ANTIDUMPING AND COMPETITION: THE CASE OF CHINA

by

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Abstract

Economic liberalization and institutional changes generated by reforms in China are significantly reshaping the country from a planned to a market economy. The unprecedented expansion of China’s trade industry has created many conflicts, among which antidumping ranks highest in priority.

For over a century, the antidumping system has been a part of national laws to counter cross-border price discrimination and to protect domestic industries from cheap imports. The increasingly frequent use of antidumping measures has attracted a lot of criticism that points towards the controversial nature of antidumping legislation.

This paper will explore the issue of competition in the execution of antidumping procedures from a legal and social economic perspective. While antidumping is allegedly aimed at protecting fair competition in the domestic market, the fact that it is a trade remedy makes this claim doubtful. In this paper, competition policy is introduced to compare it with the antidumping system in this regard. The interface is examined on an international dimension. The way in which antidumping and competition interact and the solution to their conflict are key determinants in forming a free trade environment.

Noticeably, China has been the world’s number one antidumping target. China’s fast growing exports, low prices, and business practices, coupled with the increasing protectionism of some industries in certain countries have brought China under the spotlight of antidumping applications. China, on the other hand, has started applying its own antidumping procedures.

The relationship between antidumping and competition is highlighted in the case of China. On one hand, antidumping charges against China in various countries show signs of foreign companies’ attempts to eliminate competition from Chinese exports. On the other hand, antidumping cases initiated in China also show tension between antidumping and competition. This, however, has not stimulated enough attention in China. The country’s rapid integration into free trade agreements might bring the issue onto the national stage. Chinese antidumping and competition legislation will be examined to give my audience a clear legal framework. However, the fact that China has yet to establish an antitrust system has left the competition issue ambiguous. Recommendations have been made to Chinese legislators, governments, and competitors in dealing with the issue.
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<tr>
<td>ADA</td>
<td>Anti-Dumping Agreement (WTO)</td>
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<td>ADR</td>
<td>Antidumping Regulations (China)</td>
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<tr>
<td>ACS</td>
<td>Australian Customs Service</td>
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<tr>
<td>ASEAN</td>
<td>Association of South East Asian Nations</td>
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<tr>
<td>APEC</td>
<td>Asia-Pacific Economic Cooperation</td>
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<tr>
<td>CCRA</td>
<td>Canada Customs and Revenue Agency</td>
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<tr>
<td>CITT</td>
<td>Canadian International Trade Tribunal</td>
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<tr>
<td>DOC</td>
<td>Department of Commerce (U.S.)</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>FTC</td>
<td>Federal Trade Commission (U.S.)</td>
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<td>FTA</td>
<td>Free Trade Agreements</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<tr>
<td>ITC</td>
<td>International Trade Commission (U.S.)</td>
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<tr>
<td>LAUC</td>
<td>Law Against Unfair Competition</td>
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<tr>
<td>MOC</td>
<td>Ministry of Commerce (China)</td>
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<tr>
<td>MOFTEC</td>
<td>Ministry of Foreign Trade and Economic Cooperation (China)</td>
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<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<tr>
<td>NME</td>
<td>Non-Market Economy</td>
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<td>NTB</td>
<td>Non-Tariff Barriers</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
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<tr>
<td>SAIC</td>
<td>State Administration for Industry and Commerce (China)</td>
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<td>SETC</td>
<td>State Economic and Trade Commission (China)</td>
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<tr>
<td>SIMA</td>
<td>Special Import Measures Act</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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Antidumping and Competition: The Case of China

Chapter 1. Background: Antidumping in the World

1.1 Introduction

The last sixty years have seen an effective dismantling of high tariffs in the industrialized world. This was quickly followed by the developing nations. The tariff cuts were introduced along with the inauguration of the General Agreement on Tariffs and Trade (GATT), and later the World Trade Organization (WTO). This has led to the development of certain trade remedies within the WTO framework, including antidumping measures, countervailing measures, and safeguards, all of which previously posed relatively little threat to the flow of trade.¹ Now the most popular among such measures are “antidumping” measures, imposed on imports by the importing country’s government.²

The first anti-dumping legal system was established in Canada by the Customs Act of 1904. It is regarded as the model on which much of the subsequent national antidumping legislation was based.³ Countries such as Australia, New Zealand, South Africa, the U.K., and the U.S. passed similar national laws thereafter. Noticeably, the U.S. Emergency Tariff Act 1921 (also called Antidumping Act 1921) provided the model for Article VI of the GATT, which was the umbrella international provision on antidumping.⁴

¹ Antidumping actions were originally allowed under GATT Article VI; safeguard measures were originally available under GATT Article XIX; and subsidy and countervailing measures are regulated in Agreement on Subsidies and Countervailing Measures, as in Annex 1A, Agreement Establishing the World Trade Organization, 15/4/1994. For introduction of the trade remedies, also see WTO, Understanding The WTO: The Agreements: Anti-Dumping, Subsidies, Safeguards: Contingencies, etc, available on the WTO website <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm>
² For the application of the three trade remedies, see section 1.2 of this chapter.
⁴ Emergency Tariff Act of 1921, c. 14, 42 Stat. 9, 10.
Antidumping was not regulated under international law until the adoption of the GATT in 1947. The rules in GATT were further re-defined in the Kennedy Round in 1967 and the Tokyo Round that closed in 1979. The WTO, established in 1995 as a result of the Uruguay Round, has transformed antidumping rules from general guidelines to what is now essentially a fully detailed international legal system. The existing WTO Anti-Dumping Agreement presents the rules and procedures of antidumping investigations for its member countries to incorporate into their national laws.

According to the WTO’s definition, dumping occurs if a product is sold for export at a price below its normal value, i.e. when “the export price of a product exported from one country to another is less than the comparable price for the like product when destined for consumption in the exporting country”. The difference between the export price and normal value is “the margin of dumping.” Under the rules of the WTO, a member country can impose anti-dumping duties against the dumped goods to the value of the dumping margin. In fact dumping itself is not prohibited by the WTO Agreement. There must be proof of “dumped imports”, “material injury” to a domestic industry, and a causal link between the two, in order to prove an antidumping case. The antidumping duty to be imposed on the dumped product should be no more than the dumping margin. According to the WTO ADA, normal value refers to the comparable price in the exporting country. If it does not apply, normal value could be drawn from export price to a third country, or a price constructed by the “cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.” There are three possible outcomes of an investigation. Definitive measure, as one of the outcomes, normally leads to an antidumping duty. Termination, also one of the outcomes, occurs

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8 Article 2, WTO ADA.
9 Article 7, WTO ADA.
10 Article 2, WTO ADA.
11 Ibid.
when any of the three mentioned essentials fails to be proved or the case is withdrawn by
the complainant. Price undertaking, the third outcome, is agreed upon by the exporter and
authorities to revise the exporting prices or to cease exports to the area, rather than
imposition of antidumping duties.\textsuperscript{12}

While dumping is welcomed by domestic consumers as a cheap option, it has also been a
source of complaints for domestic competitors alleging that it distorts the domestic
market and causes them financial loss. It raises the question regarding the rationale for an
antidumping action. Jacob Viner, in the world’s first book on “dumping”, has classified
dumping into ten types and three categories according to motive and continuity
respectively.\textsuperscript{13} Specifically, the three categories include sporadic dumping, intermittent
dumping, and continuous dumping.\textsuperscript{14} As a commercial activity, dumping could take place
as a result of many different reasons, such as, seasonal sales. There is one type of
dumping in Viner’s intermittent category that relates to “predatory” dumping in order to
eliminate other competitors, which is the most objectionable form of dumping from the
point of view of the import country.\textsuperscript{15} Since this kind of cross-border predatory pricing
aims at weeding out competitors and realizing market dominance, it will not only hurt
domestic producers, but also consumers in the long run. Hence, it is essentially anti-
competitive. In this regard, antidumping actions can be economically justified.

Economists, legal professionals, and practitioners have long questioned the rationale of
antidumping laws. Economists have recognized for a long time that predatory pricing is
less likely to occur in international trade than within protected national markets.\textsuperscript{16} Dale
concludes,

“It is hardly surprising, therefore, that clear-cut examples of this practice (predatory
pricing, note added) are virtually unknown in the post-Second World War literature on

\textsuperscript{12} For provisions of the three outcomes, see Article 7, 8, and 9, WTO ADA. The statistics on definitive
measures compiled by the WTO include both antidumping duties and undertakings.
\textsuperscript{13} Jacob Viner, \textit{Dumping: A Problem in International Trade}, (Chicago: University of Chicago Press, 1923)
pp 23-34.
\textsuperscript{14} \textit{Ibid}, p 23.
\textsuperscript{15} \textit{Ibid}, p 26.
\textsuperscript{16} For more discussion on this topic, see Chapter 3.2.2 of this paper.
international trade, despite the wealth of material on dumping collected by the various anti-dumping enforcement agencies. Thus, although the theoretical objections to predatory dumping still stand, its practical significance must be doubted.  

At the same time, many economists argue that the economic basis for antidumping measures is rather thin, given that focusing on injury for certain sectors of the domestic industry will neglect positive effects of dumping on national and consumer welfare. In the importing country, dumping benefits the consumers and downstream industries with a lower price, which arguably improves social welfare. Dale pointed out after an examination of the welfare implications of antidumping,

"Dumping...is generally beneficial to the importing country in that its distributive effects are favourable and its impact on the domestic economy is, except in the case of predatory discrimination, pro-competitive. On the other hand, monopolization of the export sector, which may lead either to uniform monopolistic pricing or to reverse dumping, is unambiguously injurious to the importing country. Sadly, these welfare conclusions are not reflected in laws relating to domestic and international price discrimination...".

The ambiguous grounds for antidumping action highlight the necessity for antidumping laws to be designed precisely to correct the harmful action, and the assumptions of the economic justification can only be realized based on antidumping administration that is free of error and manipulation. However, these prerequisites can hardly be met in the real world.

The existing international and national antidumping laws fail to take into account the intention of the exporter, which is a key factor in determining whether an act of dumping

17 Dale, supra note 3, p 31.
19 Dale, supra note 3, p 40.
is harmful to the competition in the importing markets. Laws in the early years sometimes included an examination on the exporter’s intention, and only those with an intention to acquire a monopoly would be found guilty. The U.S. Revenue Act of 1916\(^\text{20}\) is a case in point. However, the identification is no longer necessary under current national antidumping regulations. Similarly, neither the GATT nor the WTO ADA links dumping to intention. In other words, there is no need to prove predatory intention in order to show that dumping has taken place. It appears that antidumping laws have nothing to do with the economic rationale, as they “have taken from economics only the potential reference to threats of predation and, unfortunately, the use of the term ‘dumping’ for business practices which often have nothing to do with economic dumping.”\(^\text{21}\)

Therefore, the flavour of the antidumping system has changed over time. It is now frequently utilized as a safeguard mechanism, rather than as a mean to prevent anti-competitive business practices. This is supported by the OECD study finding that 95% of all antidumping cases are related to safeguard aspects.\(^\text{22}\)

1.2 Antidumping Explosion

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

\(^{20}\) c. 463, 39 Stat. 756.
\(^{22}\) OECD, Committee on Competition Law and Policy, *Competition Policy and Antidumping*, DAFFE/CLP/WP1(95)9, 1995.
Round of GATT in 1979. These factors led to a growing need of trade protection from governments. As a result, non-tariff barriers (NTB), for example, technical barriers and voluntary export restriction, grew. Since then, the application of antidumping mechanisms has become more common. With the further regulation on NTBs by the GATT/WTO, the use of antidumping has become more profound as it is one of the few condoned trade restrictive measures. It has the potential to restrict the effect of tariff reductions and other liberalization measures on market access.

There were 1558 antidumping investigations initiated worldwide in the 1980s (an average of 156 per year), doubling the number in the 1970s. In the 1990s, the investigations went up to 2483 (an average of 248 per year), which is far more than in the previous 40 years. From 2000 to the first half of 2004, 1302 initiations were recorded (about 289 per year). However, the numbers of initiations for each year were not necessarily the same. The ups and downs seem to correlate with the business cycle fluctuation, a hypothesis confirmed by Knetter and Prusa for Australia, Canada, the E.C., and the U.S.

Meanwhile, the proportion of affirmative outcomes to the investigations initiated has increased markedly. Prior to the 1970s, only 5% of antidumping investigations led to affirmative outcomes. In contrast, current statistics show that about half of the investigations worldwide wound up with affirmative measures.

Among the three types of trade remedies — antidumping, countervailing measures and safeguards — antidumping measures are the most frequently employed under the WTO framework in protecting domestic industries from imports. Countervailing duties are

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allowed to be imposed on subsidized imports that are found to be damaging domestic producers. 30 Safeguards are applied by countries to restrict imports of a product temporarily to protect a specific domestic industry from an increase in the import which is causing serious injury to the industry. 31 The trade remedies share an uneasy relationship with the WTO’s core principle of trade liberalization. While the WTO promotes non-discrimination in international trade, these measures treat imports differently from domestic products. Duties imposed on imports in fact function as a barrier to trade flow. Antidumping is more widely used than the other remedies. From 1995 to the first half of 2004, the number of antidumping initiations reached 2537, compared with countervailing initiations totalling 174, and 161 safeguard initiations (as of October 2004). 32 Some research has indicated that antidumping is a better tool to serve protectionist purposes. 33 Governments prefer antidumping because it is easier to apply, with less political hassle, and it does not require negotiation on compensation with trading partners nor an industrial restructuring program at home.

