0</td>
<td>127.1</td>
</tr>
<tr>
<td>Iron construction castings</td>
<td>average of certain US imports</td>
<td>25.5</td>
<td>11.6</td>
</tr>
<tr>
<td>Steel wire nails</td>
<td>S. Korea’s export price to US</td>
<td>8.0</td>
<td>6.3</td>
</tr>
<tr>
<td>Petroleum wax candles</td>
<td>Malaysia’s export prices to US</td>
<td>135.7</td>
<td>54.2</td>
</tr>
<tr>
<td>Welded carbon steel pipes/tubes</td>
<td>Argentina’s export to US</td>
<td>225.0</td>
<td>30.0</td>
</tr>
<tr>
<td>Porcelain steel cookware</td>
<td>average of certain US imports</td>
<td>51.4</td>
<td>66.6</td>
</tr>
<tr>
<td>Tapered roller bearings</td>
<td>India’s factor prices</td>
<td>115.9</td>
<td>0.9</td>
</tr>
</tbody>
</table>

As regards dumping from other NMEs, surrogate country method has also been frequently employed by the United States Department of Commerce. In *Carbon Steel Wire Rod from Poland* case, the Department of Commerce determined that Greece, Italy, and Spain were all appropriate surrogates for the determination of foreign market value. None of these countries, however, were in fact used as surrogates. The Department of Commerce instead looked to Australia, Canada, and Sweden, which were

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105 The Greek firms were unwilling to cooperate in the antidumping investigation. The Italian firms were unable to cooperate in the investigation. Spain was under a concurrent antidumping and countervailing duty investigation at the time of Polish investigation. *Id.* at 29,435.
also producers of the same type of carbon steel wire rod. The Department of Commerce concluded that, of the three, Australia’s level of economic development most closely resembled that of Poland and was therefore, the proper surrogate. Thus, the price of wire rod exported to the US from Australia were used as surrogates in the determination of foreign market value for the Polish carbon steel wire rod.\(^\text{106}\)

In *Truck Trailer Axle-and-Brake Assemblies from Hungary* case,\(^\text{107}\) the Department of Commerce used the home market sales prices of Italian truck trailer axle-and-brake assemblies as surrogates in the determination of foreign market value for their Hungarian counterparts,\(^\text{108}\) on the basis that Italy’s level of economic development was comparable to that of Hungary.

Along with the use of a surrogate country in determining NME dumping, significant problems developed during the past decades. This inevitably aroused a great deal of criticism. Firstly, this method is evidently inaccurate in determining foreign market value. As no two countries are exactly the same, it is extremely difficult, if not impossible, that they could have sufficiently similar economies such that the cost of producing a specific product in one country accurately reflects such cost in the other country. Even less similarity can be found between an NME and a market economy country. The current practice of comparing GNP figures and overall economic structure has at least two flaws:

\(^{106}\) *Id.* at 29,436.  
\(^{108}\) *Id.* at 46,153.
(a) problems exist in using NME prices at the specific sector level logically also exist at the general economy level; (b) the practice totally ignores the possibility that the specific sector in the NME could be at a much higher level of economic development than the rest of the sectors in the country. Under the surrogate country approach, a NME with some demonstrable comparative advantages can never really benefit. Apparently, the Western countries just consider that a NME can never be more efficient than a market economy country is, totally ignoring the comparative advantages an NME may have. For example, a particular raw material may be plentiful and quite cheap in an NME and therefore utilised extensively in the production process. Meanwhile, the same material may not be found in abundance in the surrogate country and consequently would be more expensive, resulting in a higher computed normal value.

Secondly, Western countries' antidumping laws generally offer little guidance as to which market economy country is to serve as the surrogate. The laws just indicate that the surrogate country must be at a level of economic development comparable to that of the NME and, under the Omnibus Act 1988 of the United States, it must also be a significant producer of the merchandise, using similar levels of technology at similar levels of production as those of the NME. The criteria for surrogate country selection are so ambiguous and arbitrary that there is no way of knowing in advance which country is going to be chosen as the surrogate, and once a surrogate is decided, it is very difficult, if

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not impossible, for the NME producers to challenge the price and cost information submitted. For instance, the range of potential surrogates for the PRC has included Thailand, the Dominican Republic, Columbia, Pakistan, Singapore, Paraguay, Egypt, Morocco, the Philippines, Sri Lanka, Malaysia, Hong Kong, India, Indonesia, Spain, South Korea, Argentina, and even a basket of prices from France, Canada, Japan, Switzerland, the Federal Republic of Germany (before unified), and the Netherlands.\footnote{Charlene Barshefsky, \textit{Non-market Economies in Transition and the US Antidumping Law: Remarks on the Need for Reevaluation}, 8 B.U. INT'L L.J., at 375 (Fall 1990).}

As William Alford stated, the net effect of the surrogate country methodology is to treat nations as "fungible,"\footnote{\textit{Supra} note 94, at 79-80.} which makes it extremely uncertain and unpredictable for both the domestic petitioner and the NME respondent.

Thirdly, this methodology is totally unfair for the NMEs. Since the identity of the surrogate country remains unknown until the antidumping investigation commences, there is no way for the NME exporters to price their goods appropriately so as to avoid behaviours that constitute dumping. Likewise, from the importer's perspectives, they can never predict if any additional costs might be added to the imported goods in the form of antidumping duty. This uncertainty may, to some extent, affect the fair free trade, disordering the world market.

Fourthly, it is evident that the surrogate country methodology does not work well, sometimes even proving to be absurdly difficult to implement. Since the price and cost
data are increasingly regarded as commercial secrets, it is likely that no producers in any potential surrogate market economy country is willing to provide the required data reliably, especially when the potential surrogate country and the NME are in severe competition with each other in the world market.\textsuperscript{113} Without the co-operation of the "most suitable" surrogate country, Western countries often find themselves in such an awkward situation that they have to make dumping decision on the basis of the best available information from a less suitable surrogate country. The United States Senate Report on the Omnibus Trade Bill of 1987 summarised the criticisms of the surrogate country methodology as follows:

\begin{quote}
"[T]he current antidumping duty law and procedures as they apply to non-market economies do not work well. The Commerce Department is frequently unable to find surrogate producers willing to co-operate in investigations by providing data. Therefore, it has had to develop Fall-back methodologies. The dumping margins for a non-market economy country will vary widely depending on which methodology or surrogate country is used. As a result, a non-market economy country typically is unable to predict whether to structure its activities accordingly. In addition an American industry faced with low-priced competition from a non-market producer is unable to determine whether the antidumping duty law would provide a remedy."\textsuperscript{114}
\end{quote}

Fifthly, even if the potential surrogate country agree to offer the price data, those data are sometimes belated. This combined with the fixed time limit on dumping investigation and determination by each Western country,\textsuperscript{115} it would be too late for either

\textsuperscript{113} For example, see supra note 104 and accompanying text.
\textsuperscript{115} For example, the antidumping law of the United States requires that within 160 days of the filing of a petition (or 210 days if the case is deemed to be "extraordinarily complicated"), the Department of Commerce shall make a preliminary determination as to whether the goods in question have been sold in the United States below their fair value. See 19 C.F.R. § 353.39 (1985). The Canadian antidumping law allows 180 days to complete the investigation and make a final determination, or 225 days in more complex cases. See SIMA, ch. 25 §§38(1), 39(1), 41(1), 1984 Can. Stat. 772-776.
the petitioner or the NME exporter to comment on the prices or adjustments made to
achieve comparability. The purposes of imposing time limit on antidumping proceeding
are mostly two-fold: to alleviate the inconvenience caused to the exporters or importers
because of their involvement in the time-consuming antidumping investigation; to keep
costs of the proceeding low for all involved.

Sixthly, there are more troublesome situations in which no market economy
country manufactures the item that is the subject of the dumping investigation, thereby
permitting the Department of Commerce to base its “constructed value” of the products
in question upon the costs and prices of any supposedly comparable nation in the world.
As a matter of fact, ever since 1978, the United States Department of Commerce has even
had the authority to use market economy countries that do not produce the items in
question as surrogates for the NMEs.\textsuperscript{116} If the Department of Commerce decides that
there are no nations at a comparable level of economic development, it has the authority to
substitute any country, including the United States, providing that “adjustments,” which
neither the pertinent law or regulations specify, are made.\textsuperscript{117} It is evident that such
practice has granted the Department of Commerce relatively untrammelled power to
intervene the implementation of antidumping laws.

b. The Heinz Bill: An Alternative Proposal

\begin{itemize}
\item[\textsuperscript{116}] See 19 C.F.R. § 353.8 (c) (1985).
\item[\textsuperscript{117}] See id.
\end{itemize}
The Western countries have realised the uncertain, unscientific, unfair, unworkable and time-consuming characteristics of the surrogate country methodology, and have been trying to gradually replace this approach with some other more efficient methods. The Heinz Bill is one of the results of this effort in the United State, proposed by Senator Heinz from Pennsylvania in 1987. The content of this approach is to use the import prices of like products from other countries in the US market as a benchmark. Therefore, it is also called the import price benchmark approach.

The benchmark approach sets the fair market price for NME goods at the average import price of like products imported from the highest volume market economy producer, excluding United States producers and those other producers who may be dumping or benefiting from subsidies. If the I.T.A. determines that there is no eligible market economy country, the foreign market value of the merchandise shall be the constructed value of comparable merchandise in any country other than a NME. That

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118 This proposal may be found in the "Omnibus Trade Act of 1987" (The Omnibus Trade and Competitiveness Act of 1987), §315(c)(1)(b), 133 Cong. Reg. S1868. The provision establishing the benchmark and also concerning the NMEs is excerpted below:

(c) NONMARKET ECONOMY COUNTRIES.--
(1) IN GENERAL --If--
(A) the merchandise under investigation is exported from a nonmarket economy country, and
(B) the administering authority finds that the information submitted by such country does not permit the foreign market value of the merchandise to be accurately determined under subsection (a), the administering authority shall determine the foreign market value of the merchandise on the basis of the trade-weighted average price at which comparable merchandise, produced by the eligible market economy country with the largest volume sales in the United States of the comparable merchandise is sold at arms length in the United States during the most recent period for which sufficient information is available.

119 Id.
is to say, the imports from NMEs must be sold at no less than this average import price. The margin of dumping will be the difference between the fair market price and the actual import price.

The benchmark methodology has many advantages to the surrogate country approach:

Firstly, it is certain and predictable as all sales figures establishing the benchmark are readily available. The prices at which imports are coming into the United States constitute known information. Using this approach, both the NMEs' exporters and the United States importers may know in advance exactly what the fair export prices of the products should be, and then engage in fair trade accordingly.

Secondly, it is comparatively easy to administer because no data from a third country is needed. Instead all the data are based on shipping and customs documents which are already available. Therefore, the benchmark method also avoids the troublesome and often fruitless search for a appropriate surrogate country, and those complaints can be processed more efficiently.

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121 Id.
Finally, as the benchmark price is tied to the prices of other United States imports, it produces a price comparatively close to existing import prices from market economy countries and thus is arguably fair as well.

Despite the above advantages, the import price benchmark approach also faces a lot of criticism from both the NMEs and the United States domestic industries. From the NMEs perspectives, it still prevents their imports from underselling competitors in the US market, even where they are the lowest cost producers and have fairly priced their products.\(^{122}\) In practice, major Western market economy countries generally have the "largest volume of sales" in the United States, the benchmark is therefore usually set by their prices. The result is protectionism, and therefore unacceptable by the NMEs.\(^{123}\) Additionally, the NMEs contend that benchmark method would prevent new NME products from entering the United States' market because, for a new product to compete in the market, it must be priced lower than like products currently on the market.\(^{124}\) The benchmark method would necessarily preclude such competitive pricing.

The United States domestic industries, in particular from the protectionist perspectives, also find the benchmark method unacceptable because it assumes that NME producers of a particular product are as efficient as the free market producers who sell the


\(^{123}\) See Horlick & Shuman, supra note 110, at 836. For details of comparative advantage, see infra notes 181-184 and accompanying text.

\(^{124}\) Letter from Edward W. Furia, Co-chairman of the Committee for a Fair Trade with China, to Sam M. Gibbons, Chairman of the Subcommittee on Ways and Means (Mar. 11, 1987).
like products at the benchmark price.\textsuperscript{125} Those protectionists insist that, as a result of the benchmark method, the United States' market could become a "safe harbour" for the dumping of NME products.\textsuperscript{126}

Under great pressure from those domestic protectionists, the Heinz Bill was finally turned down by the Reagan Administration, which insisted that the benchmark be set at the "lowest average import price" of all eligible market economy importers.\textsuperscript{127}

c. The Factors of Production Approach: An Improved Method

After years of debate and thousands of proposals and counter-proposals, the United States Congress finally adopted a cost-based methodology for determining the normal value of imports from NMEs based on the "factors of production" in the Omnibus Act 1988.

Actually, the factors of production approach is not new at all. As early as in 1977, the US Treasury Department for the first time adopted this alternative approach during the investigation of the Electric Golf Cars from Poland case.\textsuperscript{128} In that case, golf cars produced by a Polish aircraft manufacturer had been shipped to their sole commercial

\textsuperscript{125} See Horlick & Shuman, supra note 110, at 835.
\textsuperscript{126} Id.
\textsuperscript{127} S. 539, 100th Cong., 1st Sess. 5008(a)(1) (1987).
\textsuperscript{128} Fed. Reg. 40 (1975) 11,917, finding that there were "reasonable grounds to believe or suspect" that Polish golf cars were sold in the United States at less than fair value; which indicated that a constructed value methodology would be used to calculate fair value.
market, the United States. At that time, there was no golf courses in Poland, and there were also no sales of golf carts in either the home market or third country. At the beginning of the investigation, efforts were made to obtain the “fair value” of the merchandise from the prices at which an obscure Canadian producer sold a small quantity of somewhat similar factory-use carts. However, when that Canadian producer went out of business, it was necessary for the US Treasury to develop a new approach. The solution was to measure the physical volume of inputs used by the NME producer and value them in a third market economy country. The US Treasury proposed that,

"[I]f we can obtain and verify actual, objective elements of production (e.g., hours of labour, amount of raw materials) in the state-controlled economy country, these would be valued in an economically comparable market economy country, and the figures thus obtained would be used to construct value in the market economy country where production and sale of the merchandise is occurring."\(^{129}\)

This proposal was considered as pretty fair and informally established the principles of the factors of production approach. Under this approach, the Commerce Department determines the normal value of NME exports by utilising their own factors of production, and then values the factors in a market economy which is found to be reasonably comparable in economic development to the country under investigation. Prior to 1988, the factors of production methodology was used by the US Commerce Department whenever the surrogate country approach or import price benchmark method was deemed inappropriate. Finally, in the Section 1316 of the Omnibus Act 1988, this

\(^{129}\) Memorandum from Peter D. Ehrenhaft, Deputy Assistant Secretary and Special Counsel, Tariff Affairs, to Anthony M. Solomon, Under Secretary, Monetary Affairs 3 (Dec. 15 1977).
methodology was codified and formally endorsed as the preferred method for calculating
the foreign market value of all NME imports.

According to the Omnibus Act 1988, the method of calculating normal value of the
NME exports is to add certain amounts, including general expenses (at least ten percent)
and profit (at least eight percent) to the prices determined in the comparable market
economy country.\(^{130}\) The relevant factors for any given product include:

(a) hours of labour;

(b) quantities of raw materials employed;

(c) amounts of energy and other utilities consumed; and

(d) representative capital costs including depreciation.\(^{131}\)

In this way, the normal value of the NME’s exports largely depends now on the operating
records of the NME producers themselves. In that sense, the factors method has
improved both the surrogate country method and the import price benchmark approach
(no matter whether the benchmark is the Heinz Bill “import price from the largest
producer,” or the Reagan Administration “the lowest import price”).

The Act requires that the Commerce Department verify all information relied upon
in making a final determination.\(^ {132}\) The Act further provides that, if the Commerce

\(^{130}\) §1316(a), Omnibus Act of 1988, supra note 18.

\(^{131}\) Id.

\(^{132}\) Id.
Department is unable to verify the accuracy of the information submitted, it shall use the best information available as the basis for its determination.\textsuperscript{133}

So far, the factors of production approach has been recognised as the most viable and fair way in determining the normal value of the NME exports for antidumping purposes. At least it has significantly minimised the dumping margins, making it possible for the NMEs to enjoy certain comparative advantages, such as relatively low inputs of material, labour and energy, which is also very important to the liberalisation of world trade. This much improved methodology, however, is no panacea either. It eventually couldn’t escape the attack of various criticisms, especially those from the NMEs. To begin with, the valuation of such factors is still to be based “on the best available information regarding this value of such factors in a market economy country and countries considered to be appropriate (by the Department of Commerce).”\textsuperscript{134} That is to say, the factors of production method still largely depends on publicly available data for its success. If not enough data is publicly available, or the data which is available is of an inferior quality, it would be more difficult for this approach to be administered. But more importantly, this provision certainly makes the decision of normal value inevitably arbitrary and unpredictable.

\textsuperscript{133} Id.

\textsuperscript{134} To the extent possible, the market economy country selected for sources of valuation should be (1) at a level of economic development comparable to the exporting NME, and (2) a “significant producer” of comparable merchandise. However, it doesn’t say they must produce the same merchandise.
Secondly, criticism of the method also focuses on the always existing differences between the selected “surrogate country” and the NME under investigation.\textsuperscript{135}

Thirdly, also the most importantly, although the factors of production approach has been a big progress from other methods, it still represents a type of discrimination against the NMEs. The usefulness of the factors of production method as an alternative to the surrogate country approach was diminished accordingly.

d. Proposal from the “Committee for A Fair Trade with China”\textsuperscript{(CFTC)}\textsuperscript{136}

The Committee for a Fair Trade with China (CFTC) proposal mainly addresses the preliminary issue of whether to treat the imports in question as being produced by either a market economy or a NME. It also implicitly addresses the question of whether the NME should be evaluated at the sectoral level or general economy level.\textsuperscript{137} The CFTC proposal adopts a three-category approach by creating a new category of exporting country called “Planned Market Economy Countries.”\textsuperscript{138} Such a country is defined as a nation implementing economic reform that will eventually enable the foreign country’s economy to operate as a market economy.\textsuperscript{139} Only non-market economy countries are intended to be evaluated for the purpose of determining whether they qualify for the planned market

\begin{footnotesize}
\textsuperscript{135} See supra notes 92-93 and accompanying text.
\textsuperscript{136} The Committee for a Fair Trade with China is a group of American corporations which is seeking Congressional and Administrative approval for trade policies and regulations to encourage greater two-way trade between the United States and China.
\textsuperscript{137} Committee for a Fair Trade with China, Proposal for A Bill (Mar. 6, 1987).
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\end{footnotesize}
Factors to be considered in determining whether a nation qualifies are whether the nation --

(a) affords market access to United States goods and services;

(b) provides patent and copyright protection; and

(c) is moving toward fulfilling GATT principles.

If a NME is determined to have met the planned market economy requirements, it would be allowed the option of proving to the Department of Commerce that the price or cost of the import or components of the import being investigated were established by market forces. The Department of Commerce is then required to substitute a "representative world price" with respect to any component that was not proven to be driven by market forces. Following these adjustments, the planned market economy would be subject to the normal market economy antidumping laws. However, if a planned market economy country failed to provide adequate proof that the relevant prices or costs were set by market forces, the regular NME normal value determination methods would apply.

The CFTC proposal is appreciated by its advocates as "politically advantageous" for the United States. It is believed that, this approach, if fully implemented, would

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140 Id.
141 Committee for a Fair Trade with China, Section-By-Section Analysis of CFTC Proposed Bill (Mar. 6, 1987)
142 Id.
143 Letter from Edward W. Furia, Co-chairman of the CFTC, to Sam M. Gibbons, Chairman of the Subcommittee on Ways and Means, supra note 104 (Mar. 11, 1987).
represent a recognition of the reform in NMEs, which would help promote the relations between the United States and the PRC. The measure requires the Department of Commerce to study the “new market orientation” of the PRC with the goals of ascertaining the extent to which the reforms bring Chinese prices in conformity with world prices, the extent to which the United States trade laws can accommodate such changes, and the possible need for changes in the United States antidumping laws as they apply to foreign countries, such as China, which are in transition to a more market-oriented economy. By giving the NMEs the opportunity to prove that certain of their products have market-driven prices, the United States supposedly encourages additional reform toward a full market economy in the NMEs.

Proponents of the CFTC proposal contend that this approach is fair in the context of international trade, as the NMEs that are implementing economic reform deserve such acknowledgement of their accomplishments.

Meanwhile, opponents of the CFTC proposal argue that the determination process concerning whether a NME is the so-called planned economy country is cumbersome and tedious. Substituting a “representative world price” for each nonmarket-determined component is also awkward and reminiscent of the difficulties encountered in determining a hypothetical constructed value. Opponents also contend that the planned market economy proposal is unnecessary because the benchmark proposals allow for both an

145 See Horlick & Shuman, supra note 110, at 822.
economic sector and a general economy analysis to determine whether the products in question is the result of non-market forces or market forces.\textsuperscript{146} Opponents point out that, furthermore, under the CFTC proposal, the Department of Commerce is placed in the awkward position of having to pick out those market-driven components from the state-controlled ones, which would consequently invite bureaucracy and arbitrariness.

\textbf{B. THE EU APPROACHES}

As mentioned at the outset of this thesis, EU is one of the Western powers that most actively utilise their antidumping laws against NMEs.\textsuperscript{147} While proposals to reform its NME antidumping laws have been made regularly in the United States, the special rules against NME dumping have rarely been challenged in the EU.

The basic regulation of the common market, Council Regulation 2423/88, provides that in the case of imports from NMEs, normal value shall be determined in an appropriate and not unreasonable manner on the basis of one of the following criteria:

(a) the price at which the like product of a market economy third country (i.e., a country other than an EU member state) is actually sold for consumption on the domestic market of that country, or to other countries, including the Community.

\textsuperscript{146} 133 CONG. REC. at S1894 (Statement of Mr. Heinz). "[T]he non-market economy would be treated ‘normally’ if it is able to provide sufficient and verifiable information to justify doing so."

\textsuperscript{147} The special NME antidumping rules have been invoked more often, yet less controversial, in the EU than in the United States in the past decade.
(b) the constructed value of the like product in a market economy third country;

or

(c) if neither price or constructed value as established under (a) or (b) provides an adequate basis, the price actually paid or payable in the Community for the like product, duly adjusted, if necessary, to include a reasonable profit margin.\textsuperscript{148}

EU antidumping law presumes that the costs and prices of NMEs are inappropriate for the purpose of establishing normal value and therefore requires that normal value be based on prices and costs of the product in a third, a so-called surrogate or analogue country. This presumption implies that a NME can never have any comparative advantage over that of the surrogate market economy country which is used for the determination of normal value. For instance, in \textit{Magnetise from the PRC} case of 1984,\textsuperscript{149} where Chinese exporters and some importers claimed that the Chinese product has a natural competitive advantage because of the exceptionally high purity of the raw material resulting in a much cheaper production process than in other countries. The European Commission rejected this claim on the following grounds:

"[I]t is uncertain how these advantages, if they really existed and were not counterbalanced by competitive disadvantages, would be reflected in the normal value if the same conditions existed in market economy non-member countries, as prices are not only a function of costs, but also of demand. Furthermore, if normal value were to be based on constructed value in a market economy country, any adjustment of costs established in a market economy non-member country to take account of alleged natural advantages would involve


relying on costs and resource allocations in a non-market economy country, which Article 2(5) "was specifically designed to exclude."  

The EU authorities have extremely wide latitude in their selection of an appropriate surrogate country: Council Regulation 2423/88 only provides that normal value should be determined in an appropriate and not unreasonable manner. The only other restriction is that prices in the EU can only be used if prices or constructed value in an surrogate country do not provide an adequate basis for normal value. This last-resort possibility is being invoked by the European Commission more and more often: from 1988-1991, it was used five times, four of which involve China. (see Appendix 2)

The European Commission has used its discretion to establish a system for selecting the surrogate countries, which includes the following factors:

(a) existence of a like product;  

(b) similarity of manufacturing processes and technical production standards/techniques;  

(c) reliability of price levels (sufficient internal competition or price controls); and  

(d) administrative convenience. 

\footnote{Id.} 

\footnote{For a realistic definition of "like product," see Stewart A. Baker, "Like Products and Commercial Reality," in Jackson and Vermulst eds., supra note 46, at 287-294.}  

\footnote{See Jean-François Bellis, "The EEC Antidumping System," in Jackson and Vermulst eds., supra note 46, at 76-77.}
So, first of all, the surrogate country must manufacture a product that is like the product imported from the NME under investigation. Although minor differences between the products will not prevent them from being considered alike, they may result in adjustments for physical differences. Adjustments for this purpose have been made more often in cases involving NMEs than in normal cases where the product in the home market has to be like the dumped product. However, the Commission does not always consider it necessary to make an adjustment for physical differences.  

Secondly, for the similarity determination, the Commission uses a sector approach, i.e., it looks at the characteristics of the industry producing the like product. Contrary to United States’ approach, it does not consider general macro-economic criteria, such as the level of development of the country or its GNP, but the individual industries. This EU approach in the context of the similarity study seems more appropriate than a whole-nation approach.

Thirdly, the commission also attaches importance to the price level of the product in the surrogate country. Prices in that country should be based on market considerations.

Finally, administrative convenience has also played an important role in the Commission’s selection of an appropriate surrogate country. In antidumping proceedings which include imports from both market and non-market economy countries, the

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153 See, e.g., Video Tapes in Cassettes from China case (O.J. L293/2, 1991), such an adjustment claim was rejected.
Commission will normally use market economy countries as the surrogate. It is reported that such practice has happened eleven times in the antidumping investigations against Chinese exports.

Based on these factors, industries in the countries listed in the following Table 3 have been used by the Commission with respect to China up to December 31, 1990.

<table>
<thead>
<tr>
<th>Surrogate country</th>
<th>Number of times</th>
<th>Surrogate country</th>
<th>Number of times</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>6</td>
<td>South Korea</td>
<td>4</td>
</tr>
<tr>
<td>EC</td>
<td>4</td>
<td>India</td>
<td>4</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>3</td>
<td>Spain</td>
<td>2</td>
</tr>
<tr>
<td>Japan</td>
<td>2</td>
<td>Sri Lanka</td>
<td>2</td>
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<tr>
<td>Yugoslavia</td>
<td>2</td>
<td>Australia</td>
<td>1</td>
</tr>
<tr>
<td>Austria</td>
<td>1</td>
<td>Norway</td>
<td>1</td>
</tr>
<tr>
<td>South Africa</td>
<td>1</td>
<td>Thailand</td>
<td>1</td>
</tr>
<tr>
<td>Uruguay</td>
<td>1</td>
<td>Community price for one raw material</td>
<td>1</td>
</tr>
</tbody>
</table>

**C. CANADIAN APPROACH**

Section 20 of SIMA provides three methodologies for determining normal value in NME dumping cases. In addition to the application to a surrogate of the two conventional methodologies, home market prices and constructed value, SIMA introduced a third alternative to replace the requirement under the former Antidumping Act to resort to Ministerial specification. The third alternative involves designating as a surrogate a
country with exports to Canada of like goods. The price at which like goods are resold in Canada is then adjusted to reflect the exporter's ex-factory price from the surrogate country.\(^{154}\) However, it is evident that this approach is absurdly difficult for Revenue Canada to implement in practice. On the one hand, it is hard for Revenue Canada to nail down exporters in a selected surrogate country to provide their cost and price data. On the other hand, the economic development of the selected surrogate country and that of the NME are mostly not on the same level, even completely different, which decides that the dumping margin can never truly reflect the dumping situation. For example, in *Paint Brushes from the People's Republic of China* (Revenue Canada Notice of Preliminary Determination, March 22, 1984) and *Porcelain or China Tableware from the PRC* (Revenue Canada Notice of Preliminary Determination, April 11, 1984), the United Kingdom was selected as surrogate; in *Photo Albums with Self-adhesive Leaves from the People's Republic of China* (Revenue Canada Notice of Preliminary Determination, October 17, 1985), the United States was surrogate; and Denmark was selected as the surrogate in *Wooden Clothespins from the People's Republic of China and Czechoslovakia* (Revenue Canada Notice of Preliminary Determination, August 1, 1984).\(^{155}\) Among all the antidumping investigations against China's exports, only once has an underdeveloped country - Malaysia - been used as surrogate.\(^{156}\) As a result, the NME

\(^{154}\) Peter A. Magnus, “The Canadian Antidumping System,” in Jackson and Vermulst eds., *supra* note 46, at 199.

\(^{155}\) *Id.* at 200.

\(^{156}\) In *Rubber Footwear from Hong Kong, Malaysia, the People's Republic of China and Yugoslavia* (Revenue Canada Notice of Preliminary Determination, January 26, 1982), normal value was based on export sales as there were no domestic sales by the Malaysian exporter. With respect to exports from the People’s Republic of China and Yugoslavia, normal values were established by Ministerial Prescription on the basis of goods from Malaysia. *Id.*
dumping margins decided by Revenue Canada are so arbitrary and comparatively higher, which is considered unfair to the NMEs.

D. SUMMARY:

FREE MARKET IDEOLOGY UNDERLYING WESTERN ANTIDUMPING LAWS

Each of the foregoing methodologies employed by Western countries to determine normal value of imports from the NMEs has certain allures, yet each has been proved to be highly problematic, failing to provide an effective solution to the NME dumping problems for failing to address the real problems that underlie the antidumping laws, i.e., none of those antidumping approaches realise the limitations of the market/nonmarket economy countries distinction.

The ideology underlying the Western antidumping laws is the scientific and apolitical nature of the free market. The essence of this ideology is that if unimpaired by inappropriate governmental intervention or by private efforts to distort their natural functioning, the “supply and demand forces” will operate in an essentially uniform manner throughout the world to bring about the optimally efficient allocation of wealth. This ideology has been fully reflected in the Western countries’ antidumping laws.

All those approaches used in the NME dumping determination basically hold the assumption that the world’s nations can be divided into two categories: one category
consists of nations having a market economy, where "the supply and demand forces" operate to yield prices that can meaningfully be compared with prices in other market economy countries. The other category is comprised of those nonmarket economy countries where "ultimate prices and costs ... reflect political, economic, or bureaucratic factors rather than local supply and demand." Such division actually denies the fact that all national governments act more or less in a host of ways to define and order their markets, and that if a sharp line is to be drawn between market and nonmarket economies, there is a need to spell out what type of state intervention is inappropiate or how much intervention makes an economy nonmarket. The United States Department of Commerce declared that "there are no set criteria for judging whether, in a particular case, the degree of state control over an economy is such as to make home market prices inappropriate" for use in a dumping investigation. "Neither the language of the statute nor the legislative history," observed the Department of Commerce, "offers anything more than the most general guidance," since the relevant statute defines neither a market nor a nonmarket economy and he legislative history merely directs the Department to see if "the supply and demand forces do not operate to produce prices either in the home market or in third countries which can be relied upon for comparison purposes." The result, concluded the Department, is that "each case must be decided upon an analysis of the particular economic factors involved."

158 Horlick & Shuman, supra note 110, at 807.
159 See William P. Alford, supra note 94, at 99.
161 Id.
162 Id.
To address the limitations of the market/nonmarket economy distinction does not suggest that there are no differences among the different countries' economies. Nobody can deny the big differences between Chinese and the United States' economies. These differences, however, are ones of degree rather than of kind as regards the operation of the supply and demand forces being influenced by political, economic and bureaucratic factors in both countries.  

For example, the United States also have quotas on the importation of textiles, steel, sugar, meat, and other products. Just as Adam Smith stated that, there are no major segments of any national economy here or abroad operating as pure markets, wholly responsive only to supply and demand. The simplest of national markets envisioned by Smith presumes a massive degree of government involvement in such things as maintaining national security and domestic tranquillity, establishing a physical infrastructure of roads, harbours, sewers, and the like, issuing and regulating currency, protecting property rights, and providing a mechanism for the peaceful resolution of disputes that arise in that market. Without these, the forces of supply and demand - and, indeed, society itself - would not operate as they do now in the United States or anywhere else.