Behind the dramatic growth in the number of antidumping cases, there are a few noticeable aspects in modern antidumping applications.

1.2.1 Developing Countries Joining the Antidumping Club

Traditionally, the U.S., the E.C., Canada, and Australia were the major users of antidumping measures, accounting for more than 95% of the investigations in the 1980s. 34 Before the Uruguay Round was concluded, only about 40 countries had

antidumping provisions. After the Round, over 120 countries agreed to adopt and enforce the GATT antidumping regulations. Many developing countries enacted their own antidumping legislation during and after the Uruguay Round, and some of them became active users.\textsuperscript{35} Since 1995, more than half of the antidumping cases have been initiated by developing nations. For example, India leads the pack, launching 383 investigations, outpacing the U.S., with 350 investigations, and the E.C., with 287. Argentina, South Africa, and Brazil are also among the most frequent initiators in the world.\textsuperscript{36}

Simply looking at filing statistics might be misleading because the number of petitions must be related to the total volume of imports for each country. An analysis carried out by Finger \textit{et al.} constructs an index of initiations relative to imports(exports) during the period of 1995-1999, which also shows that in relative terms, developing countries are the most common users of antidumping.\textsuperscript{37}

On the other hand, more and more developing nations are finding themselves the targets of antidumping measures. This phenomenon comes along with the increased involvement of these countries in the international market. More than half of the cases are aimed at developing countries, especially large exporting countries such as China. The same work of Finger \textit{et al.} also shows that transitional economies are the most targeted countries.\textsuperscript{38} The increasing number of cases demonstrates not only the “North-South” but also the “South-South” cases. For example, India levied over half of its measures against other developing countries; and Argentina imposed nearly half of its antidumping duties on Brazil and China.\textsuperscript{39}

The increase in the application of antidumping measures by developing countries is

\textsuperscript{36} Source from WTO Statistics on Antidumping, online search \textless http://www.wto.org/english/tratop_e/adp_e/adp_e.htm\textgreater .
\textsuperscript{38} \textit{Ibid.}
\textsuperscript{39} Source from WTO Statistics on Antidumping, online search \textless http://www.wto.org/english/tratop_e/adp_e/adp_e.htm\textgreater .
directly related to the reductions of tariffs and other trade restrictions imposed upon them under the GATT/WTO regime. It is also related to the antidumping practices of industrialized countries in earlier years, which on the one hand, set the example of protecting domestic producers under the banner of antidumping, and on the other hand, introduced retaliation from affected developing countries. Francesco and Niels suggest that new users may initiate antidumping actions to retaliate against countries that have taken antidumping actions against their exports earlier. Prusa and Skeath provide a formal test in this regard, finding some support for a retaliation motive for both traditional and new users of antidumping and excluding an increase in unfair practice as an explanation of the increased use of antidumping. In Mexico for instance, when it applied antidumping measures for the first time in 1987, the government targeted steel and chemical products from the U.S. and the E.C., both of which had previously filed antidumping investigations against the same products from Mexico. It is also interesting to note that Indian exports are most often affected by antidumping duties imposed by the E.C., and similarly, the majority of all antidumping duties on E.C. goods have been imposed by India, in the WTO era from 1995 to the present.

1.2.2 Concentration on Certain Industrial Sectors

There is a large degree of concentration on a few sectors, though a broad range of industries is also affected. In the WTO era since 1995, about 80% of all antidumping measures have fallen into five categories: base metals (35%), chemicals (19%), plastics (12%), machinery and electrical goods (8%), and textiles (7%). Some suggest that is

44 Source from WTO Statistics on Antidumping, online search <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm>.
due to the cyclical nature of these markets. At the bottom of the cycle, these firms may sell below cost.\textsuperscript{45} The major affected industries (e.g. steel and chemicals) are capital-intensive and have large fixed costs. This leads to the lack of adaptability to market change, and as such they are likely to be in need of protection from external competition. In addition, the sectors mentioned above are traditionally well entrenched with interest groups and lobbies heavily involved in many antidumping procedures.

The U.S. steel industry is a case in point. Over half of the antidumping investigations in America were initiated by its steel industry, although steel only accounted for 2% of the total import value of the country.\textsuperscript{46} In fact, the U.S. steel sector has been consistently seeking various protections from intensive external competition, mainly from Japan and the E.C., since the late 1960s.\textsuperscript{47} These import relief apparatuses include escape clauses (voluntary restraint and minimum import price agreements), unfair trade petitions (antidumping and anti-subsidy investigations), and bills imposing import quotas. For example, the steel producers filed 61 anti-subsidy and 33 antidumping petitions against eight E.C. nations, as well as Brazil and Romania, in the early 1980s.\textsuperscript{48} Moore concludes that the main source of this political strength was the cohesive coalition of producers, workers’ unions, and members of Congress from steel-producing regions. Among them, the cohesiveness arose out of the technology and market structure of traditional integrated steel production, including economies of large scale, geographical concentration of plant sites, and the relative immobility of capital and labour employed in the sector.\textsuperscript{49} Although the political strength of the industry has been weakened due to the gradual changes in technology and market structure, the industry will continue to press its case for protection, and will rely on normal trade remedies.

1.3 Functions of the Antidumping Mechanism in the Modern World

\textsuperscript{45} J. Miranda, R. Torres, and M. Ruiz, \textit{supra} note 35.
\textsuperscript{46} Linsheng Wang and Hanlin Zhang (ed.), \textit{supra} note 29, p12.
\textsuperscript{48} \textit{Ibid}, p 21.
\textsuperscript{49} \textit{Ibid}, p 15.
Given the background and evolution of the antidumping system mentioned above, it can be concluded that there are four functions of the antidumping mechanism in the modern world.

First, antidumping reflects the cross-border trade condition of a nation as antidumping could potentially affect the volume of trade flowing across the border. In other words, countries with trade deficits tend to apply antidumping measures more often than those with a trade surplus. As a trade remedy, antidumping is employed by those countries with over-imports, as it is an effective way to block imports by imposing duties upon them. In the WTO era, the U.S. recorded 350 antidumping initiatives, second to those of India, when its average annual trade deficit accounted for 19% of its total trade value.\(^{50}\) Similarly, the number one antidumping user, India, was suffering from a trade deficit during the same period. In contrast, Japan only filed 3 initiations between 1995 and 2004. This was during a period when its trade surplus accounted for 11.6% of its total trade value annually. China, the most frequently affected country, has also been recorded a large trade surplus over the past years.

Second, antidumping has an instantaneous effect in protecting domestic industries. An affirmative measure will usually result in higher prices or smaller volumes of imported goods for a given country. Although this lends a competitive edge to domestic producers, there might be an adverse impact on consumers or downstream industrial users. In addition, antidumping laws provide domestic producers with an instant remedy of “provisional measure” that takes place before any determination is reached, which provides immediate relief to domestic producers by increasing their competitiveness almost instantly.\(^{51}\) In fact, literature has shown that antidumping investigations often have a pervasive effect even before the duties are officially imposed after long


\(^{51}\) Article 7, WTO ADA.
investigations. Empirical findings suggest non-duty effects, which include those of investigation, suspension, and withdrawal in antidumping procedures.

Third, antidumping serves as a political tool for various interest groups. It helps governments in answering to "nationalism" as lobbied by domestic groups afflicted by globalization. It is unquestionable that trade liberalization brings both gains and losses to different groups in a country. Consequently, governments can use antidumping as a remedy for the problems faced by adversely affected groups. As Tharakan points out,

"Within 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."

Some politicians also try to win over the electorate by waving the patriotic flag through their active support of antidumping policies. For example, the U.S. antidumping case against Chinese wooden furniture has been highlighted by some members of Congress. Senator Elizabeth Dole, from North Carolina, where a large number of complainants originated, has expressed strong support for antidumping in this particular case. Bovard provides the following critique:

“If 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

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52 Article 5.10, WTO ADA, which gives the time limit of 18 months for investigation after initiation, with the exception of "special circumstances". Under Article 13, an antidumping case might have to go through the procedure of judicial review, if it is brought to judicial, arbitral or administrative tribunals. Normally the result of an antidumping case can be obtained within a year, but in extreme cases it may take years.


55 For example, see the website of Senator Elizabeth Dole at <http://dole.senate.gov> for her strong support of the case.
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.\footnote{James Bovard, “The Morality of Protectionism”, \textit{N.Y. U. Journal of Int’l Law \\& Politics} v 25, Winter 1993, p 235.}

Fourth, antidumping is used as a pressure valve with trading partners in cross-border trade conflicts. As in the case of the Cold War Equilibrium, it may not be in one’s best interest to act too boldly for fear of retaliation from the opponent. When facing tension in international trade, governments often resort to threats of trade war. This is particularly true with regard to antidumping, the double-edged sword. It is evident that after India raised its antidumping charges against the E.C. in recent years, the E.C. has softened its charges against India. This suggests that the reason why the E.C. restricted its use of antidumping against developing countries is partly due to the concern of antidumping retaliation.\footnote{National Board of Trade (NBT), \textit{The Use of Antidumping in Brazil, China, India and South Africa – Rules, Trends and Causes}, NBT Report, (Stockholm) 10/2/2005.} A Chinese commercial counsellor to the E.C. in fact used this example to suggest an intensification of China’s antidumping application towards imports as one of its solutions to battle against antidumping charges against China.\footnote{Qinhua Wang, “Zhongguo duiwai fanqingxia de zhuangkuang ji anli (The Status Quo of Antidumping in China and Cases)”, a Presentation by Qinhua Wang, Director of the Bureau of Industrial Injury Investigation (MOC, China) at The Second International Antidumping Forum in Beijing, 2003, in Shichun Wang, Qinhua Wang, and Hanlin Zhang (ed.), \textit{Mingjia luntan- fanqingxiao yingdui zhidao (Forum: Counter Strategies to Antidumping)}, (Beijing: People Press, 2004) p 32.}

A Costly System

The antidumping system is, in actuality, quite costly. To begin with, it is expensive for the WTO and national governments to utilize this system to build and maintain the antidumping complex. In addition, the participating parties have to bear large legal fees and associated risks, and possibly even political costs for antidumping lobbying. The antidumping system potentially transfers the “price” of its operations to consumers or industrial users by increasing the price of products. As previously mentioned, antidumping might create a vengeful relationship between affected countries, which may impose antidumping measures against one another. As Stanley D. Metzger, the former Chairman of the U.S. Tariff Commission, puts it:
“I think that, considering the social costs of the Antidumping Act as it’s likely to be administered under any sort of practical circumstances, I would opt for getting rid of the whole Antidumping Act.”

1.4 Reforming the Current System

Regarding the controversial nature of antidumping, attitudes towards it are divided among the WTO members in the current Doha Round, where antidumping reforms are being intensely debated. The degree of concern that member countries have regarding antidumping measures is evident in the large number of proposals received. This quantity far exceeds proposals on any other topic submitted to the WTO Rules Negotiating Group for discussion. On the one hand, many countries are calling for reform of the current antidumping rules, to restrict overuse and abuse of antidumping measures. This camp basically consists of those countries frequently suffering from antidumping measures, including Japan, Korea, China, and Brazil. In a series of joint papers in 2001 and 2002, the “Friends of Antidumping” set forth a number of highly technical reforms for WTO antidumping procedures and methodologies, including, among others, “zeroing,” constructed values, cumulative assessment of injury, the “de minimus” rule, the causal relationship between dumping and injury, sunset reviews and the use of “facts available.” On the other hand, in order to maintain and enhance the operation of antidumping, countries like the U.S. are refusing to take obvious steps to change the present system. In fact, the U.S. is an active user and major beneficiary of antidumping measures, so there is an incentive for them to argue for this trade remedy. Some other countries, like the E.C., Australia, and Canada have a more neutral perspective on the issue at hand. Given that all of these countries are active and key participators in global

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63 Ibid. For more updated information, see WTO Rules Negotiations, online <http://www.wto.org/english/tratop_e/rulesneg_e/rulesneg_e.htm>.
economic activity, one may expect that some revision of specific provisions of the antidumping rules will be made after the negotiations, but no essential changes will likely happen.
Chapter 2. Antidumping against China

2.1 Introduction

In 1979, the first year of China’s economic reform, the country witnessed the very first antidumping case regarding a Chinese product (saccharin sodium) in the E.C. Since then the number of antidumping charges against China has increased dramatically: the whole of the 1970s saw 2; the 80s saw 64 (about 6 per year); the 90s saw 306 (about 30 per year); and the first 4 years of the 21st century saw 199 (about 50 per year).\(^6^4\) Statistics from China’s Ministry of Commerce (MOC) show that, between January 1979 and September 2004, 665 trade remedy investigations – including antidumping, anti-subsidy, safeguard, and special safeguard – were initiated against China by 34 jurisdictions in the world.\(^6^5\) Among them, antidumping, which obviously far outnumbers the rest, totalled 594 initiations, involving an estimated trade value of U.S.$19.1 billion.\(^6^6\)

Since 1995, China has been the number one target of antidumping accusations worldwide. One out of every six antidumping cases in the world was aimed at China. In the WTO era since 1995, 386 antidumping investigations have been initiated against China, out of a total number of 2,537 worldwide, as of June 2004.\(^6^7\) (Table 1) It is amazing in the sense that about 15% of antidumping charges in the world have been against Chinese exports in this period of time, considering that China’s share of the world’s total exports reached only 5.8% in 2003.\(^6^8\) In addition, Chinese exports are not only more frequently accused, they are also more prone to a “guilty” verdict. It is estimated that about 64% of the

\(^{64}\) MOC Database of Antidumping against China, online search <http://www.cacs.gov.cn/DefaultWebApp/chaxun.jsp>

\(^{65}\) Ibid. Special safeguard measure refers to the “Transitional China-Specific Safeguard Mechanism” included in China’s WTO accession agreement, allowing a WTO Member to restrain increasing imports from China that allegedly disrupt its market, whereas safeguard measures restrain imports of a product from any country, regardless of its origin.