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164 According to 19 U.S.C. (1982) §§ 2251-53, the U.S. President may order the imposition of quotas as a form of relief in "escape clause" actions.
165 See
166 William Alford, supra note 94, at 108.
In short, as regards Western antidumping laws, there is no basis for dividing the world into market and nonmarket economy countries and only treating prices within the former as legitimate.
Chapter Three

WESTERN COUNTRIES' ANTIDUMPING LAWS AGAINST THE NMES:

PROTECTIONISM VS. DEVELOPMENT

A. Protectionist Bias in Western Countries' Antidumping Laws

"Protectionism" is defined in the *New Lexicon Webster's Encyclopaedic Dictionary of the English Language* (Lexicon Publications Inc. New York, 1988) as "the theory, policy or system of helping home producers to face foreign competition by putting protective tariffs on imported goods." With more and more countries changing to rely on the more ambiguous non-tariff barriers against foreign imports so as to protect their domestic producers, this definition of protectionism is obviously too narrow to cover the concept.\(^{167}\)

The concept of development traditionally refers to an ongoing process of economic growth, expansion and diversification, and can be defined as:

- (a) the act or an instance of developing, the process of being developed;
- (b) (i) a stage of growth or advancement;
  (ii) a thing that has developed;
- (c) a full-grown state."\(^{168}\)

\(^{167}\) For the real meaning of "protectionism" used in this thesis, see *infra* notes 137-141, 181-195 and accompanying text.

\(^{168}\) The Concise Oxford Dictionary (1990), at 319.
However, in the real world, there can be no objective definition of development and therefore no universally acceptable indicator. The best one might hope for would be to get some rough consensus on objectives and hence on how progress toward these objectives can be measured. Therefore, no express constraints are imposed on the manner in which development can be pursued and the issue is generally viewed in the thesis as a sovereign right free from external interference and influence.

Starting from the developing countries’ theoretical arguments for infant industry protection through imposing high tariff in the first half of the nineteen century, down to the post-war period when Western developed countries advocated freer trade among themselves by cutting tariffs to low levels through successive GATT rounds negotiations, and then on to the 1980s-1990s when there appeared a shift from preoccupation with protectionism in the developing countries to a preoccupation with protectionism in Western developed countries. By contrast, the developed countries had lapsed into resorting to non-tariff barriers (NTBs), such as antidumping actions and countervailing duties, in lieu of the reduced tariffs “bound” at the GATT. The growth of protectionist outcomes reflected increases in both the “demand for,” and the “supply of” protection in Western countries. Intense competition among the companies of Western countries, and the desire to protect against inroads by foreign rivals, provided the context

172 See id., at 225.
within which the theoretical developments of protectionism were set. Some trade economists cried out that protectionism did break out, making the period (1980s-1990s) one of high threat to free trade.\(^{173}\) During the past decade, instead of just saying that you need help because you cannot compete with foreign export companies, Western protectionist demands are more likely to be approved by claiming that the foreigners' winning in the competition all attributed to their resort to unfair trade. Instead of acknowledging foreign competitors' comparative advantages in certain products, Western protectionism just label them "unfair advantages" that foreign rivals "should not" have. Ironically, antidumping actions, as fair trade instruments, have often been used unfairly by Western countries for protectionist purposes, i.e., to get protection rather than to safeguard free trade.

In short, antidumping laws are essentially protectionist in nature.\(^{174}\) They seem more so in recent years since they are being invoked as a protectionist device more frequently than ever before. Just like other common tools of government, antidumping action can be used to achieve good ends and less worthy ones. However, the protectionist bias of its nature decides that, even in the pursuit of worthwhile objectives, there is a great potential for abuse. Therefore, in the context of international trade, the use of

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173 Id. at 227.
antidumping actions must be very carefully circumscribed, which otherwise may lead to political corruption, economic stagnation, and even international conflict.175

B. Rationale for Dumping and NME Dumping

The rationale for dumping in the international trade context is analogous to the rationale for price discrimination in the domestic context. Profits are maximised by charging different consumers disparate prices for essentially identical products.176 However, dumping is profitable wherever a foreign producer faces a less elastic, or steeper, demand curve in its home market as compared to the more competitive importing market.177 Therefore, where a producer has greater market power at home than abroad and where consumers in the producer's home market cannot buy the producer's product abroad and re-import it cheaply, the producer will maximise profits by charging a lower price abroad.178 As long as transportation costs and import duties make it uneconomical for consumers in the home market to re-import products from the market into which the products were exported, the producer will continue to make greater profits by charging a higher price in its home market than abroad.179 In this situation, a producer is able to exploit the home market consumers in order to sell at lower prices in the foreign

178 Lindert and Kindleberger, id., at 164.
179 See id. at 165.
Such price discrimination is more profitable than charging identical prices in both markets, a practice which would yield lower marginal revenues in the home market.\(^{181}\)

According to the economic theory, dumping mainly exists in three distinct forms: (a) sporadic dumping; (b) intermittent dumping; and (c) continuous dumping.\(^{182}\) Each of these forms of dumping has its own attributes in terms of the motivation of the dumping producer and the risk to the competing domestic industry in the importing country. Basically, sporadic dumping is of relatively minor concern to the importing country because it typically is an unloading of overstock by a foreign producer who prefers to dump its goods in another market rather than endanger its home price structure.\(^{183}\) As for intermittent dumping, the motivation behind it is much more pernicious than that behind sporadic dumping, which lies in the creation of a foothold in another market. The foreign producer will seek to eliminate the domestic competition or forestall its development in the market in which it dumps its products.\(^{184}\) When the competition in the importing market has been eliminated, the exporting producer may freely raise its prices above its marginal cost.\(^{185}\) Intermittent dumping is thus tantamount to predatory pricing, and such predations deemed an extremely injurious form of dumping. However, as mentioned above, this type of dumping is \textit{very rare} if there is any in current international trade.

\(^{180}\) Id. at 164.
\(^{181}\) Id. at 165.
\(^{182}\) Fisher, supra note 142, at 88.
\(^{183}\) Id. at 88.
\(^{184}\) Id. at 88-89.
\(^{185}\) Id. at 89, see also, Lindert & Kindleberger, supra note 142, at 164.
practice.\textsuperscript{186} In contrast, continuous dumping is motivated by the producer’s belief that its costs over the long term will be less if it produces a large number of units in order to realise optimum economies of scale.\textsuperscript{187} In the regime of international trade, intermittent dumping and continuous dumping are usually prohibited because the injury suffered by domestic producers outweighs any benefits resulting from the lower prices of dumped goods. However, sporadic dumping is considered acceptable because the substantial benefit of lower prices to domestic consumers exceeds the losses of the domestic producers of like products.\textsuperscript{188} Importing countries’ antidumping policies should always be adjusted according to the nature of each foreign dumping case. If a policy makes A-group $3 better off at a cost of $1 to B-group, this policy should be regarded as being economically justified. But if A-group is $1 better off at a cost of $3 to B-group, we shall say that such a policy has \textit{no} economic rationale, even though its political attractions might be great. Nonetheless, economic rationale is always one thing while political power another. As J. Michael Finger put it,

``[D]umping is the rhetoric justifying action against imports: it is not the criterion that determines when such action will or will not be taken. When the politics of the matter compel action against imports, the legal definition of dumping can be stretched to accommodate it. In a practical sense, the word \textit{dumping} has no meaning other than the one implicit in antidumping regulations. The pragmatic definition of dumping is the following: \textit{dumping is whatever you can get the government to act against under the antidumping law.}''\textsuperscript{189}(emphasis added)

\textsuperscript{186} Id.
\textsuperscript{187} For a detailed discussion of the large scale continuous dumping, see Fisher, \textit{supra} note 142, at 89.
\textsuperscript{188} See Fisher, \textit{supra} note 142, at 91-92; see also, Albert L. Williams, \textit{UNITED STATES INT’L ECONOMIC POLICY IN AN INTERDEPENDENT WORLD}, at 72 (1971).
The rationale for the NME dumping is not as clear as that for market economy dumping, which is more likely for the purpose of gaining an economic advantage over competitors in the importing country's market, even gaining a monopoly there. However, generally, dumping from the NMEs has been non-predatory in intent. i.e., NME dumping is rarely, if there is any, for the purpose of monopolising the importing countries' market. The motivations of NME dumping mainly include:

a. Increasing Foreign Currency Reserve

An NME may engage in dumping to earn more foreign currency so as to finance the importation of needed goods. In an NME, it is the central government that issues import-export plan or import-export quota every year and almost all the foreign trade companies are state-owned. If the country has an unanticipated need for certain imports, it might export large quantities of surplus products at very low prices so as to obtain the foreign currency essential to purchase the needed imports. Even without any special need, the central may still encourage export at low prices in order to increase the nation's foreign exchange reserve.

b. Marketing Strategy

190 See Shen Daming & Feng Datong, GUOJI MAOYI (INTERNATIONAL TRADE), at 386-87 (1982).
191 Predatory pricing is commonly understood to mean artificially low pricing, done either (1) to force the competition out of the market, or (2) to prevent newcomers from entering it, and when in a monopolistic position, raising prices to recoup losses. See Viner, supra note 22, at 26.
In order to gain more market share in foreign markets, an NME may price its exports at a discount. NMEs may feel the necessity to sell at lower prices in order to overcome consumer reticence based on factors such as inferior quality, lack of spare parts and servicing, and uncertainty of continued supply, etc.. Sometimes, in order to export certain new products, NMEs may price the products lower than like products in the importing market so as to gain more market share.

c. Over Supply in Domestic Market

NME dumping may also be a result of over production and over supply in the domestic market. For example, if there are unanticipated high yield harvests, the central government may decide to dump the surplus abroad rather than let them rot. This rationale is similar to that of sporadic dumping.193 Thus, the opportunity to earn foreign currency for domestic surplus that would otherwise go to waste is the NMEs' motivation.

d. Dumping Illusion

There is quite frequently no motivation lying behind NME dumping action. However, the problems of currency valuation and conversion in NMEs may lend an appearance of dumping when in fact it does not exist. Due to the fact that in NMEs,

193 See supra note 149 and accompanying text.
currencies are not convertible, disparities will likely exist between domestic and foreign values of currencies from NMEs. This disparity may have the effect of causing the export prices of goods to appear to be only a fraction of the domestic prices, and thus a dumping margin may be calculated.\textsuperscript{194} For example, currency of former Soviet Union used to be highly over-valued, all exports appeared to be sold at a loss, and in some instances, the export price was less than ten percent of the domestic price when converted at the official exchange rate.\textsuperscript{195}

C. What Is the Rationale for Antidumping Actions?

"Antidumping is the fox put in charge of the hen house: trade restrictions certified by GATT. \textit{The fox is clever enough not only to eat the hens but also to convince the farmer that is the way things ought to be.} Antidumping is ordinary protection with a grand public relations program."\textsuperscript{196} (emphasis added)

J. Michael Finger

As a matter of fact, "the farmer" has never really believed in "the fox" - Antidumping. Economists, legal professionals and other commentators have long questioned the rationale of antidumping legislation.

a. Economic Rationale?

\textsuperscript{194} See Fisher, \textit{supra} note 142, at 85.
\textsuperscript{196} See Finger, \textit{supra} note 7, at 34.
What exactly is the economic rationale for antidumping, or rather, does antidumping action have an economic rationale? As just mentioned above, for the sporadic dumping, antidumping practice could not find any economic grounds. As regards intermittent dumping and continuous dumping, antidumping actions might be economically justified. Nevertheless, the assumption of this justification is that the administration of the antidumping policy is free of both error and manipulation, which is almost impossible in practice. In other words, even if certain antidumping practice could be economically justified, the special conditions upon which such justification is based can hardly be satisfied in the real world. Even if those special conditions are met, its scope must be very tiny compared with the current range of antidumping actions.

Professor Alan Deardorff has analysed the economic rationale for antidumping from another perspective. His conclusion is:

"[T]hus where dumping does occur in the classical form of price discrimination, it is not the low prices but the high price at home that should be objected to, and it would appear that restrictions against dumping from the importer's country point of view make no economic sense."[^197](emphasis added)

b. Social Cost?

Undoubtedly, anti-dumping laws have protectionist bias, and protectionism has a social cost. But it is less clear exactly how much it costs and who pays.[^198] A widely

accepted answer is that, antidumping is a conflict of domestic producers versus consumers, and the producers seem to be winning at the cost of consumers.\textsuperscript{199} That is to say, the antidumping legislation have focused only on the protection of some special domestic industries, while totally ignoring any welfare benefits that might accrue to consumers as a result of lower prices under competition. By concentrating solely on the impact of imports on domestic producers as opposed to consumers, antidumping legislation has, for the most part, an increasingly protectionist bias.

How much does protectionism cost consumers? William Niskanen estimated that trade protection cost American consumers about $65 billion in 1986, which represents almost a 100% increase since 1980.\textsuperscript{200} Another study estimated that trade protectionism cost consumers $80 billion in 1988.\textsuperscript{201} It is believed that these estimates actually understate the true cost of protectionism because they did not take into account the effect that the filing of antidumping petitions have on prices. The mere filing of an antidumping petition, or the threat of filing, induces those companies to raise their prices to avoid such filing, which of course costs the consumers. There is tremendous incentive for domestic companies to file such petitions, as it is so effective a tool that domestic companies can use to force foreign competitors to raise their prices. Actually, the filing procedure will not cost domestic producers anything because the cost of prosecution will be paid by the

\textsuperscript{199} Robert W. McGee regards protectionism issue as "protects one group - some special interest - at the expense of the general public. See, An Economic Analysis of Protectionism in the United States with Implications for International Trade in Europe, 26 GEO. WASH. J. INT'L L. & ECON., at 539 (1993).
\textsuperscript{201} Paul Blustein, Unfair Traders: Does the U.S. Have Room to Talk? WASH. POST, at F-1 (May 24, 1989).
federal government. Apart from the monetary cost, there are also such non-monetary costs as social cost, reduced choice for consumers, importers' freedom to enter a business contract, even retaliation by a foreign trading partner. These non-monetary costs sometimes are just too intangible to be realised.

On the social cost issue, a former Chairman of the United States Tariff Commission has opined:

"[I] think that, considering the social costs of the Antidumping Act as it is likely to be administered under any sort of practical circumstances, I would opt for getting rid of the whole Antidumping Act."

(emphasis added)

c. Political Rationale?

There is not much economic sense but high social cost for antidumping policies. Then, a conclusion we may draw is, it is actually politics playing the main role in the antidumping legislation. Professor Tharakan stressed the issue as:

"[W]ithin the realm of the political economy of trade policy decisions, antidumping policy and its application provide a fertile terrain for those who lobby for the protection of special interests and those who have the power to provide - or deny - it."

Professor David Gantz also put it as:

"[T]rade law, like most other important U.S. legislation, cannot be assessed in a vacuum. It necessarily results from a political process that reflects ongoing

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conflicts between the President and Congress, and among various powerful interest
groups, as well as fundamental American views of morality and fair play.
Organised labour, agriculture, key industries such as textiles, automobiles, steel,
semiconductors and computer software, environmental and consumer groups,
among others, influence the formulation and implementation of US trade law and
policy on a continuing basis. The situation is not markedly different in other
countries.\textsuperscript{205}

James Bovard, author of \textit{The Fair Trade Fraud}, (1991) also critiques that,

\begin{quote}
"[I]f a private citizen forcibly restricts competition, he might be imprisoned
for antitrust law violations. If a Congressman does the same thing, he might reap
additional campaign contributions. The morality and legality of a person’s action
is judged by antithetical standards depending on whether a person sits inside or
outside of the U.S. market."\textsuperscript{206}
\end{quote}

d. Moral Gains?

Protectionists may still insist that even though antidumping makes neither
economic nor social sense, the moral gains from such protectionism are greater than the
economic losses.\textsuperscript{207} That is to say, they believe that there was a moral foundation to such
international trade barriers.