\(^{67}\) Source from WTO Statistics on Antidumping, online search <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm>.

\(^{68}\) See WTO Trade Profiles: China, online <http://stat.wto.org/CountryProfiles/CN_e.htm>
initiations against China end up with affirmative antidumping measures, compared with the worldwide average of 44%.

Table 1. Top Ten Affected Countries in Antidumping Initiations (1995-2004)

So who has been suing China? The group of complainants consists of both developed and developing countries. (Table 2) According to the WTO data, India, the U.S., the E.C. and Argentina lead the charges against China in absolute terms, though their numbers of antidumping cases are not proportionate to their trade value with China. Traditionally, antidumping complaints have been initiated mostly by countries such as the E.C., the U.S., Canada, and Australia. Now, however, along with the expansion of the antidumping club by developing nations, China has become the target of both the North and the South. Statistics show that two-third of the initiations against China in the WTO era have been brought up by developing countries.

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71 Source from WTO Statistics on Antidumping, online search <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm>
Another way of determining the intensity of antidumping use by a country is to weigh it by the value of imports from China. Given the size of trade between the two countries, the larger the value, the more intensely China is being hit by antidumping measures. Messerlin’s work suggests that developing countries (including Mexico, Turkey, Argentina, and India) not only initiate more investigations in absolute terms but also relative to the value of their imports from China.\(^{72}\) For instance, China’s exports of U.S.$1.3 billion worth of goods each year to India has led to initiations totalling 70 cases, while the U.S.$125 billion of exports each year from China to the U.S. launched 100 investigation in total.\(^{73}\)

Nevertheless, the U.S. and E.C. cases usually cover larger amounts of trade value as they are China’s major traders.\(^{74}\) In 2003, for example, out of 42 charges brought against China, 8 were from the U.S. and 3 were from the E.U.. The total affected trade value of these two countries alone amounted to about U.S.$980 million, while the 31 cases from other jurisdictions accounted for less than U.S.$100 m.\(^{75}\) This explains why the Chinese government and scholars usually pay more attention to the cases initiated by the U.S. and the E.C.

Table 2. Country Distribution of Antidumping Initiations against China (1995-2004)


\(^{73}\) Source from WTO Statistics on Antidumping, online search <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm>; MOC China Trade Remedy Information, online search <www.cacs.gov.cn>

\(^{74}\) The top five export destinations for China are the U.S., Hong Kong, the E.U., Japan, and Korea. See WTO Trade Profiles: China, *supra* note 68.

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

Table 3: Sectoral Distribution of Antidumping Initiations: China (1995-2004)

2.2 Why China?
The dramatic increase of antidumping charges against China can be attributed to various factors. The reasons can be categories into two classes.

2.2.1 Class One: Universal Factors

Given the global trend of antidumping growth, this has become common globally, as was already discussed.

2.2.2 Class Two: China’s Special Features

Another class of reasons is peculiar to China, a unique, transitional, and booming economy. Chinese exports have been the target of the antidumping measures worldwide not only because of their competitiveness, but also, among others, because of the low participation of Chinese exporters in the investigations initiated by foreign governments and China’s Non-Market Economy (NME) Status.\(^{76}\)

a. Exports Explosion

China’s exports have expanded dramatically along with its open-up reform which started in 1978. It is noteworthy considering that the economic growth of many other economies slowed down during the same period. The economic liberalization and institutional changes led by the reform are substantially reshaping the country from a planned economy to a market-oriented economy. What’s more, the nation’s accession to the WTO in 2001 has further aided the process of liberalization and integration into the world economy.

Along with economic reform, China’s foreign trade regime has gradually changed from a highly centralized and import substitution regime to a decentralized and export promotion one. The changes in trade and other policies have also significantly affected the total

\(^{76}\) NBT, supra note 57, p 26.
amount and composition of China's trade in favour of products in which China has comparative advantages.

The pre-reform growth rate of 3.1% per capita GDP has doubled and remained above 7% for the past two decades, which meant China was dubbed as the world's fastest growing economy.\(^{77}\) China's international trade has been expanding even more rapidly. The trade to GDP ratio increased from about 10% pre-reform to 60% in 2003. The economy became the fourth largest trader internationally with a trade value of U.S.$851 billion in 2003, rising from its world rank of 32\(^{nd}\) in 1978.\(^{78}\) In 2004 the value reached U.S.$1.15 trillion, which ranked China as the third largest trading power of the world, surpassing Japan for the first time.

As a significant part of China's international trade, its export growth is noticeably outpacing the rest of the world. The average annual growth rate of exports has been about 17% since 1978.\(^{79}\) The WTO records of certain countries' annual growth rate of merchandise exports (1995-2003) can be the comparison: China (12%), the U.S. (3%), the E.C. (5%), Japan (1%), India (8%), Brazil (6%), and Mexico (10%).\(^{80}\) Meanwhile, statistics show that China's share of the world's total exports is also growing. It hit 5.8% in 2003, growing by 34% compared to the previous year, ranking China the fourth largest exporter worldwide with an export value of U.S.$438 billion.\(^{81}\) The U.S., the E.C., Hong Kong, Japan, Korea, and ASEAN (Association of South East Asian Nations) are the main destinations of Chinese exports. Not surprisingly, the major trade frictions that occur are between them and China.

\(^{77}\) In comparison, for example, the annual GDP growth rate (1995-2003) of the major traders: U.S. (3%), E.C. (2%) and Japan (1%); and that of the major developing countries: India (6%), Brazil (2%), and Mexico (4%). See WTO Resources: Trade Profiles, online search <http://stat.wto.org/CountryProfile/WSDBCountryPFHome.aspx?Language=E>


\(^{79}\) MOC website: Trade Database, online <http://gcs.mofcom.gov.cn/article/NoCategory/200405/20040500218164.html>.


\(^{81}\) WTO Trade Profiles: China, online <http://stat.wto.org/CountryProfiles/CN_e.htm>
It is interesting to recall that prior to 1995, Japan was the world’s number one target of antidumping investigations, as it used to be the “world manufacturer” in the 20th century, filling up every corner of the world with its products. This points out that the quantitative export activity of a country matters in the international antidumping wave. In addition to China, countries including Korea, Taiwan, and the U.S. have also surpassed Japan atop the list of most affected countries. Notably three out of the four countries mentioned are among the emerging economies and the largest exporters in the world. As the world’s fastest growing economy and the only developing country among the world top ten exporters, China cannot avoid being treated differently from other developing fellows in the antidumping club.\textsuperscript{82} This partly explains “Why China?” when there are many other low-priced exporters whose export volumes are not comparable with those of China.

Given the picture above, it is not hard to see how China’s rapid export growth relates to its status as the world’s number one antidumping target. The dramatic economic boom and speedy export expansion of China have increased not only cross-border trade friction, but also the level of threat faced by other competitors, further compounding the emerging concern of the “China threat”.\textsuperscript{83} One can only imagine the reaction of American producers when 1.2 billion shoes per year were shipped from China to the U.S., which has a population of less than 0.3 billion. Industries in different countries tend to apply trade remedies to protect themselves from the threat of an import surge. The fact that China has a large trade surplus with its major trading partners, namely the U.S. and the E.C., has resulted in the growing number of complaints, where they simply link their business loss to the Chinese exports.

A case in point relates to the American charges on Chinese honey. This case demonstrates the continual efforts made by U.S. industry to deal with pressure from

\textsuperscript{82} The top ten exporters in the world in 2003 are: Germany, U.S., Japan, China, France, UK, Netherlands, Italy, Canada, and Belgium. Source from WTO International Trade Statistics, online <http://www.wto.org/english/res_e/statis_e/its2004_e/section1_e/i05.xls>

enormous Chinese imports as long as they pose a threat to U.S. industry. In the early 1990s, China, the most important world exporter of honey, accounting for about one-third of world exports, significantly expanded its honey exports to the U.S., reaching about 30% of U.S. imports. That obviously raised the fears of the domestic producers, as U.S. honey production represents a declining industry losing its competitiveness in the world market. In 1993, the beekeepers and honey producers sought relief by accusing the Chinese product of market disruption under Section 406 of the U.S. Trade Act of 1974. This effort failed as a result of the White House’s consideration for consumers’ interests. Then in 1994, the honey industry filed an antidumping petition against honey from China. Preliminary affirmative determinations reached injury and dumping margins ranging from 128% to 157%, despite problematic calculations by the U.S. Department of Commerce (DOC). The result pressed China to reach an “agreement” with the DOC, which suspended the investigation in August 1995. This agreement obliged China to restrict the volume of honey exports to the U.S. to 20,000 tons per year, to reduce the trend of imports from this country by 30%, and to implement a price floor. It was a five-year agreement that concluded in August 1, 2000. The effect of this undertaking on the American industry is uncertain, as the export restrictions imposed on China resulted in increased exports from other exporting countries, especially Argentina. In September 2000, the U.S. producers petitioned new antidumping investigations against honey from China and Argentina. On October 4, 2001 the DOC announced the imposition of steep antidumping duties upon honey imports from China ranging between 25.88% and 183.8%.

85 19 U.S.C. 2436
86 See the White House, Report on Imports of Honey from China—Message from the President—PM 102 (Senate - April 21, 1994), Congressional Record, 103rd Congress, p S4728.
88 DOC, Honey from the People’s Republic of China; Suspension of Investigation, 60 FR, 16/8/1995, pp 42521-42527.
89 Nogués, supra note 84, p 4; Alberta, supra note 84, p 104.
a landmark of the latest protection of the American honey industry.\textsuperscript{90}

What we see from this case is increased protectionism on a declining industry. In fact, the U.S. honey producing industry has been granted subsidies and protections from the government since the late 1940s through a series of laws. Then in 1976 it sought a tariff quota on honey imports under Section 201 of the 1974 Trade Act, but it was refused by President Ford on the ground of protecting consumers’ interests.\textsuperscript{91} Following the series of trade remedies sought by the industry in the 1990s, U.S. honey output still remains stagnant while imports have continued to increase. This has occurred in spite of government financial support and various protective measures against imports from China and Argentina.

\textbf{b. Low Price}

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

\textbf{Cheap Exports}

Admittedly, China has improved its export composition during its reform: the ratio of primary products to manufactures decreased from 1:0.85 (1978) to about 1:10 (2003), which is close to the level of industrialized countries. Leading export products are shifting from textiles and light manufactures (accounting for 61\% of the increased value for Chinese exports in the period of 1980-1990), to machinery and electronic products (accounting for 50\% between 1990-2000).\textsuperscript{92} Currently, high-tech exportation is the fastest

\textsuperscript{91} Noguès, \textit{supra} note 84, p 8.
\textsuperscript{92} Jiujiang Lin, “\textit{Maoyi daguo li maoyi qiangguo you duo yuan} (How Far from a Large Trader to a Strong Trader)?” \textit{Zhongguo jingji shibao (China Economy Times)}, 9/10/2001.
growing one, at a growth rate of 46% in 2002 and 61% in 2003. Noticeably, the processing trade is growing fast, sharing around half of China’s exports.

However, the majority of the products exported are labour or resource-intensive products, with relatively low added value, constituting over 80% of Chinese exports. For example, textiles still account for one-fifth of the total exports of China, remaining higher than the world average. Compared with competing products from many other countries, Chinese products are traditionally not of very high quality, of less variety, and in poorer packaging. Together, these factors allow for maintenance of low prices.

Furthermore, China is one of the countries with the lowest wages in the world, which is a significant factor in the cost of labour-intensive product. This is largely due to its huge population of 1.3 billion, 70% peasants, who serves as a large pool of cheap labour for its manufacturing and service sectors. It is estimated that as long as the peasant population is over a quarter of the whole population in China, the labour cost of the country will be kept lower than the world average.