This assumption might be true during the old days when governments “protect”
weak producers by giving them a license to pillage even weaker consumers. Take U.S.
trade policy as an example, according to the conventional wisdom of the 1920s, it was

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{205} David A. Gantz, \textit{A Post-Uruguay Round Introduction to International Trade Law in the United States},
\item \textsuperscript{206} James Bovard, \textit{supra} note 141, at 244.
\item \textsuperscript{207} See James Bovard, \textit{supra} note 141, at 235.
\end{itemize}
\end{footnotesize}
unfair for the federal government to allow any domestic company to lose a dollar of profits to foreign competition for practically any reason, and the government was duty-bound to squeeze "every last atom of advantage" out of consumers. When the time comes to the 1990s, theoretically speaking, trade policy should not let protected industries squeeze every last dollar out of consumers, but rather provides protection to the domestic industries and consumers on an equal basis. As a matter of fact, "equal protection" is just the fount of the mirage of fair trade. Individual industries are still protected at the cost to consumers as well as to other industries. This policy is fully reflected in a speech given by U.S. Senator Ernest Hollings in 1988. He was calling for further government suppression of the market by saying that,

"[T]he market will take care of consumers. The Government must take care of producers. No government was ever organised to get everybody something for a cheap price. The market does that."

The soul of antidumping practice is just that, if individual industries cannot stand on their own feet in the course of competing with foreign rivals, government should force its consumers and other industries to carry them. The fundamental question of such protectionism is: who should pay the price of certain industries' lack of competitiveness?

From domestic customers' perspective, antidumping duty is a "tax on imports designed to protect the domestic producers against the greed of his consumers."

As Franklin Pierce

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208 Alfred Pearce Dennis, Vice Chairman of the Tariff Commission, declared in 1929, "If civilised society means anything it means protection for the weak—the thing we call justice ... By every canon of justice the farmer should obtain from our protective system every last atom of advantage that can be extracted from it." 71 Cong. Reg. 3101 (1929) (quoting Alfred P. Dennis, Saturday Evening Post, June 15, 1929)


wrote in 1909, "government cannot at once and the same time be a fountain of generosity to the manufacturer and of justice to the consumer."\textsuperscript{211} From other industries’ approach, it is evident that government cannot protect certain group of industries without hurting other industries. For instance, in the course of antidumping practice, the government protects the steel industry by sacrificing precision metal makers and agricultural equipment exporter. The government protects 11,000 sugar growers by sacrificing the sugar refining and food manufacturing industries.\textsuperscript{212} The government protects a few semiconductor producers by handicapping the computer and electronics industries.\textsuperscript{213}

In short, the antidumping practice constitutes a moral judgement, which maintain that the interests of certain groups of producers will be treated as superior to the rest of society. Then, a new question raised is, in a nation that has thousands of business bankruptcies each year, who should decide which companies or industries should be politically exempted from the rigors of competition? If the answer is "government," then how to avoid the bureaucracy and arbitrariness of such decision? Obviously, so-called "fair trade" in practice equals a moral and political deification of high prices for domestic manufactures. Western antidumping powers have carved out numerous monopolies to benefit a single group of domestic producers rather than allow foreign competition to lower prices in the domestic market which subsequently benefits innumerable consumers.

\textsuperscript{211} Franklin Pierce, \textit{The Tariff and the Trusts}, at 4 (1907).
\textsuperscript{213} Arthur Denzau, \textit{Trade Protection Comes to Silicon Valley}, at 7 (Centre for the Study of American Business, 1988).
D. Protectionism Vs. Development:

**Antidumping Actions—Barriers to NME Export-Led Growth**

Although antidumping action has obvious protectionist bias, since GATT does not expressly prohibit it, Western countries may still claim their national antidumping laws to be "completely GATT-consistent." Backed up by the second Supplementary Provision to paragraph one of the GATT Article VI, Western countries have used the freedom that the GATT regime essentially permits as far as the application of antidumping action against NMEs is concerned. They developed the so-called surrogate country approach in determining the normal value of imports from NMEs, totally ignoring the nominal prices or costs in the NMEs and, instead, base normal value on the prices or costs of a producer of the like product in a market economy. Further, the authorities are often forced to use the prices or costs of a producer located in an economy at a substantially higher level of economic development than the NME under investigation. Needless to say, this can inflate the normal value and consequently enlarge the dumping margin. In the context of "injury test," it is evident that antidumping laws protect against not only unfair import competition, but also fairly traded imports that may cause material injury to those domestic weak industries. As a result, viewed from the economic perspective, the antidumping laws have a fatal shortcoming in logic, i.e., instead of focusing on injury to

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

competition, it focuses on injury to domestic producers, and it is not often the case that injuring domestic producers injures competition.\textsuperscript{216}

Increasingly, Western countries have resorted to antidumping actions in order to protect their domestic industries from foreign competitions. As the NMEs and other developing countries have moved beyond primary commodity exports and import substitution and have begun to realign their industries for exports to the markets of Western developed world, they have naturally concentrated on products which they can produce at world market prices. Lacking advanced technology and short of capital, they just fall back on their comparative advantages: ample supplies of low-wage labours and natural resources.

\textbf{a. Comparative Advantages of NMEs}

Early theories of comparative advantage were based almost exclusively on the availability and costs of labour. It is now recognised that the decision as to what goods to produce for export depends on numerous factors, such as natural resources, technology, capital, and education levels of the populace. Each product requires a unique set of factors of production. Individual countries will possess these factors, or be able to attain them, in different degrees. Countries gain comparative advantage by using their most

\textsuperscript{216} \textit{Id.} at 398. In contrast, antitrust law aims to ensure the functioning of the free market and to protect consumers against market-distorting restraints and practice, which ensures consumers the availability of the best choice of goods and services at optimum prices.
abundant factors of production most intensively while importing goods that would require scarcer factors of production. In the field of international trade, it is to each one’s advantage to focus its efforts on those products for which it is best adapted. Theoretically, every country benefits from selling what they can produce most efficiently. However, in practice, such benefits are never distributed equally.\(^{217}\) According to the new dependency theory, the model of open trade, based on the idea of comparative advantage, is that which the industrialised countries believe is the most beneficial, and it may be—at least for the industrialised countries.\(^{218}\) From the developing countries’ perspective, this new dependency theory has several problems as a result of the inequity between developed countries and developing countries. The current capitalist world system tends to favour those with the most economic and political power to start with.\(^{219}\)

In the context of antidumping practice, this non-tariff barrier has long blemished one of the basic principles of international trade, which claims that nation with the comparative advantage in the production of a particular good should specialise in exporting it to other nations. Western countries’ antidumping laws publicly deny any comparative advantage NMEs may have. Take the import price benchmark approach in normal value determination as an example, this approach is based on the assumption that NME producers are never the most efficient producers of a given product. That is to say,


\(^{219}\) \textit{Id.} at 253.
even if a NME were pricing its exports fairly and according to its production cost, if the price was below the benchmark price, the product would quite possibly be subject to antidumping proceeding. As a result, the NMEs might never be able to gain a meaningful market share for many of its exports to Western countries.

Having realised their comparative advantages, NMEs intend to concentrate their export efforts on the production of labour-intensive products. This export strategy, however, creates tensions with existing industries in the Western countries. Because the NMEs can manufacture certain products more cheaply than developed countries, they threaten the survival of some domestic industries in the developed world and give rise to strong pressures for protectionism in Western countries. As Tussie notes:

"[D]eveloped countries wishing to protect employment will be under pressure to restrict the inflow of lower-priced, labour-intensive goods. The pressure for protection will be greater the more labour-intensive and the less skill-intensive the industry... Because of extreme wage differentials, ... labour-intensive goods will be produced more efficiently by less developed countries and imports of such goods will tend to displace employment in developed countries. What is more, imports will have an impact on the least qualified workers and the more depressed areas." 220

b. NIEO Calls for Reform in Western Antidumping Regime

Prior to 1800, the prevailing international trade theories at that time assumed that the prosperity of a country could be maximised by policies which ensured a surplus of

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exports over imports.\textsuperscript{221} The underlying assumption was that the world’s economic pie was of constant size, and therefore any gains experienced by one nation from trade had to come at the expense of its trading partners. In short, international trade was viewed as a zero-sum game, i.e., the winner in the world market would turn everyone else into a loser.

In 1776, Adam Smith published his now classic work, \textit{Wealth of Nations}.\textsuperscript{222} which explained that nations could engage in mutually beneficial trade. This analysis was taken one step further with the formulation of the principle of comparative advantage in the 19th century by David Ricardo and John Stuart Mill.\textsuperscript{223} As this theory shows, a nation can benefit from international trade even if it cannot produce any one good more efficiently than its trading partners.\textsuperscript{224} If each nation specialises in the production of those products which it can produce with the greatest relative efficiency and can then trade freely with other nations for the other products it needs, the greater overall efficiency will result from this process, which increases the size of the world’s economic pie, thereby providing a higher standard of living for all. In short, international trade can be a positive-sum interaction.\textsuperscript{225} This economic theory has a great deal of appeal, not only does it offer the prospect of greater efficiency and greater wealth, it also implies that as far as international trade is concerned, there is a fundamental community of economic interests among states.

\textsuperscript{222} Adam Smith, \textit{An Inquiry into the Nature and Causes of the Wealth of Nations} (Dublin: Printed for Messrs. Whitstone Chamberlain, 1776).
\textsuperscript{224} Id.
So it was this theory that finally leads to the establishment of GATT at the end of the World War II, and then WTO in the 1990s. The purpose of both is to promote a liberalised trade regime.

Non-market economy countries, as countries with little industrial base that have principally been importers of manufactured goods and exporters of primary commodities (especially in the immediate post World War II period), expected few short term benefits from the GATT’s approach to trade liberalisation. Indeed, it seemed to offer them the prospect of failing in international industrial competition and then being locked into the familiar pattern of dependence upon and dominance by the industrialised world—a pattern which they associated with the colonial domination from which many of them had only recently emerged. Raul Prebisch, in his book, *The Economic Development of Latin America and its principal problems* (1950), noted that the international trade relations between the developed countries and the developing countries were structurally biased against the interests of the developing countries. Prebisch finally concluded that the economic inequality would make it difficult, if not impossible, for the developing countries to achieve acceptable rates of economic growth without some fundamental changes in trade policy. As he put it,

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"[T]he imposing code of rules and principles drawn up at Havana and
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226 See generally, Prebisch, infra note 192.
227 Almost all the NMEs can fit into the developing country category.
partially embodied in the General Agreement on Tariffs and Trade (GATT), does not reflect a positive conception of economic policy in the sense of a rational and deliberate design for influencing economic forces so as to change their spontaneous course of evolution and attain clear objectives. On the contrary, it seems to be inspired by a conception of policy which implies that the expansion of trade to the mutual advantage of all merely requires the removal of the obstacles which impede the free play of these forces in the world economy. These rules and principles are also based on an abstract notion of economic homogeneity which conceals the great structural differences between industrial centres and peripheral countries with all their important implications. Hence, GATT has not served the developing countries as it has the developed ones. In short, GATT has not helped to create the new order which must meet the needs of development, nor has it been able to fulfil the impossible task of restoring the old order."

The developing countries began to push for changes in the international trade and development regimes within the United Nations Conference on Trade and Development (UNCTAD). In 1974, the developing countries formulated their demands for change in the form of resolutions passed by the United Nations General Assembly which together called for the New International Economic Order (NIEO) in these terms:

"[J]ust and equitable relationship between the prices of raw materials, primary commodities, manufactured and semi-manufactured goods exported by developing countries and the prices of raw materials, primary commodities, manufactures, capital goods and equipment imported by them with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and the expansion of the world economy."  

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230 UNCTAD was founded in 1964. As a new international institution, it was a result of the dissatisfaction of developing countries with the GATT and the Bretton Woods institutions.
231 Declaration on the Establishment of a New International Economic Order, Article 4(j), supra note 29.
Chapter Four

NMES IN TRANSITION VS. WESTERN ANTIDUMPING LAWS:

TIME FOR A NEW EAST-WEST DIALOGUE

In recent years, economic reforms have been carried out in countries. These economic reforms are of a continuing nature, leading these countries which previously had been classified as NMEs under Western countries’ antidumping laws towards market-oriented economy.

A. NMEs’ Transition towards Market Economy Countries

a. Eastern European Countries

As a matter of fact, NMEs have traditionally been equated with Communist countries. With the decline of communism in Eastern Europe, this bright line is fading, demanding a harder look at the economic characteristics displayed by those former communist countries. Recently, as a result of the export-led foreign trade policies in Eastern European countries, Western countries’ antidumping actions against imports from those countries have become increasingly significant. The success of the new

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governments in those countries depends, in large part, on their ability to revive their
countries’ dormant economies. Access to Western markets has played an important role
in these emerging economies. Currently, only few communist countries have survived the
early 1990’s communism crisis, all of which are still classified as “NMEs” by Western
economic powers and many of their exports are subject to the special antidumping
legislation.233

(a) Hungary

Hungary instituted economic reforms in the 1970s. The government’s long-term
economic reform objective is the development of market orientation and the concomitant
responsiveness to permit guidance of the economy through the use of monetary and fiscal
policy levels. Past Hungarian reforms have reduced the role of central government
planning, decentralised economic management, and allowed the expansion of private and
co-operative enterprises. Current Hungarian reform plans are based on the reduction of
subsidies to inefficient enterprises; the establishment of true labour, capital, and product
markets; the expansion of the role of private enterprise; the subjection of domestic
producers to increased import competition; the abolishment of government controls on

233 The United States Department of Commerce has determined that the following countries have non-
market economies: Czechoslovakia, Hungary, Poland, Romania, the People’s Republic of China and the
Union of the Soviet Republics. The re-unification of East and West Germany has changed those
industries of former East Germany into part of a market economy. For EU’s list of NMEs, see supra
footnote 75, 76 and accompanying text.
wages and prices; and, the increase of private and foreign ownership of the country’s productive assets.  

(b) Poland

Poland has also significantly reformed its national economy - ‘nearly all price controls and subsidies were ended with the stroke of a pen on January 1, 1991." Poland has also out-paced other Eastern European nations in encouraging private investment from the West. While Polish industry is still 95% state-owned, Poland has adopted new rules for creating private companies from state-owned enterprises. Poland’s joint venture law has provided foreign investors with greater flexibility and improved tax treatment in the establishment of enterprises within Poland. Poland’s private enterprise law has eased many prior restrictions on entrepreneurs and has provided them with equal access to loans from financial institutions and industrial inputs supplied by state-owned industries. Poland’s foreign exchange regulations have legalised the purchase and sale of foreign exchange at market-determined rates. Moreover, less foreign exchange is allocated arbitrarily to state-owned industries at undervalued official rates. Both state-owned and private export industries are permitted to retain a greater share of their foreign exchange earnings. Under Poland’s agricultural policy, farmers are permitted to market their own

234 See generally, U.S. Department of Commerce Study of China’s New Market Orientation and U.S. Trade Laws, at 168 (1989). This study was mandated by U.S. Congress in the Ominibus Act 1988, Section 1336(a), and was delivered in August 1989.
produce, meat, and other goods, rather than being required to sell them to the government.\footnote{236}{U.S. Department of Commerce Study of China's New Market Orientation and U.S. Trade Laws, \textit{supra} note 198, at 169 (1989).}

\section*{b. Former Soviet Union}

Poland's 'shock therapy' approach to reform was also suggested in former Soviet Union. Kremlin approved guidelines for new or expanded reforms in enterprise financial management, wage determination, pricing, and foreign trade. When fully implemented, these reforms would have significantly transformed the former Soviet Union's economic structure.\footnote{237}{\textit{Id.} at 167-168.} Given the demise of the Soviet Union and the Communist Party,\footnote{238}{Michael Dobbs, \textit{Gorbachev Resignation Ends Soviet Era; U.S.Recognizes Russia, Other Republics; Nuclear Command Shifted to Yeltsin}, \textit{WASH. POST}, at A-1 (Dec. 26, 1991); see also David Remnick, \textit{Gorbachev Abandons Part, Quits Leadership Post, Orders Property Seized}, \textit{WASH. POST}, at A-1 (Aug. 25 1991).} it is believed that the pace of economic reform will increase dramatically.\footnote{239}{Michael Dobbs, \textit{Gorbachev Clears Way for Secessions, Swift Conversion Urged to a Market Economy}, \textit{WASH. POST}, at A-1 (Aug. 27, 1991).}

\section*{c. People's Republic of China}

Since China launched a formal bid to rejoin the GATT in July 1986, China has unremittingly made efforts over the past decade to reform its economic regime, in particular, its foreign trade regime, which has been paid a special attention by the GATT contracting parties. In November 1993, the Chinese government formally endorsed the
move to build a “socialist market economy” in China, which is completely in line with GATT’s aim of “allocating resources by market means, widening the full utilisation of resources, and promoting economic growth and development.”

B. Clinton Administration’s Antidumping Policies against NMEs:

Why So Inconsistent?

United States’ trade law - just like those of most other Western countries - purportedly seeks to establish a “level playing field” for US companies and their products, both in the United States and abroad. The trade policy of the United States fully reflects their attempts to reconcile the inherently incompatible goals of free trade and protectionism. One central objective is the promotion of free trade based on “the unchallenged proposition that every country is better off in a world of free trade than in which all countries practise highly protectionist policies.” It is believed that a global economy promoting free trade enhances competition within industries which, in turn, yields greater efficiency and better products. At odds with free trade, however, is

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240 As early as in January 1992, Deng Xiaoping visited South China to promote further economic reforms and to advocate the establishment of a market economy under the socialist system in China. As for the so-called socialist market economy is defined as a market economy with public ownership as its main force. That means, except for the fact that state ownership of economic institutions will be maintained, other aspects of the economy are the same as those of other market economies. See Guiguo Wang, China’s Return to GATT: Legal and Economic Implications, 28 J. WORLD TRADE at 56, n.27 and 28 (June 1994).
241 See Peter Suchman, America’s Unfair Dumping Laws, J. COM., at 8A (May 17, 1994).
243 See id.
protectionism, which protects one group - usually represents some special interest - at the expense of the general public.\textsuperscript{244}

According to the definition for "non-market economy" under the United States Omnibus Act 1988, China has got rid of some of those characteristics of NME.\textsuperscript{245} In an attempt to keep pace with the market reforms in NMEs, the United States Commerce Department has twice introduced new approaches for administering the antidumping laws in cases involving NMEs in transition. However, when I look at recent antidumping policies against NMEs pursued by the Clinton Administration, the first thing that comes to mind is, "Why so inconsistent?" For example, at the very beginning, even though the US government knew well that some NMEs had undergone substantial economic reform, it still insisted on retaining its special antidumping laws against NMEs.\textsuperscript{246} Then, in 1994, the late Secretary of Commerce Ron Brown indicated that the Clinton Administration disfavoured amending the antidumping laws despite the market reforms underway in


\textsuperscript{245} See supra note 20 and accompanying text.

\textsuperscript{246} As early as in 1984, China began to actively argue in various cases, such as \textit{Chloropicrin from the PRC} (49 Fed. Reg. 5982, Dep't of Comm., 1984), \textit{Petroleum Wax Candles from the PRC} (51 Fed. Reg. 25,085, Dep't of Comm., 1986) that substantial economic reform justified application of the standard antidumping law. In \textit{Candles}, the Department of Commerce acknowledged that the PRC had undergone substantial economic reform. It determined, however, that state control existed because the key input into candles (paraffin wax) was state controlled and certain foreign exchange controls insulated candle producers from external market forces.\textit{(id. at 25,086)}.

Since then, nearly ten years have passed, China has seen great improvement. Especially the early 1990s' reform of China's price system and foreign exchange regime signals that China has taken another big step nearer to the market economy. If Western countries insist on applying the old rules, undoubtedly, it will hurt both parties' interests, even disrupting the international market order.
NMEs. However, about five months later, the Administration felt it unnecessary and rejected proposals for amending United States antidumping laws in cases involving NMEs in transition. Again, right before presenting the implementing legislation to congressional committees for review, the Clinton Administration reversed itself and decided to include proposals altering the treatment of NMEs in transition. This proposal was finally turned down by the Congress. However, President Clinton, in a joint press conference with Russian President Boris Yeltsin, indicated that he would pursue legislation designating Russia as an NME in transition under the US antidumping law. It was on the day after introduction of the implementing legislation, thereby making it unamendable under the Congress' fast-track authorisation. These events, on the one hand, reflect the inconsistent approaches of the United States as to whether, and how, to alter the United States' antidumping laws to better accommodate those NMEs in transition. On the other hand, they reflect an attempt of the US government to reconcile the inherently incompatible goals of free trade and protectionism.

C. Time for a New East-West Dialogue on Antidumping

In the preceding text, it has been demonstrated that market economy reforms in those NMEs have achieved significant success. Meanwhile, looking through all four

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247 Brown Douses Reform of Antidumping Laws for Non-market Economies, INSIDE US TRADE S-22 (Jan. 28, 1994). Brown stated in Jan. 24, 1994 press conference that the Administration had "no specific plans" to review the antidumping law relating to NMEs. Id.
248 INSIDE US TRADE (Special Report), at S-1 (June 17, 1994).
249 INSIDE US TRADE (Special Report), at S-1, S-22-23 (June 21, 1994).
250 Press Conference by President Clinton and President Yeltsin, WL 525,367, at 7-8 (White House, 1994).
jurisdictions' antidumping laws, none of them has provided for any transitional mechanisms to be applied in case of involving the NMEs in transition yet. In that context, Western countries' antidumping laws have somehow already been out-of-date and lagged far behind the development of the NMEs. It is therefore not surprising that some classified NMEs under Western antidumping laws, such as China and Hungary, have long argued that their achievement of liberalisation in the trade regimes should have entitled them to the regular antidumping treatment, instead of the current discriminatory one. The expansion of United States' trade with NMEs, coupled with the realisation that the global economy is becoming increasingly and intensely interdependent, have made a new round of dialogue concerning Western antidumping laws against NMEs not only necessary, but also feasible.

Take China as an example, the United States Omnibus Act 1988 directed the Department of Commerce to conduct a study of China's new market orientation and the United States' trade laws.\textsuperscript{251} In that study, the Department of Commerce discussed the difficulties associated with applying the NME antidumping statute to economies in transition and made the following three findings:

First, as regards China's exports, while some outputs may be produced solely for the state at a set price, others may be devoted to the state with the remainder sold outside
the state plan at guidance prices. Goods may also be sold outside the state plan free of
government interference, with no allocated inputs.

Second, an economy may be found to be more market oriented under some criteria
than others. For example, in the agricultural sector, there may be little government
control over inputs and outputs, but the country's currency may remain nonconvertible.
Since the state does not assign weights to the various factors, it is impossible to determine
which, if any, should be controlling.

Third, even when a market oriented sector of China is analysed under the statute,
the Department of Commerce must analyse the sector with reference to the larger
economic system. Thus far, such an analysis has resulted in NME determinations even
when the sector exhibits a clear market orientation. Given the inevitable piecemeal nature
of reform, however, absent sectoral analysis, these countries will continue to be treated as
non-market until the economy at large is sufficiently freed of government intervention to
bring it into conformity with market principles.

Despite the inherent difficulties involved in determining market economy status,
the absence of transitional mechanisms in the US antidumping law cannot be sustained.
The inflexible application of the law is politically as well as strategically dangerous. The
inflexibility is particularly troubling when the dumping country is undergoing a significant
economic transition towards market-driven economy. As Alford has said, the allure of a
supposedly bright line between market and non-market economy belies a degree of arbitrariness in the administration of the antidumping law that is difficult to justify in the face of substantial economic reform.\textsuperscript{252}

Obviously, it is high time for the NMEs (Eastern) and Western countries to sit down to reappraise Western antidumping laws and NMEs foreign trade policies. What are the transitional mechanisms that may be suggested to better accommodate the NMEs in transition? How to encourage the export-led growth in the NMEs without smothering them with anti-dumping duties? What should the NMEs do to speed up their transition towards greater market-orientation economy?

\textbf{a. Eastern (NMEs) Complaints and Proposal}

That Western antidumping laws should not apply to the NMEs at all is one of the arguments some NMEs always hold. Antidumping law is a remedy devoted to markets, however, according to Western countries' definition to the NMEs, the so-called NMEs do not "operate on market principle of cost or pricing structures."\textsuperscript{253} Therefore, antidumping against NMEs seems to be a self-contradictory practice which need to be re-evaluated.

The problems of current Western countries' antidumping laws indicate that a viable solution must meet certain criteria, which include:

\textsuperscript{252} William Alford, \textit{supra} note 95, at 79-80.
(a) certainty as opposed to the current case-by-case determination of whether the specific country is an NME;
(b) predictability as opposed to the ambiguity of current laws in surrogate country selection;
(c) administrability as opposed to the current difficult-to-apply methodology in normal value determination;
(d) accuracy as opposed to the unscientific methodologies in current dumping margin calculation;
(e) fairness to the NMEs through lessening politicisation;
(f) flexibility in the context that it should reflect the changes in evolving NMEs.

So far, none of the methodologies adopted by Western countries in NME antidumping determination satisfy all of the above criteria.

Firstly, under Western antidumping laws (except for EU), any determination as to whether a specific country should be treated as an NME will have to be made on a case-by-case basis. Such practice lends a great deal of uncertainty to the administrative process. NMEs in transition at different stages will not be able to know in advance whether the foreign market value of their exports will be calculated based upon regular method (i.e. home market prices) as with market economy dumping, or based upon special methods (i.e., surrogate country method, benchmark method or factors of production approach) as with NME dumping.
Secondly, the factors of production approach has merit. However, stricter rules should govern the I.T.A.'s application of the antidumping law. To make the law more predictable for NME exporters and domestic importers as well, Western countries should establish a set list matching market economy countries with NME countries for the I.T.A. to use when valuing factors of production. Only in this way could NME exporters and domestic importers estimate factor values to determine if it had violated US trade law prior to exportation.

Thirdly, to solve the problems of applying the surrogate country approach (i.e., lack of co-operation from the exporters of the selected surrogate country), the new antidumping law could replace the use of surrogate country approach with a more workable and predictable benchmark method where NME export prices are compared with benchmark prices, namely, average import prices; the lowest import price; or the price charged by the largest volume exporter to the US market.

Fourthly, as an alternative to the "all or nothing" approach of determining a country's market orientation, the sectoral analysis methodology could be taken into the new antidumping provisions to accommodate those NMEs in transition where "bubbles of capitalism" exhibits. To establish such method, Western governments should be

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254 The issue of a sector-by-sector transition was addressed in Certain Headwear from the People's Republic of China, see 54 Fed. Reg. 11,983 (1989). In that case, the I.T.A. considered the possibility of using a sectoral or "bubble of capitalization" approach to the Chinese headware industry.
prepared to create a new category for NMEs at a transitional stage in which a mix of market and non-market forces exists. Under the premise of a sector-by-sector transaction, an NME in transition could have each respective sector of its economy treated as a sector of a market economy country as each such sector makes the transition. Only in this way, could the new law accurately calculate the normal value of imports from the NMEs in transition; and only in this way, could an NME in transition be able to benefit by having certain sectors of its economy classified as market sectors.

Fifthly, current Western antidumping laws are obviously politically motivated which have a strong protectionist bias. \textsuperscript{255} Take the United States' antidumping regime as an example, the Omnibus Act 1988 has made the protectionist bias from bad to worse by newly providing that the determination of state control judicially non-reviewable. This special exemption implies that antidumping decisions under the new law would be politically-determined instead of based upon macro and microeconomics analysis. For example, with respect to the aspects of currency convertibility and foreign exchange control, current Western antidumping regime is not fair to NMEs. Despite the great similarities between NMEs in transition and developing market economy countries in the handling of those aspects, Western antidumping laws treat these two divergent types of economies quite differently. Therefore, a NME in transition can justifiably argue that it should be treated in a manner identical to developing market economy countries. \textsuperscript{256} As a

\textsuperscript{255} For a detailed discussion of the "protectionist bias," see supra notes 136-141 and accompanying text.
\textsuperscript{256} See U.S. Department of Commerce Study of China's New Market Orientation and U.S. Trade Laws, supra note 198, at 156.
mater of fact, the NME determinations of Western capitalism countries are always covered with a heavy political colour. i.e., whether a country is an NME equals to whether it is a communist country.

Finally, in the context of NMEs in transition, short of flexibility is also one of the weaknesses of Western antidumping regime. Current legislation is inherently restrictive since it only recognises two types of economies, “market” and “non-market,” there is no “grey area” in between, which put the NMEs in transition into an awkward situation. The Department of Commerce usually weigh the facts of a specific case and then categorise the country’s economy as either “market” or “non-market” despite the fact that in reality, the country’s economy may be neither.257

b. Western Concerns: NME Export-led Growth Vs. Domestic Industries

Ever since World War II, national economies in the world have become increasingly and intensely interdependent and therefore mutually vulnerable.258 In the context of West-East trade relations, Western countries’ concerns mainly surround two issues: First, how to obtain more market access into Eastern countries’ market? Second, how to let less domestic market share be taken by Eastern countries? As regards antidumping, how to encourage the export-led growth of the NMEs in transition without

257 Id. at 158.
258 See generally, Professor Ivan L. Head, On a Hinge of History: The Mutual Vulnerability of South and North (University of Toronto Press, 1991).
smothering them with antidumping duties and meanwhile protect domestic industries against dumping has become one of the main concerns of Western economic powers. This concern is particularly timely given the transition of the new democracies in Eastern Europe and the former Soviet Union from NMEs towards full-fledged market economic systems. There is no satisfying answer to this question yet. Some alternatives have been suggested by Western scholars:

(a) replace antidumping laws with antitrust legislation;\textsuperscript{259}

(b) through bilateral negotiations with various NMEs to deal with disruptive trade actions caused by imports from NMEs;\textsuperscript{260}

(c) change to rely on quotas or increased tariffs.\textsuperscript{261}


\textsuperscript{260} Though it is a good method, such a process may be cumbersome and time consuming.

\textsuperscript{261} This is not a good alternative for antidumping because the use of country-specific quotas actually violates GATT Article XIX which requires that all import restrictions imposed by contracting parties upon other contracting parties to be product-specific, not country-specific. The use of increased tariffs also violates GATT principles.
Chapter Five

CHINA'S REACTIONS TO WESTERN ANTIDUMPING PROCEEDINGS

A. National Strategic Export-Led Foreign Trade Policy

Reforms and greater openness are China's only way out.\(^{262}\) Bearing this principle in mind, China has unremittingly made efforts over the past decade to reform its foreign trade system, setting an export-led foreign trade strategy.

Since 1979 open-door to the outside world, China has achieved a continued and tremendous success in the reform of its foreign trade regime, which made China's exports increase ninefold and imports more than sevenfold.\(^{263}\) As regards China's foreign trade legislation, during the past seventeen years, China has issued hundreds of foreign trade laws and regulations governing import and export administration, foreign-invested enterprises, custom tariffs, foreign exchange control, quality control, and protection of intellectual property rights. It is no exaggeration to say that China's foreign trade legislation has played an indispensable role to the remarkable development of its foreign trade. Especially noteworthy is the promulgation of the long-awaited Foreign Trade Law (hereinafter, FTL) of PRC on 12 May 1994,\(^{264}\) which, taking into account both GATT

\(^{262}\) Deng Xiaoping reiterated this principle during his trip to South China in January 1992.


principles and China’s real conditions, regulates China’s foreign trade activities, clarifying the relationship between government ministries and foreign trade operators, and establishing the basic system involving import and export control over goods, technologies and services. The new FTL, together with other foreign trade laws and regulations, has to a great extent increased the transparency and unification of China’s foreign trade regime, reduced the uncertainty associated with trading with China. Most importantly, it has significantly facilitated the integration of China’s foreign trade system into the international trade community and has promoted China’s transition towards a full-fledged market economy. The final success of this transition will, to a large extent, hinge on whether China can effectively implement its export-led foreign trade strategy as well as further phase out the administrative controls within the regime of its foreign trade.

a. Decentralisation of Foreign Trade Management Structure

Where China’s foreign trade decentralisation is mentioned, Western observers always advocate that China reduce or totally abolish the government intervention in its foreign trade and change to rely on Adam Smith’s invisible hand of market competition to determine prices and foreign exchange rate as soon as possible - preferably to do something just like what Ludwig Erhart did in West Germany when he abolished exchange rate controls overnight, or what Margaret Thatcher did in Britain when she simply announced the end of exchange controls.\(^{265}\)

Undoubtedly, China is also anxious to get rid of the shackles on its foreign trade and complete its transition to market-economy as soon as possible, however, the ideas proposed by those Western observers can be regarded only as a goodwill gesture and perfect only in theory. They are just scratching an itch outside the boot of China (Ge Xue Sao Yang), to use a Chinese proverb. They totally miss the real problem, i.e. they failed to take into full account the difference between China and Western countries. Currently, China’s economy is in transition from non-market to market economy. Its economy is a mixture of both. During the transition period, while some market forces began to dominate the market, the state would still decide the scale and direction of development.\textsuperscript{266} Realising that a highly centralised foreign trade system was too rigid to meet the demands of its export-led growth, China decided to take the decentralisation of foreign trade structure as the first step of its foreign trade strategy.