Other reasons often cited as key factors contributing to the price advantage of China include the supposed devaluation of the RMB, low environmental protection costs, subsidized energy inputs, subsidized infrastructure costs, subsidized freight, and lower overheads (uncompleted superannuation payments, occupational health and safety costs, etc.). Coupled with China’s enormous scale of manufacture and notable growth in production plant infrastructure, as well as increasing sophistication of production technology, the scene is set to get more challenging for foreign competitors in the world.

94 Processing trade refers to the business activity of importing all or part of the raw and auxiliary materials, parts and components, accessories, and packaging materials from abroad in bond, and re-exporting the finished products after processing or assembly by enterprises within the mainland. The imported materials and parts are supplied by the foreign party which is also responsible for selling the finished products. The business enterprise only charges the foreign party a processing fee.
95 For more information, see Employment and Wage rate in manufacturing: ILO LABORSTA database.
96 Yang, Wang, and Chen (ed.), *supra* note 69, p 5.
markets. Understandably, in 2004, the Valencian town of Spain saw shoes “made in China” being set on fire by hundreds of laid-off workers from local shoe factories.

“Cheap” Business Practice

The business practice of many Chinese producers further induces antidumping investigations in importing countries. For many Chinese firms, a common way to attract customers is to offer a favourable price. Economists have pointed out that such competition is especially prevalent when firms sell products for which the consumer has no strong brand attachment.98 This is the case for many Chinese products overseas. There have been price wars almost everywhere in the world among Chinese exporters when they compete to survive, to acquire market share, and to earn hard currency. The price war among them is common, even when most of them, especially the private firms, enjoy no government subsidy. They have seen serious results. The price-cutting game among Chinese colour-TV producers in the U.S. resulted in an antidumping initiation being brought up against them in 2003.99

Unlike firms in the western countries, which often have long-term strategic plans for foreign markets by means of dumping, many emerging Chinese firms tend to speculate on short-term vision. As many observers point out, once a Chinese company does well in exporting to a certain destination, a school of like producers will immediately follow and compete energetically in the same foreign market.100 Several years ago, Chinese Ginseng poured into Brazil at a price almost comparable to that of local carrots, as a result of severe price competition amongst many Chinese exporters. This ended up with an

antidumping investigation and a duty was imposed on Chinese ginseng that consequently shut it out of the Brazilian market.\textsuperscript{101}

Although these sorts of business practices would seem unusual to classical western economists with little understanding of Chinese ways, they are commonplace in China. Since a detailed elaboration is beyond what is necessary for this paper, this paragraph will attempt to provide a brief backgrounder about why such behaviour exists. While China’s transformation from a state-planned economy to a market economy has just begun, institutional deficiencies still remain. Competition mechanisms and business competitors have yet to mature. Subsidies provided to certain state-owned companies, poor performance in the credit market, and the ineffective bankruptcy system have opened the door to fierce price competition with little concern for consequences. In addition, the absence of efficient governments and industrial associations, and poor governance and coordination amongst Chinese sectors, leave room for such competition disorders. Hence, some call China a “disorderly heaven.” The disorder and irregularity feature in the Chinese market is typical of many other transitional economies.\textsuperscript{102}

c. High Possibility of a Guilty Verdict

The high possibility of being found “guilty,” coupled with the imposition of high duties on Chinese producers in antidumping investigations, has induced more charges against them. It is as simple as that if a hunter has found a rabbit is easy to capture, other hunters will tend to hunt rabbits. Similarly, many countries in the past two decades have found that it was relatively easy to prove dumping cases against China, and so impose duties on its exports. This is supported by the higher percentage of proving antidumping cases against China, and higher antidumping duties imposed on Chinese exports, compared with other target countries.\textsuperscript{103} The countries also found that through antidumping measures, they could effectively protect their own industries from China, the major

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\textsuperscript{101} Xiaoli Zhu, “Yingsu fangqingxiao (Respond Antidumping),” Tianxia caifu (World Fortune), online <http://www.linlins.com/talk/story/2002-6-18-14-25-09.html>
\textsuperscript{103} See Chapter 2.1 of this paper, also the WTO Statistics on Antidumping, online search <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm>.
\end{flushleft}
exporter of many goods. This phenomenon paved the way for more industries and more countries, following the preceding model, to launch new charges targeting the same country. As previously mentioned, almost two-thirds of the initiations against China ended up with affirmative antidumping measures, while the worldwide average is less than half. In the U.S., Moore estimates that the average dumping margin found on Chinese exports is 96%, whereas the total average has been 65% in cases where exporters failed to cooperate with the DOC since 1980.104

Why are Chinese exports more likely to be found guilty of dumping and to have higher dumping margins? It owes a lot to the way the Chinese participate and the way the investigators calculate margins in such investigations. In other words, the poor performance of affected Chinese producers in antidumping investigations and the application of "surrogate country" by investigators, leave China vulnerable in many cases.

Participation

A brief introduction to how antidumping investigations are carried out will be of assistance in understanding the importance of participation from accused exporters. According to the WTO rules, the authority arrives at a definitive conclusion in antidumping investigation when three factors are proved: "dumping" by the exporter, "injury" of the domestic industry, and a causal link between the two. Government agencies often play the role of antidumping authority.105 To initiate an investigation, the complainant needs to provide basic information substantiating the three elements. Intricate calculation methods and considerations are often employed in the finding of "dumping" where the home price and exporting price are compared. Many factors will affect price comparison, such as the differences in conditions and terms of sale, taxation,

105 For example, in Canada, the Ministry of National Revenue determines issues relating to dumping, and the Canadian International Trade Tribunal considers issues relating to injury to domestic production, while in the U.S., the Department of Commerce determines dumping, and the International Trade Commission decides injury.
level of trade, quantities, and physical characteristics. It will be even more complicated if constructed price has to be sorted out if no comparable home price is available. Meanwhile, in the course of determining "injury" to the domestic industry, vigorous debates between the complainant and the respondent often take place. Evaluation of relevant economic factors and indices have to be evident, including actual and potential decline in sales, profits, output, market share, productivity, return, employment, factors affecting domestic prices, and so on. Severe debates may also occur when demonstrating a causal relationship between the subject imports and the injury to the domestic industry. Many factors other than the subject imports which concurrently affect the domestic industry have to be examined.

Therefore, it is important that both sides involved in the case participate actively in the investigation, in order to reach a fair result. If the accused does not participate or fails to "cooperate" properly in an antidumping investigation, they will be put into a very disadvantageous position. For example, in the absence of data provided by the accused exporter, the antidumping authority often applies the data provided by the domestic complainant. If this were the case, obviously, it would be easy to find the exporter guilty, based on information from the petitioner. In fact, arguably some biases inherent in antidumping law already place the respondents at a disadvantage. In many jurisdictions, exporters must prove the negative (e.g. no hidden discounts) and basis for all favourable adjustment, while the petitioner's allegation is assumed to be true unless disproved by exporter. Hence, silence from the accused exporters usually means loss for them in antidumping cases. It is estimated that in the U.S., the average dumping margin found with participation from respondents is 34%, while the margin based on BIA (when

106 For basic calculation and considerations in determining "dumping", see Article 2, WTO ADA. Member countries interpret the clause in their own ways. For example, in the U.S., various adjustments of the normal value are required in determining dumping margin under different circumstances of production and trade. Section 1677b (6), (7), Tariff Act of 1930, 19 U.S.C.1677b.
107 For basic procedure of determining "injury", see Article 3, WTO ADA. Similarly, national antidumping authorities apply the clause according to their own procedures, while the ADA gives the umbrella outlines.
108 In practice, the respondents fail to co-operate "properly" when their answer is not completed or satisfying, judged by the antidumping authority in the importing country.
109 It is labelled, for example, "best information available" (BIA) in the U.S. antidumping procedures. For details, see Section 1677e (a), Tariff Act of 1930, 19 U.S.C. 1677e. This provision allows the U.S. authorities to make an adverse inference upon information from the petition, determination in the investigation, or previous review.
exporters fail to cooperate) is as high as 67%. Not surprisingly, participating and non-participating exporters, in a single case often get different results. For instance, in the U.S. disposable pocket lighters case of 1994 which affected fifty-seven Chinese lighter producers, only five participated in the investigations. Those who participated were found to have dumping margins of 0%~27.91%, while the others who ignored the case were found to have as high as 197.85%, although the producers were mostly private and in similar conditions in China.

Historically, Chinese companies rarely answered to antidumping investigations. This is mainly due to two facts. First, the traditional Chinese culture of “no litigation” deeply rooted in Confucian thoughts generally discouraged litigation. Second, the Chinese have a fear of international law suits due to their lack of familiarity with international antidumping practices and high legal fees. In the beginning of antidumping charges against China in the late 70s and early 80s, most affected Chinese companies had no idea what antidumping was about, and hardly any companies participated in such investigations. It is widely agreed that the response rate and the degree of cooperation of Chinese companies in antidumping investigations were low. The study from the E.U. by Liu and Vandenbussche maintained that Chinese companies had largely ignored demands for information from the E.C., and in cases where they provided it, it was often incomplete or untimely. The consequence of this was serious. A lot of companies suffered business losses or had to put considerable efforts into shifting their export markets from where the antidumping duties were imposed to others. In 1991 the E.U. initiated an investigation against bicycles from China, which shipped 2 million bikes to the E.U. market in the year. Without any representation from the Chinese exporters, the antidumping authority imposed a duty of 30.6% on the Chinese bikes which, by and large, closed the promising E.U. market for them.

110 Moore, supra note 104, p 19 (Table 7 and 8).
In 1994, America shut all Chinese garlic out of their market by imposing a high antidumping duty of 376.67% as a result of Chinese companies not responding to the investigation.\textsuperscript{114} The law firm representing the American garlic producers helped to bring another series of investigations against Chinese honey in 1994,\textsuperscript{115} and persuaded U.S. bicycle producers to bring an antidumping case against Chinese bicycles in 1995,\textsuperscript{116} which covered U.S.$180 million worth of imports. Knowing that the Chinese exporters were not likely to participate in the investigations, the law firm alone helped in opening the mushroom case of 1998\textsuperscript{117} and synthetic indigo case of 1999\textsuperscript{118}. Since the small garlic case, this single law firm has brought antidumping cases covering almost U.S.$300 million of Chinese imports.\textsuperscript{119}

Recently the participation of Chinese companies in overseas antidumping investigations has improved gradually with the efforts of the Chinese government and a number of industrial associations. To encourage the affected Chinese firms to participate in foreign antidumping investigations, the MOC (formerly Ministry of Foreign Trade and Economic Cooperation (MOFTEC), the Chinese antidumping authority) issued Provisions on Answering Antidumping Investigations of Export Product in 2001. The central and provincial governments now provide more support for their affected exporting companies than before. The former MOFTEC, for example, set up the first Chinese web site on trade remedies, providing service on information and consultancy. Some provinces, e.g. Guangdong and Zhejiang, where most of the affected producers reside, regularly organize training programs on antidumping for exporting firms. Some industrial associations, such as China Import and Export Commercial Association for Five-mineral Chemical Industry, participate actively in overseas antidumping investigations against China. A number of

\textsuperscript{118} DOC, Initiation of Antidumping Duty Investigation: Synthetic Indigo from the People's Republic of China, 64 FR 28/7/1999, p 40831.
\textsuperscript{119} William E. Perry, "U.S. Antidumping Cases against China – Lessons Learned", online <http://www.gsblaw.com/resource/pub_result.asp?ID=1745587282000>
antidumping practitioners and scholars frequently give speeches in various forms across the nation. It is said that in recent years, affected Chinese exporters have answered 60% to 70% of investigations worldwide, and they have won more and more cases. Particularly, in recent years, they have participated in all the U.S. and E.C. cases, which are usually of large trade value. Compared to zero show-ups prior to 1994, this is tremendous progress. A recent report also shows that China has improved its overall performance in answering antidumping charges abroad, winning 35.7% of all cases.

“Surrogate Country” Approach

While the Chinese are trying hard to improve their presence in international antidumping investigations, the application of “surrogate country” in determining dumping margins still maintains the high possibility of finding the Chinese products guilty and imposing high antidumping duties. The term “Market economy status” (MES) is not a WTO related concept but rather derived from anti-dumping laws in the U.S. which established criteria for an exporting country to meet in order to qualify as a market economy (ME) in antidumping cases. It became a practice in many WTO members: for an ME country, normal value is based on the price in the domestic market of the export country; while for a non-market economy (NME), normal value often refers to price in a substitute country or a third country. The latter approach for an NME is the so-called “surrogate country” (or “analogue country”) approach, where the antidumping authorities rely on obtaining cost and price information from surrogate third countries with market economies considered to be at or close to the same level of development as the NME subject to the antidumping investigation. In some cases, these investigating authorities have developed and used synthetic cost and price information. Arguably this approach of the surrogate country has often been taken advantage of by petitioners in proposing a higher dumping margin.