During the past seventeen years of reform, central control of foreign trade has gradually been decentralised in favour of provincial or municipal Foreign Trade Companies (FTCs). Most provincial and municipal FTCs are empowered to deal directly with foreign firms and conclude import-export contracts within their respective legal scope of business.\textsuperscript{267} Meanwhile, some industrial ministries under the state council are also allowed to set up their own FTCs to directly conduct foreign trade in goods produced by a

\textsuperscript{266} See Xu Zhiming, "The impact of China’s Reform and Development on the outside world," in James A. Dorn, \textit{id.} at 250.

network of factories under the ministries’ jurisdictions.\textsuperscript{268} As a result, China’s foreign trade management structure began to comprise two levels. At the central level, it is MOFTEC and twelve NFTCs under it. At the local level, it is local governments and thousands of FTCs under their jurisdiction.

MOFTEC is horizontally the department within the State Council in charge of administration of foreign trade and economic co-operation and vertically the highest administrative authority in China’s foreign trade apparatus. It is explicitly provided in the FTL that, “[the] State Council’s department in charge of foreign trade and economic relations shall be in charge of foreign trade throughout the country in accordance with this law.”\textsuperscript{269} That is to say, MOFTEC has the power to grant foreign trade rights to FTCs, enterprises and organisations; to approve export quotas and import and export licenses; to approve the establishment of foreign investment enterprises in China; and to negotiate bilateral and multilateral trade agreements with foreign governments. It is responsible for supervising the work of foreign trade bureaux and commissions at provincial and municipal level. Those twelve NFTCs under the MOFTEC are organised by the trade commodities and services they represent. Their importance is reflected in the fact that they still monopolise the imports and exports of some China’s most important foreign trade commodities.\textsuperscript{270}

\textsuperscript{269} Foreign Trade Law, supra note 228, Art. 3
\textsuperscript{270} See Medelyn C. Ross, Foreign Trade Offensive, CHINA BUS. REV., at 33 (July/Aug. 1987).
As well, there are many other specialised departments, agencies and financial institutions also involved in foreign trade administration. For example, the State Planning Commission, together with the MOFTEC, is responsible for making initial control figures for imports and exports for long-range and annual plan; the Bank of China handles trade financing and, together with the State Administration for Exchange Control (SAEC), controls the national foreign exchange; the People’s Insurance Company of China provides relevant insurance coverage; the Customs Administration and the State Administration of Commodity Inspection (SACI) jointly control the quality of import and export goods; the State Pricing Administration supervises the setting and enforcing of prices of imported goods. MOFTEC works closely with these agencies to formulate and implement China’s foreign trade laws and regulations, as well as makes the national import and export plans.271

Finally, a small number of export-oriented manufactures have also been granted the power to engage directly in import and export trade within a specified scope.272 This is really a considerable progress in the regime of China’s foreign trade. In this way, the NFTCs’ monopoly over foreign trade regime has been broken up, and simultaneously many new sino-foreign trading channels have been established. It made trading methods

271 China used to have two types of plans: mandatory plan and guidance plan. The former is compulsory in nature and mainly comprises the exports of raw materials and heavy industrial products, which is handled mainly by the NFTCs with the subsidisation from the government. The latter is more flexible and mainly carried out by the FTCs under other ministries and local governments. Since 1993, mandatory plans for imports and exports have been cancelled. See Yongjiang Gu, A Review and Preview of Negotiations on China’s Return to GATT, in CHALLENGES AND OPPORTUNITIES: CHINA’S RETURN TO GATT AND ITS IMPACT ON THE HONG KONG ECONOMY, Collection of Conference Speeches, at 6 (Hong Kong: One country, Two Systems Economic Research Institute, 1993).

272 See Feng Datong, supra note 231, at 3.
and patterns more flexible and variable. However, while these newly created FTCs acquired the right to handle most of the export commodities on their own, there are sixteen kinds of especially important items still centralised under the NFTCs, such as corn, sugar, wool, cotton, steel, and crude oil, etc.

In the process of decentralisation, local governments were given more power to approve the establishment of foreign trade enterprises, to issue import and export licenses, and to manage quotas allocated to foreign trade enterprises in their localities as well. Notably, local governments also control the NFTC branch offices in their jurisdictions, which used to be controlled exclusively by a NFTC head office in Beijing. Another big reform demonstrated China’s efforts to decentralise its foreign trade regime is that local government, instead of turning over all of its foreign exchange earned through exports to the central government, began to be allowed to retain certain amounts. Facts show that all these reform methods have to a great extent stimulated local initiatives and have tremendously increased China’s foreign trade volume.

While the decentralisation of China’s foreign trade structure proved productive and really injected vitality into China’s foreign trade regime, some unexpected problems cropped up along with the reform. For instance, due to the lack of an efficient foreign trade macro-control system and a comprehensive set of foreign trade laws and

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273 Such as processing and assembly of imported materials and parts, compensation trade, the export of Chinese labour and engineering for construction projects abroad, etc.
274 See Provisional Measures on the Control of Export Commodities, Act of 30 Dec. 1992, Art.3
275 See Madelyn C. Ross, Changing the Foreign Trade System, CHINA BUS. REV., at 34 (May/June 1988).
regulations, combined with the lack of knowledge of some local authorities and enterprises about the international market, after the decentralisation, China’s foreign trade was once falling in somewhat of a state of disorder. For example, in order to earn more foreign exchange, some enterprises engaged in unfair competition against each other by pricing their products in foreign markets much lower than in the domestic market. Such practice has caused many anti-dumping actions against China’s exports, which has consequently affected China’s export volume as well as its international reputation.

Furthermore, in order to promote exports, provinces and localities granted tax rebate and profit retention incentives to export manufacturers and FTCs which found themselves sandwiched in the market between inflationary domestic purchase prices and low international product prices. Some local governments just subsidised the raw material purchases of export producers so as to encourage more exports. This caused those export manufacturers to ignore their production costs and consequently created an awkward situation, i.e., the more products they exported, the less profit they made.

The out-of-control situation in its foreign trade regime would certainly lead to the central government’s recentralisation of its foreign trade management structure in the mid-1980s. MOFTEC in January 1986 issued the Decision on Further Reconstruction of All Types of Foreign Trade Corporations, which demanded that:

276 See Li Lanqing, Zhongguo de Waimao Tizhi Gaige (Reform of China's Foreign Trade System), ZHONGGUO DUIWAI MAOYI (CHINA'S FOREIGN TRADE), at 6-7 (Jan., 1988).
277 See generally, Li Jianfeng, Dangqian Waimao Qiekuai Chengbao de Xiaoying Fenxi (Analysis of the Efficiency of the Current Division of Contracts in Foreign Trade), ZHONGGUO DUIWAI MAOYI (CHINA'S FOREIGN TRADE), at 22-25 (Dec. 1988).
(a) each type of foreign trade corporation must be approved by MOFERT (now, MOFTEC) or agencies to which such approving authority is delegated, must have clear articles of association and business scope, and must conduct its business strictly within the permitted business scope;

(b) a corporation below provincial level cannot engage in foreign trade;

(c) a corporation that specialises in international financing, contracting, or consulting cannot engage in foreign trade;

(d) any corporation in the 14 coastal cities may export only local products or import the goods needed for the local development; any engagement in other foreign trade business is prohibited;

(e) foreign trade may be conducted only by state enterprises, collectives or individual enterprises are prohibited from foreign trade.

This decision has been the legal basis on which the Chinese government supervises foreign trade enterprises.\(^{278}\)

By withdrawing the approval powers of some foreign trade enterprises from local governments and tightening control over the operation of local FTCs, China seemed to have put its foreign trade regime in order again.\(^{279}\) Unfortunately, before long, many new problems caused by the incomplete decentralisation plagued the central government again. The recentralisation of economic decision-making and abandonment of market-style

\(^{278}\) See Feng Datong, supra note 231, at 7

\(^{279}\) By early 1990, over 24 percent of the country's corporations had been abolished or merged so as to cease their illicit foreign exchange trading or other improper activities. See the Work Report delivered by Premier Li Peng at the 7th NPC in March 1990, CHINA DAILY (Mar. 21, 1990).
reforms in vital areas such as prices, wages and finance in 1989 seriously undermined China's application to join the GATT. 280 A telling remark developed within the central government, "As soon as you loosen up, there's a mess; as soon as there's a mess, you take charge; as soon as you take charge, it becomes deadening; as soon as it becomes deadening, you loosen up." 281 During the 1980s, China's policy regarding foreign trade management just fell into a vicious cycle, fluctuating between decentralisation and recentralization. 282 In fact, as long as the administrative control still dominates China's foreign trade regime, it is hopeless for China to get out of the dilemma. i.e., once the central government tightens its control, the economy will become rigid and local governments will complain about the lack of foreign trade autonomy, which in turn forces the central government to loosen its control. Obviously, without the support of a comprehensive legal system, the economy will inevitably turn chaotic again. "China has reached a point when piecemeal tactics are not likely to be effective in advancing her economic reform." 283 In order to extricate itself from the 1980s' vicious cycle, China decided to adopt a macro-control mechanism which lets market forces to decide the operation of the whole economy. The central government, instead of making business decisions for enterprises as it used to do, just exercises macro-management through effectively formulating and implementing a unified series of foreign trade laws and regulations, and greater reliance on some 'market forces', such as tariffs, interest rates,

280 See, China's foreign trade may hinder GATT membership, ASIAN WALL ST. J., at 6 (Sept. 21, 1987).
281 Yi Boshui, Waixiao Fazhan Yu Waimao Tizhi Gaige (The Development of Foreign Trade and Reform of the Foreign Trade System), GAIGE YU ZHANLUE (REFORM AND STRATEGY), at 43 (Jan. 1988).
283 Steven Cheung, Privatisation vs. Special Interests: The Experience of China's Economic Reforms, 8 CATO J. 593 (winter 1989).
exchange rates and loans, to manage the market indirectly. But most importantly, China must try to avoid its inveterate weakness, namely, shifting from one extreme to another. The experience of the recent past has suggested that, instead of extremely decentralising or extremely tightening its foreign trade, China must try to find a way in-between, dismantling its administrative controls in a more planned and co-ordinated manner, simultaneously establishing a market mechanism step by step. Actually, the promulgation of the new FTL itself has been an important step to strengthening macro-management in China’s foreign trade regime.

b. Import-Export Control System

(a) Import-Export Licensing

With the drastically reduction of mandatory planning for the foreign trade sector in the early 1980s, the import-export licensing were established to strengthen the State control over foreign trade regime, co-ordinating and unifying the foreign trade activities of the various localities and departments in foreign transactions.

Import licensing mainly serves three purposes: First, it enables the State to maintain a favourable balance of payments for foreign currency by restricting the import of

284 Before 1979, the export plan covered some 3,000 commodities. By 1982, the number fell to only 199; it fell further to a low of about 100 in 1984. The number rose in 1985 during a balance of payments crisis, and stood at 112 in 1988. Then, in 1993, it was totally abolished in order to meet GATT requirement.
consumer or luxury goods. Second, it protects the country's infant industries by restricting the import of certain products.\footnote{Since October 1982, a list of designated controlled goods were published annually by the State Planning Commission and MOFTCE, which serves primarily to control three groups of products: agricultural raw materials subject to domestic price control; critical domestic production such as steel and textiles; and non-essential consumer goods.} Finally, it conserves valuable foreign exchange and allocates limited foreign exchange to different FTCs to allow them to import the most advanced technology and key raw materials that China needs for its economic development.

As for the objectives of export licensing, on the one hand, it serves the purposes of increasing the prices of export commodities in order to avoid China's exports flooding the foreign markets.\footnote{The export licensing for some agriculture commodities such as beef, pork and vegetables exported to Hong Kong and Minerals such as tungsten, in which China has a very large share of the international market (40 percent), are for the purpose of price control.} On the other hand, it may prevent potential domestic shortage of certain goods.\footnote{E.g., export controls over rice and maize are for the purpose of ensuring the adequate supplies of these goods domestically.} Additionally, China possesses a virtual monopoly over the supply of a variety of agricultural products to Hong Kong and Macao. Licensing helps reduce domestic export competition in order to extract maximum monopoly rent from such exports. These goods constituted 25 of the 212 items on the list of goods requiring export license in 1987.\footnote{Walter Galenson ed., \textit{China's Economic Reform}, at 211 (The 1990 Institute, 1993).}

Import and export licensing demands a foreign trade operator to apply to the appropriate agency for a license before ordering goods for import or shipping goods for
The Chinese customs authorities, on the basis of the import or export license and related documents, will inspect the goods and allow them to clear customs. As a basic principle, those commodities for which the State regulations require a license for import and export cannot be imported or exported without a valid license. The laws and regulations regarding import and export licenses are the Interim Procedures of the State Import-Export Commission & the Ministry of Foreign Trade of the PRC Concerning the System of Export Licensing (hereinafter, Export Licensing Procedure), promulgated by the MOFT on 30 January 1980; Interim regulations of the PRC Concerning the System of Licensing of Import Goods (hereinafter, Import Licensing Regulation), promulgated by the State Council and effective on 10 January 1984; and Rules for the Implementation of the Interim Regulations of the PRC Concerning the System of Licensing of Import Goods, issued by the MOFERT & the General Administration of Customs on 15 May 1984.

The approved foreign trade operators are deemed to have obtained the import and export licenses for the commodities within the approved scope of business. That is to say, they do not need to apply for a separate license for each transaction as long as it is within their respective scope of business. However, commodities for which MOFTEC or other agencies of the State Council have issued special regulations restricting import or export require separate applications in order to obtain a license.

289 See Feng Datong, supra note 231, at 5.
290 Id.
Generally, MOFTEC, which acts on behalf of the State, issues import and export licenses. However, since the institutional decentralisation, MOFTEC also authorises the foreign trade bureaux of different provinces, municipalities and autonomous regions to issue certain types of licenses within their jurisdictions. The chief trade commissioners in the port cities of Shanghai, Tianjin, Dalian, and Guangzhou are responsible for issuing import licenses for their jurisdictions.\(^{292}\)

With respect to the foreign invested enterprises (FIEs), to facilitate their import and export, a FIE may prepare an annual plan for importing the machinery, equipment, spare parts, and raw or other materials required in its production within the business scope of the FIE and an annual plan for exporting its products. The import and export licenses may be issued every six months in accordance with the annual import and export plans. Therefore, application for each transaction is not required. Where a foreign investor wishes to import certain goods as part of his investment to the FIE, direct application can be made to the competent agencies on the basis of approved documents for the formation of the FIE, unless importation of such article otherwise require individual application or is not within the business scope of the FIE. In addition, FIEs do not need to apply for an import license for items that cannot be purchased in China, but that are needed by the FIE production.\(^{293}\)

(b) Import and Export Quotas

\(^{292}\) Import Licensing Regulation, Art. 3, \textit{id.}

\(^{293}\) \textit{Id.} Art. 7.
The import and export quota system was originally adopted to ensure effective utilisation of quotas imposed on China's textile exports. Since 1979, China has signed bilateral textile agreements with the United States, Canada, Sweden, Finland, Austria, Norway and the European Economic Community (EEC), which include quota restrictions on Chinese textile exports to those countries. In addition to textile exports, some other export products, such as steel, ammonium tungstate exported to the United States, shoes, dried sweet potatoes, and canned mushrooms exported to EEC countries, are also subject to quota restrictions. In order to stabilise the export market, fresh and frozen commodities exported to Hong Kong and Macao were subjected to quota administration in 1986. In addition, China also imposed import quotas to protect certain sectors of its economy. In 1992, import quotas applied to 7.7 percent of total imports, and export quotas covered 15 percent of China's exports. Along with the licensing system, quota administration serves the important purpose of controlling the total volume of imports and exports, making a rational distribution of key, staple or resource-bound goods on domestic and overseas markets, preventing dumping of export goods at low prices, and controlling high-price competition for imports.