Under normal market circumstances, antidumping cases are already complex and there are many opportunities for investigating authorities to make miscalculations. Many critics find these procedures deeply troubling, especially since many observers believe that the methodologies of these antidumping authorities are arbitrary or may be faulty. In short, comparing prices between markets is difficult, and considerable asymmetries occur in the methodologies used to calculate price differences between markets. It is difficult to discern whether or not dumping is taking place at all, since antidumping laws usually do not require evidence of the variable that transcends all forms of dumping in a protected home market. An introduction of "surrogate country" in an antidumping investigation, where data from third or fourth country work together, simply makes the procedure more confusing. NMEs are at a real disadvantage because there is considerable scope under the loose rules for manipulation of data on prices and costs in ways that increase dumping margins. Besides, countries of market economies have a clearly defined route to challenge such miscalculations through the WTO dispute settlement understanding (DSU), while for the NMEs where the "surrogate country" approach applies, it is difficult to bring a successful challenge under the DSU.

Therefore, China’s greatest concern in antidumping investigations is its status as an NME. In its protocol of accession to the WTO, China has accepted that investigating authorities in other WTO Members may apply NM methodologies in antidumping and anti-subsidy investigations. Since Russia’s graduation in 2002 by the U.S. and the E.C., China is now the most notable country to still be considered as an NME. In fact, the MES of China

is still an on-going issue. Negotiations between China and its trading partners regarding its NME status have been one of the focuses of the Chinese government recently. This campaign has so far reached the result that some 40 countries have recognized China as an ME, while other countries denied or reconsidered it.\textsuperscript{125}

The WTO leaves individual government the discretion to define a country as ME or NME and the specific antidumping procedure for an NME. The way to identify an economy is a very complicated issue, especially for those economies in transition, given the particular circumstances of each country. In fact whether or not to brand a country ME appears to be more than an economic issue, as it comes with enormous social and political implications. In the absence of universal criteria under the WTO framework, governments treat the issue very differently. For example, the U.S., the E.U., and Canada have different approaches when determining if a Chinese producer (or a Chinese industry) can be granted MES. However, detailed analysis on the identification of NME and the antidumping procedures in different jurisdictions is beyond the scope of this paper.\textsuperscript{126}

The NME approach has had a significant effect on the levels of dumping found in investigations of Chinese exports.\textsuperscript{127} Given the fact that the antidumping authorities have broad discretion in choosing the surrogate country, and that they employ complicated methods of calculation and variables of adjusting the price from the chosen country, it makes it very possible for Chinese firms to be found guilty of dumping. Few surrogate countries have China’s cheap pool of labour (a key component of its price); even so, few exporters of chosen surrogate countries, for various reasons, would provide the large amount of genuine information (often relating to confidential business data) demanded by a foreign government in antidumping investigations. In some cases, the companies in nominated surrogate countries simply refuse to provide price or cost information. In the

\textsuperscript{125} An increasing number of countries have announced their recognition of the MES of China, including New Zealand, Singapore, Russia, Jamaica, etc. Source from the MOC ongoing press release at its website <www.mofcom.gov.cn>.

\textsuperscript{126} For more information, see Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, MOC Comments to DOC, Ref. 10512-001 0001 1, June 2004; Stephen Green, “China’s Quest for Market Economy Status”, Chatham House Briefing Note, (London: The Royal Institute of International Affairs) May 2004.

\textsuperscript{127} NBT, supra note 57, p 33.
Australian case of glyphosate from China in 1996,\(^{128}\) for example, the refusal of the Malaysian producers (the suggested substitute country by the Chinese respondents) in providing the cost information resulted in the U.S. being chosen as the surrogate country. In some other cases, the reliability of information from chosen countries thousands of miles away may be questionable. In the long lasting U.S. case of concentrated apple juice concentrate from China initiated in 1999,\(^{129}\) the Chinese respondents found out, after on-the-spot research, that the apple price from India (the surrogate country) provided by American petitioners was for those nicely displayed in a supermarket, not those massively used for making juice which are much cheaper because of lower quality requirements.\(^{130}\) In many cases, the cost factors from a few countries are used complementarily to determine the “normal value” of a Chinese product, when information from a single surrogate country could not complete the construction of the product’s cost. In the U.S. case of crawfish meat from China in 1997, the production factors referred to India’s data for labour, energy, etc. and Spanish data for its imported crawfish meat from Portugal since India does not produce crawfish.\(^{131}\) In short, it is to some degree a subjective process in choosing a “surrogate country” in antidumping procedures; hence uncertainty is the main concern for Chinese respondents in such cases.

Furthermore, the lack of comparability of firms across countries with different levels of development and the wide range of products open the door to abuses of this approach. In antidumping investigations, China has been “substituted” by many countries, comparably or incomparably. Some cases mentioned above showed the possibility of choosing surrogate countries with different development levels and that normally means different production costs. The E.U. case of sulphanilic acid from China in 2001 is another example where the U.S. was chosen as the substitute country of China in determining dumping margin.\(^{132}\) Also, the E.C. case of colour TV receiver from China in 1999

\(^{130}\) Zhou, supra note 100, p 65.
referred to the costs in Singapore.\textsuperscript{133} Although countries like India, Indonesia, and the Philippines are often referred to in antidumping investigations, circumstances can be very particular in each case. In another E.C. case of \textit{brushes from China} concluded in 1989, the price of Chinese brushes was substituted by that of Sri Lanka. This was incompatible as Sri Lanka produced different types of brushes and had a much smaller production volume (by only two producers), accounting for 0.5\% of China’s, and in fact relied on imported materials, such as pig bristle, since Sri Lanka is Muslim oriented and so the pig bristle could barely be produced there.\textsuperscript{134}

The subjectivity and arbitrariness of the “surrogate country” approach has been condemned by China as a discriminatory treatment. Concerns with respect to free trade have also arisen from within the nations which actively apply this approach. In the U.S., for instance, there are calls for the government to “take a hard look at its antidumping policy toward China, particularly the DOC’s absurd nonmarket economy methodology…”\textsuperscript{135} Whilst Russia and Romania have been recognized by the U.S. and E.C. as ME recently, many have realized that this issue is more political than economic. In my opinion, this is the major reason why China launched the campaign to gain ME status through diplomatic channels. Different governments answer differently according to their own economic parameters coupled with their strategic purposes. When New Zealand vigorously invited China into a bilateral FTA that would largely benefit the former in the foreseeable future, it “acknowledged” China as an ME for the first time in world history, in 2004.\textsuperscript{136}

Admittedly, the continued treatment of China as an NME in antidumping investigations is a serious problem, but it is undoubtedly temporary. China’s WTO protocol sets a deadline

\textsuperscript{136} In an interview that I conducted in Beijing in 2004, a government official from the PRC Agriculture Ministry expressed concern about the FTA according to the trade structure of the two nations, and suspected China might lose in the agreement. Also, in the discussion on this issue with some other prestigious Chinese scholars, practitioners, and government officials, I had the impression that the governments are horse trading. The issue has gone beyond economic discussion.
for this treatment that will expire 15 years after the date of China’s accession to the WTO, and it is likely that China will effectively cease to be treated as an NME long before 2016. As a practical matter, many believe that the continued development of the market and related government policies will demonstrate the market-based nature of the Chinese economy in the not too distant future.

d. Summary

To summarize, China’s special status as the world’s number one antidumping target is due to many reasons. One major reason is that China is one of the world’s lowest cost producers. It is able to sell a wider range of products for lower prices than most competitors because of the cost structure of its industries, and because it tends to manufacture products at the low end of the quality scale. The growing export surge from China has greatly concerned the domestic manufacturing counterparts in countries with which China trades. This drives the local producers to seek protection from their respective governments. Furthermore, because China is classified as an NME by most traders that employ special antidumping procedures to determine the costs of an NME’s products, the normal values of Chinese goods are likely to be distorted through the special procedures. This procedure can be easily utilized by a domestic industry to find the accused exporter “guilty”. Thus China, being a low-cost producer, large exporter, and labelled NME, seems destined to be the largest antidumping target in the world.

The labour and natural conditions of China are unlikely to change overnight, which means that the comparative advantage of the price of its products will remain. Also, the negotiations between the Chinese government and its traders regarding the status of NME are still going on. It is, therefore, predicted that China will likely continue being the number one target country in the antidumping wave worldwide for the next twenty years, while it carries on with economic restructuring.

138 For example, see Stoler, supra note 123, p 8.
139 Zhou, supra note 100, p 50. (Shijian Zhou, a prestigious antidumping practitioner in China)
2.3 China’s Position in the WTO Antidumping Forum

China has not been a very active participant in neither the Rules Group Negotiations under the Doha Agenda, nor in the antidumping working groups on implementation and anti-circumvention. In fact, China has acted more as an observer than as an active participant. One of the two Chinese contributions to the Negotiations focuses on issues regarding the initiation of antidumping investigations and on price comparisons. In another paper, China has contributed to the WTO by expressing concerns of the developing countries with respect to the use of antidumping in textiles and clothing and to S & D treatment.\footnote{140}

China to some degree plays a careful role in the antidumping club. It is taking a relatively conservative position while the camps are divided in their views on the WTO antidumping reform. On one hand, China opposes the overuse or abuse of antidumping by some nations. On the other hand, China is reluctant to participate in the Group 14 and actively advocate restriction over antidumping initiations.\footnote{141} As explained by a MOC official, the reason why China is not very radical in reforming the WTO antidumping system is the consideration of the growing application of antidumping measures of China itself as a new user.\footnote{142} In my opinion, the government is taking too mild a position on the WTO forum regarding antidumping reform, especially when China has been targeted by antidumping measures around the world for such long time and has suffered so much. A significant change under the WTO framework that might restrict the overuse of antidumping will undoubtedly be in China’s interest.

\footnote{WTO doc. TN/RL/W/48/Rev. 1}
\footnote{Group 14, also called “Friendship of Antidumping,” consists of fourteen export-oriented countries, including Japan, Korea and Brazil, which promote restrictions on the use of antidumping measures.}
\footnote{Wang, \textit{supra} note 58, p 33.}
Chapter 3. Antidumping and Competition

3.1 Introduction: Competition Policy

Many governments with antidumping mechanisms in place hold the assumption that they are pro-competition and promote a level playing field for all competitors. The name of competition, or rather 'pro-competition', is often used in public. Most economists value competition because it provides for an efficient allocation of resources. Numerous economists have probed and analyzed the value of competition, discussions the details of which are beyond the scope of this paper. In general, competition is preferable to monopoly because competitive pressure often forces firms to provide products at a relatively low price, or to offer consumers some other desirable products in hopes of increasing sales. Competition also has value in its ability to promote democracy in the marketplace, both for the producer and the consumer, as is commented on by Thomas C. Clark, the former Associate Justice of the U.S. Supreme Court:

"The philosophy of the antitrust laws is that the freedom of every person to carry on the business of his choice is the nature of a personal liberty as much as a property right...the enactment of the antitrust and trade regulation laws is the answer of Congress to this problem."\(^{143}\)

A free market is efficient if firms behave competitively. Were any firm, or group of firms, perceived to be exercising an inappropriate degree of market power, a government could use its competition policies to address this anti-competitive behaviour. Competition policy in this paper has the same meaning as “antitrust”, referring to laws and administrative regulations that promote competition, deal with issues covering monopoly or abuse of dominance, restrict trade practices and other anti-competitive agreements, and regulate combinations such as mergers, acquisitions, and buyouts.

Antitrust legal systems have a longer history than antidumping systems and can be traced back to the U.S. Sherman Act of 1890 prohibiting practices that are anticompetitive.\textsuperscript{144} So far about 90 countries have competition laws in place. Developed countries, such as the E.C., Australia, and Japan, have quite a long history of enforcing such laws. Among the newly industrialized countries/regions, some have relatively short history, such as Korea and Taiwan, who enacted their laws in 1980 and 1991 respectively, while others like Hong Kong and Singapore have not enacted comprehensive competition laws yet.\textsuperscript{145} Developing countries including Argentina (1919), Colombia (1959) and India (1969) are among those countries with a longer history of competition laws.

Competition laws greatly assist national governments in preserving the competition in their home markets. However, difficulties arise when firms exercise market power in the international market. International cartels of private firms that engage in restrictive practices can be detrimental to the economic development of affected nations. Also, cross-border mergers and acquisitions that lead to market dominance and restrictive practices challenge national competition legislation. Therefore, along with economic globalization, discussions on international cooperation on competition policies have come onto the stage. Among others, the Organization for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and the Asia-Pacific Economic Cooperation (APEC) have been active in promoting this kind of cooperation. In the WTO, a competition policy Working Group was introduced at the Singapore Ministerial Meeting in 1996.\textsuperscript{146} The efforts made by this group also promoted cooperation at the global level, although the issue had not been properly debated at the Cancun Ministerial Meeting in 2001.\textsuperscript{147} It is expected that an international framework of competition policy will be built within the WTO.

\textsuperscript{144} The U.S. Sherman Act (15 U.S.C.S 1-7) was followed by the Clayton Act of 1914 (15 U.S.C. S12-27, 29) and the Federal Trade Commission Act of 1914 (15 U.S.C.S. 41-51) with the objective of promoting strong competition, to form a systematic antitrust system in the U.S.

\textsuperscript{145} Pradeep S. Mehta, "Competition Policy in Developing Countries: an Asia-Pacific Perspective", \textit{Bulletin on Asia-Pacific Perspectives} 03/2002, CUTS Centre for International Trade, (Jaipur, India) 2002.

\textsuperscript{146} Singapore WTO Ministerial, \textit{Singapore Ministerial Declaration}, WTO doc. WT/MIN(96)/DEC/, 13/12/1996.

\textsuperscript{147} For more information on the WTO Cancun Ministerial Meeting, see WTO doc. WT/MIN(03)/*, or visit WTO website <http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm>
3.2 Antidumping: Competition Policy or Trade Protectionism?

After Canada adopted the first antidumping law in 1904, several other nations followed suit in the years up to 1920. It has been suggested that this first wave of antidumping legislation was related to a general hostility towards Germany, which resulted in a huge production surplus to be dumped towards the end of World War I, and trust busting.\(^{148}\) The legislative burst introduced the first comprehensive work on antidumping as a protection tool by Viner in 1923.\(^{149}\) He analyzed economic rationale as a remedy for discriminatory pricing in his work, as well as cartel behaviour. In the beginning years of antidumping implementation, the rationale for antidumping as a remedy for predatory behaviour was widely stated. To Viner and others in his time, antidumping laws were to a large extent an extension of antitrust laws.\(^{150}\)

The following thirty years were fairly quiet. However, from the 1950s onward antidumping started to surface again on the world stage. More and more countries were adopting antidumping laws and applying them at a growing pace, with the exception of the 1970s.\(^{151}\) Nowadays more than 100 countries, including major traders in the world, are equipped with antidumping laws. The number of antidumping petitions has also dramatically increased in the last three decades. Meanwhile, the economic rationale, if any, for antidumping has changed dramatically.

3.2.1 Antidumping Law: Origin

Ideally, in a free trade world, global efficiency is achieved through a complete elimination of trade barriers assuming firms behave competitively in the world market,

\(^{148}\) Finger (ed.), supra note 6, p 16. Finger commented that it might be mistakenly believed that countries enacted antidumping law referring to Germany’s production surplus. It was also suggested that this phenomenon might have been caused by “the wartime plague of mendacious propaganda.” See Viner, supra note 13, p 61.

\(^{149}\) Viner, supra note 13.


\(^{151}\) Ibid, p 4.
and without the need for any governmental intervention. When firms exercise market power cross-border, the exporting country, in theory, could apply antitrust laws to discipline its firms to behave competitively in foreign markets. However, it is usually not in the interests of the home country to do so, as long as the restrictive behaviour does not hurt the trade and the domestic market of the country. In fact, such behaviour — for example, an agreed action or predatory pricing of exporting firms — might result in promoting the exportation of the exporting country. Hence, national interests open the door to the exemption of foreign trade in an antitrust legal system in many jurisdictions.\textsuperscript{152}

Antitrust law, on one hand, promotes competition in the domestic market by disciplining local and foreign competitors. On the other hand, it explicitly and implicitly permits domestic firms to exercise monopoly in the foreign market. In fact, in a segmented world, it is inevitable that nationalistic economics will result in unfair treatment. National antitrust law is handicapped by this kind of practice.

In the absence of antitrust instruments applied by exporting countries when their firms inappropriately exercise price discrimination overseas, importing governments have to find alternatives. Antidumping laws were introduced, allowing governments to impose duties upon imports whenever a sign of price discrimination between national markets was found and without any requirement of supranational powers. It appears that antidumping law, initially as a "hybrid of traditional tariff ideas and price discrimination theories of antitrust law,"\textsuperscript{153} was created partly to protect competition. However this assumption is debatable. There were difficulties in interpreting antidumping law as part of competition policies, even in the early ages of the former. Dale puts it:

"These difficulties have been reflected in a vigorous debate between those who see the essential purpose of anti-dumping policy as the protection of competition and those who

\textsuperscript{152} For example, the antitrust legislations of the U.S., the E.C., and Japan have similar exemptions of restrictive competition behaviour in exportation.

view it as a restriction on one particular species of competition (discriminatory pricing) in the interests of domestic competitors. Academic commentators apart, one of the foremost proponents of the view that the anti-dumping statute should be interpreted as an anti-trust law aimed at protecting competition, not competitors, is the United States Department of Justice which has adopted the practice of submitting anti-dumping briefs to the hearings of the United States International Trade Commission (USITC) on the grounds that it is the executive agency responsible for advocating the public interest in competition.\textsuperscript{154}

It is safe to say that antidumping law came into existence with the intention of complementing the competition legal system in regulating anti-competitive behaviour of exporting firms, as part of larger competition policies. However, antidumping law has normally been in the interests of domestic competitors instead of the competition within the national market. It was devised as a "hybrid" policy with an initially economically justified rationale, while growing in a very different direction from the antitrust system.

### 3.2.2 Antidumping Law: Where Is It Now?

After the 20\textsuperscript{th} century, we see the U.S., as a nation that shares one of the longest antitrust and antidumping histories in the world, officially states that "the antidumping rules are not intended as a remedy for predatory pricing or any other private anti-competitive practices with which competition laws are concerned."\textsuperscript{155}

As previously mentioned, the design of modern antidumping laws does not attempt to distinguish the intention of exporters when they exercise dumping overseas. The laws just simply discipline "dumped" imports that cause "injury" to the domestic counterpart producers without regard to whether or not the dumping is promoting competition in the market or whether it is increasing social welfare.

**Antidumping and Social Welfare**

\textsuperscript{154} Dale, \textit{Supra} note 3, p 56.

Dumping itself is not necessary a concern in the international markets. Many believe that it can be a component of pro-competitive trade. The increasing volume of goods flowing across the border through trade liberation makes markets more competitive since domestic producers no longer hold the market as a monopoly. Thus, it is to the benefit of consumers who can expect more goods, and possibly lower prices, as result of more intense competition. It is likely that foreign goods are being “dumped” if producers earn less on each exported good than if it were sold in their domestic market. Consequently, the exporters have to absorb the trade costs. Wooton comments that “rather than being exceptional, anti-competitive behaviour, dumping is a quite typical response to trade barriers and is generally pro-competitive, benefitting consumers.”

However, antidumping aids domestic producers to exercise their market power by either forcing up the prices of imports or driving them out of the market. It appears that antidumping duties become a substitute for tariff protection as trade liberalization progresses and tariffs are reduced, and have been pursued on pure protectionist grounds by some users. Domestic producers are protected under antidumping procedures, while the direct impact on consumers is analogous to the effect of import tariffs in raising the prices for imported, and possibly domestic, goods. Analyses of some active users have suggested that the net effect of antidumping measures on national welfare is negative.

**Antidumping and Predatory Pricing**

The primary economic rationale of antidumping law seems shaky since predatory pricing is arguably very hard to afford. The barriers in establishing an international monopoly are significant. These include the difficulties of preventing consumers from stockpiling

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156 Wooton, *supra* note 150, p 12.
goods during the predatory pricing phase, the need for quick exit levels, high barriers to entry in the foreign market, and high home market barriers for a dumper to protect its home market share. Other barriers in achieving cross-border monopoly by means of predatory pricing include the need for the dumped product to exhibit high inelastic demand in order to prevent consumers from switching to a substitute product.¹⁵⁹ Last, vigorous international competition also sets a significant barrier to establishing an international monopoly. Matthew Marks, the former Deputy Assistant Secretary of the U.S. Treasury, concludes,

“As one who has had considerable practical experience in administering the American Antidumping Act of 1921, I can say there has never been a case with which I have come into contact, which I am prepared to categorize as predatory dumping.”¹⁶⁰

Empirical studies have also shown that very few of the antidumping petitions were against instances of possible predatory dumping. This is supported by the OECD’s finding that only 5% of antidumping cases are correlated to anti-competitive practices such as predatory or strategic pricing.¹⁶¹ Messerlin demonstrates that during the period of 1980-1989 the percentage of possible predatory pricing cases was 2.5 in the E.C. and 5.7 in the U.S.¹⁶² Shin finds that, at most, 10% of the antidumping cases in the U.S. during the same period of time were likely to have involved predatory pricing.¹⁶³ Marceau also shows the figure from the same decade revealing that in 90% of cases, the foreign

¹⁶¹ OECD Committee on Competition Law and Policy, supra note 22.
country's share of the market was less than 25% – too small for predatory pricing to make sense.\textsuperscript{164}

Nowadays, therefore, antidumping seems to have little concern with predation. The criteria for proving dumping and injury allow firms around the world to seek protection from antidumping measures. Protection has been granted to industries, predominantly in the steel, textile, and chemical industries, through the numerous petitions they filed.

\textbf{Antidumping and Fairness}

Some maintain that the antidumping laws are there to promote fairness, which allows for equal standing in the market place. In a broad sense, what is "fair" to the producers in importing countries might not be fair to consumers of the importing countries, or to the producers from exporting countries. Without a universal standard on fairness, a belief of antidumping promoting fairness could be marked as discrimination.

\textbf{Antidumping as Protective Device}

Given the above observation, it is difficulty to see how antidumping law is still an extension of the antitrust system that is aimed at promoting market competition. When competition promotion is no longer a primary concern of antidumping users, the major intention of national antidumping laws has been redirected towards the protection of domestic producers from import competition. A report from the World Bank concluded that the impositions of antidumping duties "act more as protective policies to insulate the import-competing sector from competition... they do not end the dumping because they do not remedy the root cause."\textsuperscript{165}

This is widely recognized, even by countries that frequently exercise antidumping. Among others, the U.S. has been often accused of applying antidumping as more of a

\textsuperscript{164} "Repeal the Protectionist's Charter", \textit{The Economist}, 15/6/1992, p 20, in Marceau, \textit{supra} note 21, p 27.
protective tool. As noted by Kenneth Dam, Deputy Treasury Secretary of the current Bush administration, "Despite this smiling fair trade face, the antidumping proceeding always has been and is increasingly a protectionist device, as various congresses have amended the underlying statute to make the proceeding and remedy more effective. This darker face of antidumping proceeding is so well known inside the Washington Beltway that it has become a trite joke among trade lawyers that antidumping is the protectionist's weapon of choice." 166

Nevertheless, the use of antidumping could be justified in the sense that, in the process of trade liberalization, it is reasonable to feel threatened by a surge of imports causing massive unemployment and commercial loss for domestic industries. Certain industries remain sensitive for reasons of their geographical locations, national pride, or security, and so on. Some infant industries, especially in developing countries, often need special protection from overwhelming competition from foreign firms. Antidumping laws are also able to remedy some of the negative impacts of foreign protectionism. As was already mentioned, the national interest often shares a tenuous relationship with trade liberalization, which often puts national governments in a difficult situation. On one hand, the governments promote trade liberalization. On the other hand, they try to protect the groups negatively affected by it. Unfortunately, an abuse of trade remedies tends to proceed in the wrong direction leading to a greater adverse impact on the international community.

The initial purpose of incorporating antidumping rules into GATT 1947 was to restrain national antidumping actions and to ensure a proper application of national antidumping laws that would not overstep the parameters set in the international rules. However, many would argue that they have failed to do so. 167 The last half-century witnessed the transformation of antidumping rules on the international scene from general guidelines under GATT to a fully detailed system in the WTO. The language in the ADA, however,

still seems too loose to confine member nations’ use of antidumping measures. The ADA does not provide parameters for national practice or provide any sanction against it. For example, it lists a set of calculation methods in determining the dumping margin, which could be skewed by the various methods of calculating.\textsuperscript{168} Additionally, it does not consider the issues of competition, investment, taxation, labour laws, and other social policies of the domestic markets concerned. Specifically there is no reference in the WTO provisions relating to the degree of market power of the exporter that would construct restrictive business practices and the capacity to affect the importing market. The international and national antidumping laws are simply interpreted for the benefit of producers in the importing country. Not surprisingly, member states in the WTO have called for an overhaul of the antidumping rules and a great debate over the issue has spread out the world.

3.2.3 Beyond the Rhetoric: Political Factors

The political economy is probably the most common factor leading to the misuse of antidumping, and unfortunately the most difficult factor to eliminate. The typical political justification is that antidumping is a safety valve for trade liberalization, which would not be otherwise accomplished due to objections of the sectors disadvantaged in the move to free trade.\textsuperscript{169} Thus the antidumping mechanisms not only respond to critical economic needs but are also used to help preserve political support for free trade.

Not surprisingly, governments are divided in opinion towards antidumping reform according to their situation in the antidumping war on the international scene. Nations more inclined to export goods, especially those often affected by foreign antidumping measures, are urging a significant reform of the WTO antidumping provisions for the purpose of economic development promoted by free trade.\textsuperscript{170} Similarly, political justifications and influences in the administration of antidumping are crucial in explaining the resistance of some countries, the U.S. particularly, to amend the

\textsuperscript{168} For details, see Article 2, WTO ADA.
\textsuperscript{169} Wooton, \textit{supra} note 150, p 14.
\textsuperscript{170} For example, the Group 14, \textit{supra} note 141.
international system. Therefore when antidumping is seen as a threat, claims of necessity to sustain the multilateral trading system are often cited as rationale.