China's export quotas are divided into three types: planned quotas, passive quotas, and active quotas. Planned quotas cover thirty-eight varieties of bulk exports of resources that impact the national economy and people's livelihoods. They serve the

\footnote{EEC was later replaced by European Community (EC), and then European Union (EU) at present.} \footnote{See CHINA: FOREIGN TRADE REFORM, supra note 227, at xx, xxi.
important purpose of maintaining the balanced development of China's economy and ensuring the stability of people's living standards. Passive quotas are basically a response to quota restrictions imposed on China's exports. Active quotas are set up to prevent market saturation and sharp drops for exports in overseas markets and price hikes for imports in domestic markets. According to the Provisional Measures on the Control of Export Commodities, the export commodities under the control of the State quota license include: (a) thirty-eight varieties of bulk exports of resources that impact the national economy and people's livelihoods and bulk traditional exports; (b) fifty-four varieties of China's key export commodities that dominate the world market or a specific market, or commodities that foreign countries request China to restrict; (c) twenty-two varieties of key brand-name, top-quality and special local products, certain products exported in great amounts, and a few other exports placed under general export license control; and (d) twenty-four varieties of Chinese exports which are put under passive control because foreign countries have imposed quotas on them. Under the FTL, quotas apply to goods and technologies whose imports and exports are subject to restriction. Goods and technologies subject to quota can be imported or exported only when they have been approved by MOFTEC independently or jointly with other relevant departments under the State Council.

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296 Provisional Measures on the Control of Export Commodities, 3 CHINA LAW FOR FOREIGN BUSINESS REGULATION (CCH), Act of Dec. 30, 1992, Art. 1.
297 Quota licensing, CHINA'S FOREIGN TRADE, at 6 (Mar. 1990).
298 Id.
299 Id.
300 Supra note 260, Art 1.
301 Foreign Trade Law, supra note 228, Art.19.
Issuing quotas for some especially important export commodities is an important content in the macro-economic control of China's foreign trade at the present stage. Since 1 March 1994, China has introduced bidding into the quota allocation process to increase competition.\textsuperscript{302} MOFTEC implemented the system of compensatory bidding of quota rights for 13 kinds of export commodities, including lumber, light (heavy) magnesium, etc.\textsuperscript{303} It has changed the past practice of making arbitrary decisions on allocating quotas and achieved significant results in promoting a good order in foreign trade operation and curbing panic buying and underselling.

With regard to export commodities quota control, corporations and enterprises empowered to export commodities under planned-quota control must propose and report the amounts of the commodities planned to be exported in the following year.\textsuperscript{304} The proposal and report are made to the foreign economic relations and trade departments of the provinces, autonomous regions, municipalities directly under the central government, or cities handling their own development plans.\textsuperscript{305} Local subsidiaries must also report the export plans to their parent corporations if they import or export non-ferrous metals, metallurgy, international petrol-chemical, electronics, or autos.\textsuperscript{306} After receiving the export plans from foreign trade corporations and enterprises, local government offices in

\textsuperscript{303} \textit{Bidding of Quota Rights for Exports Discussed}, \textit{DAILY REPORT CHINA}, at 63 (27 Dec. 1994).
\textsuperscript{304} Provisional Regulations of the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China concerning the Administration of Voluntary Quotas for Export Commodities, Act of April 20, 1993, Art.5.
\textsuperscript{305} \textit{Id.}
\textsuperscript{306} \textit{Id.}
charge of foreign trade will balance all of the proposed export amounts of commodities, and submit a written report of the proposed export amounts of commodities, and submit a written report of the results to MOFTEC.\textsuperscript{307} In addition, foreign trade and industry-trade corporations under various ministries or commissions will compile the plans for exporting the planned-quota commodities in the following year and report them to MOFTEC.\textsuperscript{308} MOFTEC will make a final determination for all the proposed amounts of annual exports of commodities under the planned-quota goods and give orders for their enforcement.\textsuperscript{309} After the local government in charge of foreign trade and MOFTEC approve the export plan, FTCs must apply for licenses of the allocated quotas of export from offices assigned by MOFTEC by showing their planned-quota export certificates.\textsuperscript{310} A license for an annual export quota is valid for the current year and is not subject to renewal.\textsuperscript{311}

(c) Evaluation of China’s Import-Export Control System

Although China’s current import-export control system, through adopting import-export licensing and quota system, as well as commodity control approach, has seen major progress over the mandatory trade planning system, it is still not quite on-stream with the market mechanism. As a result, foreign trade in China today remains heavily manipulated by the government. Current control system can only be taken as a transitory measure towards market economy. However, at the transformation stage, China has to rely

\textsuperscript{307} Id. Art. 6.
\textsuperscript{308} Id.
\textsuperscript{309} Id.
\textsuperscript{310} Id. Art 13.
\textsuperscript{311} Id. Art.14.
continuously on both economic and administrative means to guarantee the smooth transition of its economic and trade regime. China will not abolish its current import-export control system overnight, nor will it totally give up the planned quotas and exclusive management of certain commodities by NFTCs immediately.

As regards China's import-export control system, one of the major concerns of Western countries is the issue of transparency and unity of the system. Western countries' lingering doubts over the transparency of China's foreign trade controls focus mainly on China's practice of placing licenses or quotas on several long lists of import and export goods and the lists have been under constant revision with some products being added or removed from year to year. Even worse than that, sometimes internal directives just take precedence over published regulations, which greatly increased the difficulty for foreign traders to penetrate China's market. As for the lack-of-unity issue, before the promulgation of FTL, the local authorities and various ministries under the central government often pass local legislation and administrative regulations that are inconsistent with China's foreign trade laws. It is not uncommon for national foreign trade laws to

\[312\] E.g., it is reported that a secret State Council directive effectively banned American companies from participating in the development of China's telephone system. See Jan Prybyla, *How should the U.S. Handle Trade Issue with China?* E. ASIAN EXECUTIVE REPORT, at 9 (Apr. 15, 1993).

\[313\] E.g., in 1986, Guangdong province made a list of items subject to import controls. Some of the items, such as form vehicles and heavy-duty trucks, were not contained on the import license list issued by the central government. See, Fair-trade Subcommittee of the American Chamber of Commerce in Hong Kong., *Import Controls in China*, CHINA BUS. REV., at 42 (Jan.-Feb. 1987).
be unevenly enforced, as localities and ministries adopt different criteria in interpreting the laws.\footnote{314}{It is reported that in China, while one port of entry enforces one rule, another port of entry might stress another. See \textit{U.S.-China GATT Accession Talks Described as Making Progress}, 11 \textit{Int'l Trade Report}, at 899 (June 8 1994).
}

In response to Western countries' request of unifying and clarifying China's foreign trade regime, China has taken significant steps during the past decade. The promulgation of hundreds of laws and regulations concerning foreign trade regime, especially the new FTL, has established a legal framework and signalled China's move away from administrative control toward legal and economic management of foreign trade. A great number of previously unavailable decrees, rules and regulations pertaining to the import and export control have been disclosed and published.\footnote{315}{In 1993, China disclosed the existence of 17 "classified documents" on import-export administration and submitted to the GATT Secretariat 21 key trade regulations. See Edward Balls, \textit{Survey of China}, \textit{Fin. Times}, at 7 (Nov. 18, 1993).
}

China has made a further commitment not to enforce any law, rule, regulation, administrative guidance or policy measure governing trade unless it has been published.\footnote{316}{China to Make Trade Regulation Transparent, \textit{US Official Says}, \textit{Asian Wall St. J.}, at 3 (July 20, 1992).
}

The new FTL further codifies that MOFTEC is the only State department that has the power to promulgate all policies, laws and regulations regarding foreign trade and to take charge of foreign trade work for the entire country. In particular, MOFTEC is the only organ, in consultation with other relevant departments under the State Council, that may draft, revise and publish the catalogues of banned or restricted goods and technologies.\footnote{317}{Foreign Trade Law, \textit{supra} note 228, Art. 19.
}

Thus, the FTL makes it easier for foreign trade partners to monitor China's trade regulations through reading
MOFTEC issued official documents. Even though China fails to abolish the use of licenses and quotas, the FTL requires the publication of the list of commodities under licenses or quotas and the identification of the governments department in charge of making the list. These requirements represent a step toward keeping China’s foreign trade practice more transparent and uniform. Furthermore, the allocation of licenses and quotas have been more open and efficient by the introduction of more competition mechanisms into the distribution process. Currently, the awarding of licenses or quotas are based on the prices that bidding companies offer, their financial ability, and their credibility in the international market.318

In short, one possibility to gradually phase out the government intervention in the foreign trade control regime is to first reduce the import-export licensing system by ensuring that all decisions with regard to import-export licensing are made only by central government authorities according to criteria that are uniform and transparent,319 then gradually replace the import-export licensing with import tariff or export tax equivalents. This would allow sizeable rents to accrue to the government budget instead of being captured by a few FTCs or enterprises designated to handle such products.

c. Reform of Domestic Price System and Trade Subsidies

318 Wu Yunhe, Bids for Export Licenses, CHINA DAILY, at 11 (July 2, 1994).
319 China drastically shortened the catalogues of goods needing import-export licenses or quotas in 1992.
The most distinctive feature of China's foreign trade system, just like those of other sectors of China's economic system, is that it has been undergoing a transition from non-market economy to a socialist market economy. One the one hand, this transitional nature decides that China faces an extra daunting task of reforming its fundamental economic system from a state controlled economy to a market-based one of which domestic price system reform is inevitably an important part. On the other hand, an important objective of reforming the trade regime is to rationalise the structure of incentives for domestic economic activity and thereby improve resource allocation. However, if domestic price controls remain in place, the trade regime would be of little help in accomplishing this objective.\(^{320}\) Therefore, without further price liberalisation, the transition of China's economy towards a full-fledged market economy cannot be carried out smoothly.

China once kept domestic prices fixed by the State for decades prior to reform, with only minor adjustments, which made domestic price structure seriously distorted, reflecting neither domestic relative scarcities nor world market conditions.\(^{321}\) The large price differentials were sustainable when foreign trade was tightly controlled by the planning authorities and conducted by a small number of NFTCs. However, tight price control was no longer feasible. Intense competition among export FTCs bid up the domestic prices of primary products, narrowing their differences with world prices.\(^{322}\)

\(^{320}\) *China: Foreign Trade Reform, supra* note 227, at 102.
\(^{321}\) See Walter Galenson ed., *CHINA'S ECONOMIC REFORM*, at 214 (The 1990 Institute, 1993).
Furthermore, because of the declining share of mandatory and priority imports and the increasing share of imports conducted through the agency system over the years, the link between international and domestic prices of imported goods has become stronger, although the gap between domestic and world market prices still exists. It is undeniable that, after the past decade’s reformation, China has already made remarkable progress in its price regime.

The major reform of domestic price for imported goods took place in 1984, by which they are priced domestically on a “agency” basis rather than on the basis of “comparable domestic prices,” as was the case prior to reform.\(^{323}\) The agency pricing system is,

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\text{domestic price of an import} = \text{CIF value} + \text{import duty} + \text{internal taxes} + \text{commissions}
\]

The shift of imports from the comparable-domestic-pricing system to the agency pricing system relieve the government from subsidising imports. Thus the fiscal burden on the government also declined.\(^{324}\) While the proportion of market prices has grown to cover eighty percent of categories of goods in China, government fixed prices still apply to

\(^{323}\) The purpose of pricing certain imports on the basis of comparable domestic products was not to protect domestic producers--import licensing and tariffs took care of that--but to provide the domestic users with the same low fixed prices as domestically produced goods.

twenty percent of categories of goods that the Chinese government considers crucial to
the lives of the people and to the national economy.\(^{325}\)

Government fixing prices practice had led to a situation that where the oversupply
of a particular good in the international market does not result in the increase of domestic
prices and domestic sales. Such price system of course cannot effectively guide the
domestic enterprises in the market, nor can it control the flow of imports and exports. On
the import side, the higher domestic prices of some commodities are responsible for blind,
repetitious importing of the same product that threatens to consume large amounts of
precious foreign exchange. On the export side, sometimes lower domestic prices give
FTCs a wrong incentive to sell products to the international market and to earn foreign
currency. This has led to domestic FTCs competing against each other for control of
export goods and expansion of export channels. Because of the intensity of the
competition, some FTCs have utilised unfair competition practices, such as controlling
sources of export goods and selling at unreasonably discounted prices to undercut
competitors. Such practice, as a whole, is detrimental to China’s national interest,
resulting not only in the loss of revenue to China, but also in anti-dumping lawsuits against
Chinese products in foreign countries, which in turn influences China’s normal export.\(^{326}\)

\(^{325}\) See generally, Xinhui Wang, "Preparation in Respect of the Chinese Economic System For Returning
to GATT," in CHALLENGES AND OPPORTUNITIES: CHINA’S RETURN TO GATT AND ITS IMPACT ON THE
HONG KONG ECONOMY, Collection of Conference Speeches (Hong Kong: One country, Two Systems
Economic Research Institute, 1993).

\(^{326}\) See Shuxin Tong, Tongyi Duiwai Shi Fazhan Woguo Duiwai Jingji Maoyi De Keguan Xuyao, (Uniting
to Compete Against Foreigners Is an Objective Requirement of Developing Our Country’s Foreign
Trade), 14 INT’L TRADE PROBLEMS, at 17 (1986).
In order to fulfill planned export quotas, the Chinese government instituted an export-promotion program in 1985, providing attractive incentives, including a large currency devaluation and a generalised foreign exchange retention system. Under such a system, with pervasive domestic price distortions on the one hand, and FTCs bound by obligations of the planned export quotas on the other, a great amount of domestic currency losses on some international transactions were inevitable - with a 14 percent rise in exports, the government direct fiscal subsidy on exports jumped from a negligible level in 1985 to more than RMB 7 billion in 1986. Import and export subsidies became a big burden on the government budget.

Chinese government has realised the adverse effects of the dual track pricing system. However, since it is one of the side products of non-market economy and China is still in a transitional period, it is still a little bit earlier for China to abolish the current system at once. Just like the retained licensing and quotas system, China has to use both economic and administrative means in the price system for the time being and gradually change to let market forces determine the prices of all products. As regards fiscal subsidies, in 1991, China eliminated export-related subsidies completely. The key provision of the 1991 reform made all specialised NFTCs and all provincial-level administrative units responsible for their own domestic currency profits and losses, at least on exports. Central government fiscal subsidies for money-losing exports were said to be

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327 See Zhou Xiaochuan, supra note 286, at 341-343.
328 In 1986, government subsidies to FTCs to cover their losses were more than Y 24 billion, more than two percent of the official budget deficit. By 1988, total fiscal subsidies to FTCs had reached an annual level of over Y 26 billion. See CHINA: FOREIGN TRADE REFORM, supra note 227, at 25-26.
cut to zero beginning in 1991. In parallel, the central government has also moved to reduce the burden of fiscal subsidies to offset money-losing import transactions, which amounted to Y 20 billion. Efforts to reduce this burden focused on price increases for domestic products that historically had been sold at low prices.\(^{329}\)

**d. Foreign Exchange System in Transition**

At different stages of China’s development, its foreign exchange policy and legislation are revised according to the specific characteristics of each stage. At present, its purpose is mainly to enable the government to regulate both the volume and composition of the nation’s foreign exchange spending so as to maintain the balance of payments equilibrium.\(^{330}\) To achieve this goal, some form of administrative mechanism are still needed to allocate foreign exchange to priority uses. However, China has already come a long way toward freeing itself from administrative exchange control. The development of the exchange retention system and the establishment of Foreign Exchange Adjustment Centres (FEACs) have provided a significant alternative to the exchange control authorities as a channel for obtaining foreign exchange.\(^{331}\)

**(a) Foreign Exchange Retention Scheme**

\(^{329}\) See id. at 27.
\(^{330}\) See Walter Galenson, supra note 285, at 222-225.
\(^{331}\) Id. at 222.
China traditionally combined an inconvertible currency with a rigid system of exchange control requiring all exporters to turn over all of their foreign exchange receipts to a specialised bank, the Bank of China, in exchange for domestic currency. Exporters thus were left with no foreign exchange to finance their imports. Like any other would-be importer they had to depend on the State Planning Commission, which allocated all foreign exchange earnings via an annual import plan. The government began to decentralise the administration of foreign exchange earnings in 1979 by allowing local authorities, departments, and enterprises to retain the rights to buy back a certain proportion of their foreign exchange earnings instead of surrendering them all to the state at the official rate. Initially, retention quotas, which are transferable between enterprises, were transacted at the administered exchange rate, but by 1988, all FIEs and domestic enterprises with retention quotas were permitted to operate in the FEACs (informally named swap markets).\textsuperscript{332} Retained foreign exchange can be sold at the FEACs for Renminbi at a higher rate than the official exchange rate, or used to purchase imports. Retention quotas can be traded in the foreign exchange centres or used for acquiring foreign exchange at the official rate to purchase approved imports. It is evident that the exchange retention system has provided a strong incentive for export expansion.