A communication of Japan to the WTO in 1999 states that “Japan shares the view of many developing country Members which have expressed concern about the abuse of antidumping measures and insisted on removing ambiguity and excessive discretion inherent in the Anti-Dumping Agreement. These characteristics have dangerously made it an instrument of protection rather than an instrument to counteract unfair dumping.” This statement received severe criticism from the U.S. while it received support from the E.U..

In the Doha Round of multilateral trade negotiations, the U.S. objected to any substantial change of the present antidumping system. Its Congress states that the government’s standing point at the WTO round was to “(1) preserve the ability of the United States to enforce rigorously its trade laws, including the antidumping and countervailing duty laws, and avoid agreements which lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies, in order to ensure that United States workers, agricultural producers, and firms can compete fully on fair terms and enjoy the benefits of reciprocal trade concessions; and (2) ensure that United States exports are not subject to the abusive use of trade laws, including antidumping and countervailing duty laws, by other countries.” Interestingly, this statement seems to show double standards with respect to the active use of antidumping, and being a target of it. In other words, the Congress recognized the possibility of a misuse of antidumping in other countries when it comes to their exports, but it fails to admit any wrongdoing in its use of antidumping. In citing the constituency that antidumping protects (e.g. workers, producers, and firms), the statement repeats the political justification of the law.

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As the political factors are impossible to ignore or eliminate entirely, it seems the reform to these trade remedies is most likely to be some combination of politically-driven decisions.

3.2.4 Antidumping Law vs. Competition Policy

As was already discussed, in the absence of antitrust instruments applied by exporting countries when their firms exercise market power abroad, importing governments find alternatives through the use of antidumping measures. When antidumping was regarded as assisting national governments in regulating exporting firms' competition behaviour, both antitrust and antidumping were seen as instruments of competition policy, particularly targeting price discrimination. As such, antitrust and antidumping could be thought of as complementing each other where the former applies to domestic competitors and the latter pertains to the domestic sphere of foreign firms.\(^{173}\)

The interface between antitrust and antidumping is far from showing complementary characteristics. The growing number of national antitrust laws maintains the purpose of promoting competition in the market place, and aims to ensure that consumers are not harmed by private trusts and cartels. They are targeting primarily collusion, price-fixing, and other restrictive trade practices, and also seeking international cooperation. On the other hand, antidumping laws and practices, shaped by other economic and political motives, are rather different than the idea of "fairness" that motivated them in the first place, and have deviated from the original function of providing an international extension of antitrust laws. It is now hard to conceive of any ideal and complementary relationship in regards to the two legal systems in place.

Since the link between antidumping and antitrust has been lost, they can be considered as totally alien to one another. Modern antidumping laws are rooted primarily in concepts that are substantially different from antitrust laws. As a result of addressing different problems and pursuing different objectives, the two legal systems have evolved along

\(^{173}\) Wooton, supra note 150, p 11.
separate paths for more than half a century. Nowadays actual policies, substantive rights, and procedural standards of antidumping laws substantially differ from those of competition laws.

As a matter of fact, when a government has both antidumping and competition policies in place, they share an uneasy relationship in regulating a single market. The fact that they pursue different objectives might eventually lead to conflict. Antidumping is a trade remedy for industries sustained by import competition. In contrast, the final goal of competition policy is to promote consumer welfare and productive efficiency, which in part depends on market contestability, wherein import competition often plays a role.\textsuperscript{174} What's more, antidumping policies are more inclined to protect competitors, particularly domestic competitors, instead of competition. This protection of some competitors may contradict the objective of preserving competition because the protection of competition does not always call for the same policy as the protection of competitors. If the government intends to promote efficiency and competition, competition laws would clearly be the superior instruments, under which the producers are regulated. While a domestic producer intends to reduce competition, an intention not supported by antitrust laws, they would probably resort to antidumping laws to file antidumping petitions before the government. In this way, if an antidumping duty is finally imposed competition will certainly be reduced where competition law is incapable of remedying the competition.

Moreover, antidumping laws not only fail to supplement competition law on many occasions, but may actually facilitate collusion of firms, which is supposedly disciplined by competition law. Antidumping rules that punish certain types of price differentiation are justifiable under competition policy. From a legal perspective antidumping procedures protect domestic industries and allow practices such as price undertaking and quantitative trade, which are supposed to be challenged by competition law.

For instance, undertakings by exporters to raise prices or limit export volume in order to avoid antidumping duties could easily contradict fundamental concepts of competition, although this action is often participated in by the antidumping authorities of the importing country. Undertakings, in fact, have proved to have particular competition reducing effects.\(^{175}\) It raises a concern since undertakings represent a frequent action. For example, more than two thirds of the E.U.'s antidumping investigations end with acceptance of undertakings.\(^{176}\) Additionally, informal settlements such as a withdrawal of a petition occur in exchange for commitments by foreign exporters.\(^{177}\) Both undertakings and withdrawals that often result in private agreements on prices or quantities raise antitrust problems.

It has also been demonstrated that antidumping mechanisms can increase the likelihood of international collusion. Certain close relationship of antidumping and cartel can be seen from cases in jurisdictions with established antidumping and antitrust systems. Nearly 30 of the E.C. anti-cartel cases initiated in the 1980s dealt with products that had also been involved in antidumping cases, which represented 25% of all antidumping cases initiated during this period.\(^{178}\) The reason why the two kinds of cases are closely related partly lies in the fact that antidumping procedures have the potential to be utilized by firms to facilitate cartel actions.

To begin with, antidumping actions can help a domestic cartel. Messerlin's work shows that firms have been able to capture the E.C. antidumping procedure; they have paid the fines for cartelisation imposed by the Competition Directorate, DG IV, and thereafter have been able to limit the penetration of imports by initiating antidumping investigations.\(^{179}\) In these cases the antidumping procedures were captured by the firms in


\(^{179}\) Ibid, pp 465-492.
four major steps: the definition of the market, the determination of dumping, the determination of injury, and the duration of the measures.\textsuperscript{180} Countries subject to dumping charges were mostly Eastern European transitional countries, including Hungary, Romania, and the former Czechoslovakia, etc. This work shows that E.C. firms have used antidumping laws as a means of obtaining a \textit{de facto} exemption from E.C. competition law when foreign competition has created difficulties for the creation and organisation of a cartel. The antidumping actions were crucial to the survival of the cartels, with careful price and quantity control on imports, and the allowance of necessary time needed to enhance their capacity to generate stronger and more stable cartels.

Antidumping, then, may facilitate collusion among exporters or between home and foreign firms. Scherer reports a possibility that a mere threat of antidumping measures may generate an export cartel among exporters, as in the U.S. antidumping case against Canadian potash.\textsuperscript{181} Empirical evidence in the U.S. shows that many antidumping petitions are withdrawn before the International Trade Commission (ITC) completes their investigations. Prusa argues that petitions are used by domestic industries to threaten and induce foreign industries into a collusive agreement exonerated from antitrust concerns because of U.S. trade laws.\textsuperscript{182} Zanardi suggests that the decision to withdraw a petition depends on two key parameters: the coordination cost and the bargaining power of domestic and foreign industries. He constructs a model and employs econometric analysis with findings consistent with the hypothesis that the antidumping law is used as a collusive device.\textsuperscript{183} Using a slightly different approach, Veugelers and Vandenbussche investigate the effect of antidumping legislation on collusion between two domestic firms as well as between the foreign exporter and the domestic producers. They find that depending on the degree of product heterogeneity and cost asymmetry between foreign and domestic firms, introducing antidumping can lead to a full cartel between all three

\textsuperscript{180} \textit{Ibid}, p 477.
\textsuperscript{182} Prusa, \textit{supra note} 177.
firms. Interestingly, the cases demonstrated in the aforementioned works linking antidumping devices and cartels show that the cartels or cartel initiators are often firms or multinational giants from industrialized countries, while their antidumping targets are often exporters from developing economies in transition (e.g. Eastern European countries). In doing so, it seems easier for petitioners to prove their case, or to help their cartels survive, as antidumping procedures are often different when it comes to non-market economies. It is also easier for the petitioners to include these exporters in their cross-border collusions and to compromise because the latter are relatively weaker in trade experience and negotiation capacity.

3.2.5 Summary

To conclude, it is hard to determine the nature of the relationship between antidumping and competition policies. Merely saying antidumping is a pro-competitive or anti-competitive device does not accurately describe the entire picture across time and jurisdictions. Given the above discussion, it is safe to say that antidumping law plays different roles in different ages and scenarios, and the law's role in promoting competition has changed over time. Antidumping procedures may have functioned mainly to correct market distortion in early years as a supplementary to competition policy while protecting domestic industry, and they may still serve the purpose of promoting healthy competition when exporters exercise their market power.

However, the overuse of antidumping measures in the recent twenty years implies the rise of the protectionist feature of the antidumping device. Now in many countries, the major rationale to justify the use of antidumping measures is the political economic factor. Competition promotion seems no longer the main goal of antidumping mechanisms. Whether or not it promotes fairness is also questionable. It is evident that under certain

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circumstances antidumping can help domestic market powers survive and has the ability to facilitate cross-border collusion between domestic firms and foreign exporters. In this regard, antidumping mechanisms could be anti-competitive. Given the works showing the negative overall national welfare brought by antidumping measures in certain countries, it is safe to say that the antidumping mechanism has deviated too far from pro-competition.

3.3 Solution to the Inconsistency of Antidumping and Competition

To correct the aberrant direction of antidumping law and practice some solutions have been introduced, as academics, economists, and lawyers address the issue vigorously. The solutions include reform of the antidumping legal system itself and the alternatives that could replace it.

3.3.1 General Solutions

a. Introducing “Public Interest” into Antidumping Law

It is fairly obvious that the result of an antidumping duty is to transfer income from the rest of the community to domestic producers of the charged goods. Since consumption often exceeds output for an imported good, consumers lose more than producers are eligible to gain.\(^1\) In competition policies the consumer’s benefit is the main concern that can be extended to the antidumping system by incorporating a “public interest” clause into antidumping law. This would reintroduce competitive considerations into the antidumping process and change the general mode of practice of the national antidumping authorities. Contrary to antidumping’s supposed primary objective of protecting producers, the “public interest” clause is interpreted as covering user and consumer interests, thus causing the protectionist element of antidumping actions to decline. A firm implementation of this clause could cause governments imposing antidumping duties to favour the broader interests of the economy. Therefore, introducing,

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\(^1\) The Anti-Dumping Tribunal, Law Reform Commission, (Ottawa) 1979.
extending, and reinforcing considerations of public interest would render antidumping determinations much more competitive.

In fact, some countries already have such a clause in place including the E.U., Canada, Brazil, Thailand, Malaysia, etc.. The following selective list of countries that have such provisions and practices with comments will show a general idea of where they are and what needs to be improved.

- Article 6.12 of the WTO ADA states “the authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.”\(^{186}\) This article attempts to halt the protectionism inclination of antidumping measures. However, as a guideline it fails to provide detailed procedures, thus it does not have a binding effect on national laws of member states.

- Article 21 of the E.U. antidumping legislation states the famous “Community interest” clause. It tries to ensure that antidumping measures are in the broad interest of the Community where a decision is made based on “an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers.”\(^{187}\) In fact, it shows only limited practice on the clause to date.\(^{188}\)

- Canada introduced the public interest clause into the Special Import Measures Act (SIMA) of 1984.\(^{189}\) It is the only national law that has a procedure for inquiry into the public interest before assessing antidumping duties. It shows between 1984 and 2000,

\(^{186}\) Article 6.12, WTO ADA.
\(^{187}\) Article 21, Council Regulation 3283/94.
\(^{188}\) It is suggested in one case (Ferro-Silicon from Brazil, China, Kazakastan, Russia, Ukrane and Veneuzuela) that the European Commission’s decision was affected by the “public interest” investigation; in Aradhana Aggarwal, “The WTO Anti-Dumping Agreement: Possible Reform Through the Inclusion of a Public Interest Clause”, Working Paper No. 142, Indian Council for Research on International Economic Relations, September 2004, p 4.
11 inquiries on public interest were initiated out of 315 antidumping initiations, and 4 of the 11 resulted in antidumping duty reduction.\footnote{The cases were \textit{grain corn} (1987), \textit{re beer} (1991), \textit{iodinated contrast media} (2000) and \textit{prepared baby food} (2000). In Aggarwal, \textit{supra} note 188, p.4.}

- Singapore law has a unique feature. The Antidumping Legislation requires consideration of the "public interest" factor by the Minister of Trade and Industry, the antidumping authority, before an investigation is initiated.\footnote{L Hsu, "The New Singapore Law on Antidumping and Countervailing Duties", \textit{Journal of World Trade}, v 32, no 1, 1998, pp 121-145.}

- Lithuania introduced its antidumping law in 1998 and placed its authority in the same agency responsible for consumer protection.