\textsuperscript{332}\textit{Starting in 1986 in Shenzhen, each province, autonomous region and centrally administered city was authorised to establish at least one FEAC within its territory, and by the end of 1992, there were over 100 FEACs in operation throughout China. The volume of FEAC transactions grew rapidly, which reached $25 billion in 1992, or about one-half of all cash imports. The FEAC system has served two key functions: it has provided critical relief to exporters in maintaining export incentives, and it has forced the government to move the official rate to more market-determined level. See \textit{China: Foreign Trade Reform}, supra note 227, at xviii.}
Although the 1991 foreign trade reform has removed most of the inter-regional differentials, the inter-industry differentials still exist more or less. Apparently, further steps are needed to unify China's foreign exchange retention scheme. Beginning on 1 January 1994, with the unification of exchange rates and relaxation of exchange control, the usefulness of maintaining the foreign exchange retention system disappeared. The practice of retaining a proportion of the foreign exchange for use while transferring the rest to the government by enterprises was eliminated, and enterprises with valid permits may purchase foreign currency from banks as they need it.\textsuperscript{333} This important reform places domestic enterprises on an equal footing to compete with FIEs.\textsuperscript{334}

(b) Exchange Rate Policy

Prior to the reform, from 1981 till 1984, China adopted dual foreign exchange rates: official and internal settlement rate. The official rate depreciated gradually under a system of managed floating while the internal settlement rate was fixed at a more depreciated rate.\textsuperscript{335} In January 1985, the official exchange rate was set at the internal settlement rate and the latter was abolished. However, dual exchange rates reappeared with the establishment of the FEACs in 1986. At present, the administered official rate is used for foreign trade and other external transactions included in the annual foreign exchange budget.

\begin{footnotesize}
\begin{itemize}
\item[334] After the abolition of the uncompensated transfer practice, domestic enterprises can retain all the foreign exchange it has earned, with which to make more profit.
\item[335] The internal settlement rate was used for settlement of payments between FTCs and the supplying enterprises.
\end{itemize}
\end{footnotesize}
exchange plan, while the non-official rate, as a more depreciated rate, is determined in the FEACs, where enterprises are permitted to buy and sell foreign exchange and retention quotas which can be used to acquire foreign exchange at the official rate to finance primarily trade transactions not included in the foreign exchange plan. The gap existing between the two rates inevitably created another distortion on the import side because it accentuated the bias in favour of planned imports.\footnote{336 CHINA: FOREIGN TRADE REFORM, supra note 227, at 42.}

It was the stated objective of China to unify the official and swap market exchange rates and eventually to make the Renminbi a convertible currency. To achieve this, it would be necessary for the exchange rate to be set at a realistic level determined by supply and demand. Eventually, in January 1994, China made the long-awaited move to eliminate its dual currency system and allowed the Renminbi to float against a basket of currencies to bring the country's foreign trade more in line with international practice.\footnote{337 The Chinese government floated its currency to clear the way to joining the GATT and said it would make other trade concessions as well to gain membership. See DAILY REPORT CHINA, at 48 (Dec. 29, 1994).} The move ends four decades of setting exchange rate by central planners and begins to set rates at market-determined levels. Due to the depreciation of the exchange rate and the attractive high interest rate of Renminbi Juan, international funds kept pouring in, which effectively increased the supply of foreign exchange in China.\footnote{338 In the first three-quarters of 1994, the amounts of funds realized from direct investment by foreign businessmen got a 49% increase over the same period in 1993.}
In short, the currency reform is a big step to fulfilling China's promise to the GATT that it will achieve a fully convertible exchange rate within five years.\(^{339}\) It also made China's economic structure more efficient, more integrated with the world system, and more profitable.\(^{340}\) Evidently, China has reaped significant benefits from its currency reforms in the form of increased foreign direct investment and foreign trade volume.\(^{341}\) But, most meaningfully, greater efficiency and vitality were injected into China's foreign trade regime.

e. Summary

Ever since China applied for rejoining the GATT (now WTO) in 1986, it has been sticking to its export-led trade policy and has expanded economic co-operation with all other countries on an equal and beneficial basis. China’s transition towards market-economy so as to join the WTO, and joining the GATT so as to promote China’s transition to market economy are, to certain extent, kind of reciprocal causation. Obviously, it would be much easier for China to carry out the transition within the WTO, and the sooner the transition is completed by China, the more benefits to China, to the West, and to the world at large.

\(^{339}\) See *DAILY REPORT CHINA*, supra note 301, at 48.
\(^{340}\) *Prosperity Given Top Priority by Leadership*, *CHINA DAILY*, at 1 (May 14, 1993).
\(^{341}\) According to the statistics announced by China State Statistics Bureau, in 1994, China has become the second largest country in terms of direct foreign investment; exports have risen 30% to US $120 billion; imports grew 10% to US $115 billion, resulting in a trade surplus of US $5 billion for the first time in three years.
B. Suggestions to China’s FTCs on Anti-Western-Antidumping

Antidumping is not a theoretical but a practical problem in the international trade regime. In order to avoid being determined as dumping or to better react to Western antidumping proceedings, China’s FTCs should take into account the following suggestions:

a. Export Prices Perspective: How to Avoid Antidumping Actions

First, avoid including any long-term fixed prices in export contracts. FTCs could better write into their contracts more elastic prices rather than fixed ones.

Second, avoid unfair competition against each other by pricing products in foreign markets lower than in their domestic market.

Third, avoid pricing exports below cost so as to earn more foreign exchange.

Fourth, avoid prices of exported goods being decreased greatly in any short term.

Fifth, regularly collect cost and price data of potential surrogate countries and the importing countries in order that exports may be similarly priced.
b. Reaction to Antidumping

When sued by Western rivals, FTCs should provide the costs and prices data as required by the importing country antidumping authorities as soon as possible. To better achieve this end, FTCs should pay more attention to collecting data and western antidumping cases on a daily base.


Chapter Six

RECOMMENDATION AND CONCLUSION

"Antidumping, as practised today, is a witches’ brew of the worst of policy making: power politics, bad economics, and shameful public administration. The most appealing option is to get rid of antidumping laws and to put nothing in their place. Then all of the evils of such policy—its power politics, its bad economics, and its corrupted law—would be eliminated."342

-- J. Michael Finger

Summing up this thesis, clearly, it is time for all GATT Uruguay Round Antidumping Agreement contracting parties to reappraise their antidumping laws, in particular, their special antidumping rules against NMEs in transition, in the light of the post Cold War development in the international trade. According to the 1979 Antidumping Code and 1994 Antidumping Agreement, "[t]he Parties to this Agreement ... taking into account the particular trade, development and financial needs of developing countries ...hereby agree as follows ..."343 However, in reality, NMEs as a subgroup of developing countries, never benefit from this special requirement.

As demonstrated in the preceding chapters, the conclusions drawn from either economic, social or political economy approaches seem to be the same, i.e., antidumping laws should never be adopted because, from the whole country even the whole world development perspectives, the losses exceed the gains as a result of such laws. Such a

342 Finger, supra note 7, at 57.
343 Antidumping Code (1979), reprinted in Bierwagen, supra note 52, at 223.
conclusion can also be drawn from a utilitarian perspective, namely, the greatest happiness for the greatest number.\textsuperscript{344} In the context of Western antidumping laws, it is a few special interest groups - certain domestic industries - that benefit some, while the vast majority of consumers, importers and other domestic industries are harmed a lot. The total losses from the antidumping laws exceed the total gains. Furthermore, from the point of view of rights theorists, antidumping laws could possibly lead to the violation of certain rights.\textsuperscript{345} Rights theorists take the position that a particular policy is acceptable, from a public policy perspective, if no one’s rights are violated and unacceptable in all other cases. In the context of antidumping, consumers’ rights to cheap prices and various choices of like products have been severely violated; domestic importers’ freedom to enter whatever business contracts have also been influenced. If the sole purpose of government is to protect life, liberty and property, then any policy of antidumping that disparages any of these rights is illegitimate and therefore should be repealed as soon as possible.

Even though a good economic case could be made for abolishing all antidumping legislation, in practical terms, it is a highly unlikely outcome. Generally, Western countries’ current trade policies reflect an attempt to reconcile the inherently incompatible goals of free trade and protectionism. On the one hand, it is believed that “the unchallenged proposition that every country is better off in a world of free trade than in a world in which all countries practice highly protectionist policies…”\textsuperscript{346} That is to say, a

\textsuperscript{344} For one of the classical works on this topic, see generally, Bentham, \textit{THE PRINCIPLE OF MORALS AND LEGISLATION} (Hafner Publishing Co., 1948).
\textsuperscript{345} For rights theory, see generally, J. Waldron, \textit{THEORIES OF RIGHTS} (1984).
global economy promoting free trade enhances competition within industries which, in
turn, yields greater efficiency and better products, particularly in domestic companies.\textsuperscript{347}

On the other hand, at odds with free trade is protectionism, which "protects one group--
some special interest -- at the expense of the general public."\textsuperscript{348} However, it should be a
much easier step for the Western countries to reappraise their special antidumping rules
against the NMEs and figure out a satisfying answer--preferably they might modify their
antidumping laws in accordance with the bottom line suggested by the fundamental
principle of the GATT, namely, \textit{No discrimination.}

\textsuperscript{347} \textit{Id.}

\textsuperscript{348} Robert W. McGee, \textit{An Economic Analysis of Protectionism in the United States with Implications for
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BOOKS


* Canada, Anti-dumping Tribunal, *Recreational camping tents and hardware assemblies originating in or exported from the PRC* (Ottawa: The Tribunal) 1985.


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**ARTICLES**


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**OFFICIAL DOCUMENTS**


Appendix 1

EU Anti-dumping Proceedings Against China’s Exports
(1 January 1980–31 December 1991)

--- Silicon Carbide from the Soviet Union, Norway, Poland and China, O.J. C279/11 (1991) (initiation review);
--- Magnesium Oxide from China, O.J. C279/10 (1991) (initiation);
--- Deadburned (sintered) Magnesia from China, O.J. C276/3 (1991) (initiation);
--- Silicon Metal from China, O.J. C273/20 (1991) (initiation of an Article 13(11) investigation);
--- Bicycles from Taiwan and China, O.J. C266/6 (1991) (initiation);
--- Magnetic Disks (3.5” microdisks) from Japan, Taiwan and China, O.J. C174/16 (1991) (initiation);
--- Woven Polyolefin Bags from China, O.J. C157/5 (1991) (initiation of an Article 13(11) investigation);
--- Dihydrostreptomycin from China, O.J. L362/1 (1991) (definitive);
--- Oxalic Acid from India and China, O.J. L326/6 (1991) (definitive);
--- Gas-fuelled Non-refillable Pocket Flint Lighters from Japan, China, Korea and Thailand, O.J. L326/1 (1991) (definitive);
--- Video Tapes in Cassettes from China, O.J. L293/2 (1991) (definitive);
--- Artificial Corundum from the Soviet Union, Hungary, Poland, Czechoslovakia, China, Brazil and Yugoslavia, O.J. L275/27 (1991) (undertakings, termination);
--- Polyester Yarn (man-made staple fibre) from Taiwan, Indonesia, India, China, Turkey and Korea, O.J. L276/7 (1991) (provisional; termination, Korea);
--- Small-screen Colour Television Receivers from Hong Kong and China, O.J. L195/1 (1991) (definitive);
--- Espadrilles (beach slippers) from China, O.J. L166/1 (1991) (definitive);
--- Barium Chloride from China, O.J. L60/1 (1991) (definitive);
--- Woven Polyolefin Bags from China, O.J. L318/2 (1990) (definitive);
--- Pure Silk Typewriter Ribbon Fabrics from China, O.J. L306/21 (1990) (definitive);
--- Tungsten Carbide and Fused Tungsten Carbide from China, O.J. L264/7 (1990) (undertakings);
--- Tungstic Oxide and Tungstic Acid from China, O.J. L264/4 (1990) (undertakings);
--- Tungsten Ores and Concentrates from China, O.J. L 264/1 (1990) (undertakings);
--- Silicon Metal from China, O.J. L198/57 (1990) (definitive);
--- Tungsten Metal Powder from China and South Korea, O.J. L183/124 (1990) (termination);
--- Paint, Distemper, Varnish and Similar Brushes from China, O.J. L79/24 (1989) (definitive);
---Paracetamol from China, O.J. L348/1 (1988) (definitive);
---Oxalic Acid from China, O.J.L343/34 (1988) (undertakings);
---Potassium Permanganate from China, O.J.L138/1(1988) (definitive);
---Roller Chains for Cycles from China, O.J. L138/1 (1988) (definitive);
---Paint, Distemper, Varnish and Similar Brushes from China, O.J. L46/45 (1987) (undertaking);
---Potassium Permanganate from China, Czechoslovakia and the GDR, O.J. L339/1 (1986) (definitive, China) and O.J. L339/32 (undertakings, Czechoslovakia, GDR and China);
---Silicon Carbide from China, Norway and Poland and the USSR, O.J. L287/25 (1986) (undertaking);
---Natural Magnesite (dead-burned) from China, O.J. L70/41 (1986) (termination);
---Roller Chains from China, O.J. L40/25 (1986) (definitive) and O.J. L40/27 (1986) (undertaking);
---Hammers from China, O.J. L29/36 (1986) (termination);
---Artificial Corundum from China, O.J. L340/82 (1984) (undertaking);
---Natural Magnesite (caustic Burned) from China, O.J. L66/32 (1984) (undertaking, termination);
---Saccharin and its Salts from China, Korea and the USA, O.J. L352/49 (1983)(termination)
---Lithium Hydroxide from China, O.J. L294/29 (1983) (undertaking);
---Barium Chloride from China and the GDR, O.J. L228/28 (1983) (definitive)
---Pears in Syrup from Australia, China and South Africa, O.J. L196/22 (1983) (undertakings, termination);
---Paracetamol from China, O.J. L236/23 (1982) (undertaking);
---Oxalic Acid from China, O.J. L48/37 (1982) (definitive);
---Furfural from the Dominican Republic, Spain and China, O.J.L189/57 (1981) (termination);
---Saccharin and Its Salts from China, USA, and Japan, O.J. L331/41 (1980) (undertakings, China, USA; termination, China, Japan and USA);
---Mechanical Alarm clocks from China, Czechoslovakia, the GDR, Hong Kong and the USSR, O.J. L158/8 (1980) (undertakings, China, Czechoslovakia, Hong Kong) and O.J. L334/34 (1980) (definitive, GDR and USSR).
APPENDIX 2

EU Anti-dumping Proceedings Against China’s Exports
Where EU Prices Were Used in Normal Value Determination

(1 January 1988--31 December 1991)

---Barium Chloride from the PRC, O.J. L60/1 (1991) (definitive);
---Pure Silk Typewriter Ribbon Fabrics from China, O.J. L306/21 (1990) (definitive);
   O.J. L174/27 (1990) (provisional) (cost);
---Silicon Metal from China, O.J. L198/57 (1990) (provisional) (cost);
---Oxalic Acid from China, Czechoslovakia, O.J. L343/34 (2988) (acceptance
   undertakings, termination) (price). In the last case, the Commission successively tried
Korea, Taiwan, Japan, Brazil and India, but was unable to use any of them. For a
discussion of the case, see Vermulst, Commercial Defense Actions and Other
International Trade Developments in the European Communities I: 1 July 1988 - 30