- In a communication to the WTO in 1999, Mexico presents "some practical examples of the way in which certain basic concepts of competition policies could be used to improve the antidumping rules."\footnote{WT/WGTCP/W136, 15/07/1999.}

- China has incorporated public interest into its Antidumping Regulation of 2001.\footnote{Antidumping Regulations (hereinafter ADR 2001), State Council Decree No. 328, 26/11/2001.} Article 33 authorizes the MOC to terminate an antidumping process as a result of an acceptable price undertaking, which is in the "public interest," and Article 37 states "the imposition of antidumping duty should be in accordance with public interest."\footnote{Article 33, 37, ADR 2001.}

Like most countries, no procedures on examining public interest are elaborated in the Chinese legislation.

The public interest element in dumping is actually "a tacit acknowledgement of the overlap of political and legal considerations."\footnote{EEC Parliament (1981) Point G-19 Reported in Stegemann, in \textit{International Trade and The Consumer} (Paris: OECD) 1984, p 250.} However, the problems lie in referring public interest to an elaborate investigation that incorporates a wide range of parameters, and a possible delay of the antidumping process.
Unfortunately, considerations of public interest have often been equated with the domestic industry's interests. As a result of the slim concern by antidumping authorities in their practice, a concrete implementation of "public interest" in antidumping procedures has been called for. To change the practice in general, the clause should be included in the WTO ADA as an explicitly mandatory consideration and the consideration ought to be placed through the antidumping procedures, from initiation, to determination of dumping and injury. Only in this way, is there a possibility that the implementation of antidumping can be steered back towards the original goal of pro-competition.

b. Shift from Antidumping to Safeguards

As previously mentioned, there are three trade remedies allowed in the WTO framework, i.e. antidumping, countervailing, and safeguards. They have the similar effect of restricting imports but with different objectives and procedures. Countervailing duty is imposed on imports subsidised by foreign governments. A safeguard measure, i.e. restricting imports of a product temporarily, is to protect a specific domestic industry from an increase in imports which is causing, or which is threatening to cause, serious injury to the industry, regardless of their origin. Compared with antidumping measures, the two remedies are rarely used. For the governments, anti-subsidy will easily raise political hassles; and the safeguards will bring them more "work".

The GATT provision on safeguards authorizes member governments to raise tariffs and use quotas over a definite period of time to adjust to such an event. The important difference between antidumping and safeguard remedies is that while antidumping measures target specific countries and are applied in a discriminatory manner without any obligation to compensate, safeguard measures have to be imposed without national discrimination and with compensation to the exporters. For safeguard measures, the focus

196 For details, see WTO Agreement on Subsidies and Countervailing Measures, supra note 30.  
197 For details, see WTO Agreement on Safeguards, supra note 31.
is shifted to the readjustment of the industry in the importing country during the action period, and not only on the practices of firms in the exporting country, especially if the alleged dumping is beneficial to some interest groups in the importing country. Hence safeguard measures seem more appropriate to deal with the root cause of the problem.\(^{198}\)

In fact, antidumping works de facto as a safeguard since antidumping dodges the issue of a transitory loss of competitive edge behind the charge of "unfair" competition.\(^{199}\) As the more transparent and efficient procedure, a safeguard measure as prescribed in GATT is a better means of settling the arguments against disturbing the flow of imports in strategic industries. One scholar even advocates that there should be only one system of rules for the control of all imports without reference to the reason for protection.\(^{200}\)

Academics strongly suggest the shift of trade remedies from antidumping to safeguard but it seems they hardly reach policy-makers. Statistics still show that antidumping actions are taken far more frequently than safeguard actions. The use of safeguard measures is in fact discouraged by those who seek firm and effective protection for domestic industry.\(^{201}\) As antidumping procedures are easy to utilize and can be used "once for all" for protecting domestic industries, it is realistically expected that the shift in question will not occur in the near future unless substantial reform within the WTO legal framework takes place.\(^{202}\)

c. Replace Antidumping Law with Competition Policy

A handful of studies have introduced the idea of replacing antidumping with competition policy, especially in free trade agreements (FTA).\(^{203}\) It is suggested that the abolition of

\(^{198}\) Marceau, supra note 21, pp 48-49.

\(^{199}\) Messerlin, supra note 178, pp 242.


\(^{202}\) Safeguard actions are limited to four years with a four-year extension, while antidumping measures last five years and can be extended without limit as long as the domestic industries prove the possibility of dumping again after the antidumping duty ceases.

\(^{203}\) For example, see *The Relationship Between Competition Policy and Anti-Dumping Law: The Canadian Experience*, a study by Lecenomics Inc. funded by Consumer and Corporate Affairs Canada, 1990; Ivan R.
antidumping laws in favour of harmonized antitrust laws enhances economic welfare, and offers a practical solution to the global increase in antidumping actions. A uniform standard of competition policy can be applied to regulate a single market, regardless of the nationality of each producer. In this way, price discrimination will be examined under the national competition law (or possibly international law in the future); as long as it is acceptable under the competition rules, no litigation will be initiated against it. There will be a great saving of resources since the enormous antidumping administrative, legal and political costs will be trimmed from the country's administration. Additionally, this alternative appears to be in compliance with the WTO's principle of "national treatment", and be helpful with furthering trade liberalization.

Admittedly, this solution represents a high level of market integration, and makes the issue of fairness more sensitive in a scenario that industries in different nations present different levels of development. Not surprisingly, this way is and will be under attack by those calling for strong protection of domestic industry. Also, like free trade itself, the solution is likely to conflict with national industry policy. For instance, infant domestic industries will easily be put into a difficult situation under a free trade regime. From a practical point of view, if the antidumping system is to be replaced by competition policy, it will be necessary that competition policy address the interest of competitors, and certain exemptions (e.g. protection of infant industry) have to be included. As such, it has to maintain some focus on opportunity and fairness; as well, the authorities should have a broad antitrust concept dealing with injury to competitors.

In summary, antidumping reformers usually assume that consumers have a right to low prices made possible by foreign exporters, regardless of the cost to competing producers,
while antidumping defenders put emphasis on the causes of the low prices and the adverse impact on domestic competitors. How to balance antidumping laws and competition policies under the current environment is one of the major concerns of policy-makers in national government and international organizations. Without political consensus, there is slim chance for the two remedies to be merged at the world level soon. It will be a long process.

3.3.2 The Arrangements on Antidumping Laws in Free Trade Agreements

Free trade agreements (FTA) play an important role in trade liberalization. Preferential trading has so flourished in recent decades that 80% of the existing FTAs have come into force after 1989. An FTA promotes free trade or zero tariffs on bilateral trade flows and some agreements have the goal of a common market. The feature of an antidumping system that treat exporters differently from domestic traders seems not to perfectly suit FTA’s goal, and it might counteract the efforts of member countries to create a free trade territory. Also the inclination of antidumping laws to protect competitors rather than competition represents a serious impediment to the play of market forces in an FTA. Hence, some FTAs have tried to find solutions in accordance with their particular situations.

The E.U.

The E.U. has substituted antidumping with antitrust for intra-union trade and applies common antidumping procedures towards imports from non-E.U. countries. The Treaty of Rome of 1958 provided an elimination of national antidumping laws after a transition period. A central competition law, parallel to the national competition laws, regulates restrictive business practices that affect trade between member states. Problems arise in coordinating the two levels of legal enforcement – the national level and union level.

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205 Wooton, supra note 150, p 9.
The E.U. represents integration at a high level with free movement of goods, capital, labour, and coordinated monetary and fiscal policies. In order to reach a common market, the elimination of antidumping can be regarded as a necessary step. The goal of creating a single market seems to be the driving force in dealing with antidumping in the E.U. It is reflected in the various forms of agreements that the E.U. has signed with other countries. In the European Economic Area (EEA), antidumping applications have been abolished without reference to antitrust.\(^{206}\) In terms of the E.U.’s agreements with Eastern European and Mediterranean countries, the E.U. retains the right to initiate antidumping investigations against imports from these countries.

**Australia-New Zealand Free Trade Area**

The Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCEFTA) entered into force in 1983 with the aim of promoting free trade between the two nations. Antidumping measures were no longer to be used against each other. Both of them changed their antitrust laws to allow firms to be tried in both jurisdictions. It is pointed out in the official documents that antidumping law “ceases to be appropriate as the Member States move towards the achievement of full trade in goods between them and a more integrated market.”\(^ {207}\)

**MERCOSUR**

The Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay, and the Eastern Republic of Uruguay (MERCOSUR) claimed to aim at a common market by the end of 1994. It applies a double antidumping regime according to the source of imports. Member governments are supposed to coordinate their actions for intra-region antidumping investigations. A common legal framework, but without a supranational authority, applies for antidumping actions against third countries. When the transition period is over and the Protocol of

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\(^{206}\) The EEA includes the E.U. and Liechtenstein, Norway and Iceland.

\(^{207}\) *Preamble to The Protocol on Acceleration of Free Trade in Goods*, 1998.
Fortaleza is implemented, national antidumping laws are to be eliminated and replaced by a common competition policy.

**NAFTA**

In 1994, Canada, the United States, and Mexico launched the North American Free Trade Agreement (NAFTA) and formed the world’s largest free trade area so far. However, the strong support of the U.S. for antidumping made it almost impossible to accomplish much on the issue. The only concession was the establishment of binational panels to ensure the correct application of the antidumping laws. Similarly, no attempt has been made to harmonize their competition laws.

**Canada-Chile Agreement**

The Canada-Chile Free Trade Agreement (CCFTA), which entered into force in 1997, replaced antidumping with safeguard measures, without adopting common competition laws.

**CARICOM**

The Caribbean Community and Common Market (CARICOM), established in 1973, has no arrangement of national antidumping laws, but it adopted a supranational approach on the cooperation of competition policy.

**Others**

The Free Trade Area of the Americas (FTAA) and the Asia-Pacific Economic Cooperation (APEC) forum have working groups on antidumping issues, but in neither case is the discussion in conjunction with competition laws.

**Summary**

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In FTAs, there is often some kind of coordination of antidumping and competition policies. Antidumping laws have to be made less anti-competitive in order to narrow the gap between trade and competition action amongst FTA member states. At one extreme of the spectrum, an FTA could completely substitute national antidumping laws with a common antidumping system with regard to third parties, leaving competition policies to deal with intra-region trade and competition issues, as represented by the E.U. At the other end of the spectrum, countries in an FTA still retain their rights of initiating antidumping investigations towards each other, while they maintain their own competition mechanisms, and no harmonization of the two systems takes place.

The experiences surveyed show that a particular free trade arrangement is not the determining factor, while the intention to create a single market seems to be the motive to trigger the phasing out of antidumping actions. Countries that establish a customs union or a common market must jointly agree on common external tariffs. Antidumping policy could be put on the same footing, with a regional policy replacing the individual antidumping laws of member countries with regard to imports from the rest of the world. In this way, some level of coordination of competition policies of the countries concerned is crucial. The completion of the regional market calls for the establishment of a region-wide competition regime, which would result in a more effective disciplining of firms’ competition behaviour in the regional market. In contrast, the lowest level of integration consistent with WTO obligations is the FTA that simply obliges countries to zero tariffs on their imports from other member nations. No aspect of national trade policy is placed in the hands of a regional or supranational agency and so there is no reduction in national sovereignty.

In short, depending on the objective and degree of integration of the economies, as well as the tradition of member countries, FTAs seek different arrangements regarding antidumping policies. Generally, the deeper the integration, the more likely the members diminish the intra-region application of their antidumping laws and work cooperatively on their competition policies for the maintenance of competition in the integrated market.
However, even when nations eliminate antidumping by an FTA, competition problems might still remain. It is not clear whether regional coordination would improve welfare at the world level. On the one hand, a consistent set of antidumping policies would deal with goods entering into the region from outside countries. On the other hand, the region may be able to wield antidumping more effectively as a protectionist device, through coordinating its actions. The E.U., with the union-wide antidumping system, is among the active users in the world, and is also often accused of misuse of antidumping measures. It is safe to say that the intra-region elimination of antidumping measures benefits member states by removing a discretionary policy, while the rest of the world still needs to cope with the region on antidumping issues.

Ideally, a worldwide elimination of antidumping measures will be the optimum solution to the inconsistency of antidumping and competition on a world level. Any initiative to solve the problem of antidumping on a larger scale might be expected to come from one of the large global organizations, such as the WTO, the World Bank, or the OECD. There is concern that these bodies have been captured by U.S. influence and are therefore silent on these issues.209

Practically, aside from those within regional arrangements, antidumping laws are likely to be maintained. But they can be made more transparent and less anti-competitive through the solutions mentioned above. The antidumping provisions in the WTO, as exceptions to the general principle of the WTO being in favour of free trade and non-discrimination, should be interpreted narrowly and the procedure should be fully respected. The information received during antidumping investigations cannot be used to form cartels or oligopolies, or for restricting competition. It is also hoped that lobbying by other interest groups in today’s sophisticated context will press for a wider range of variables to be considered in antidumping investigations, which might lead to a more competitive result.

Chapter 4. Case Study on Antidumping and Competition: Antidumping against China

4.1 Wooden Bedroom Furniture from China: the U.S.

4.1.1 Case Brief

On October 31, 2003, the American Furniture Manufacturers Committee for Legal Trade (AFMCLT) filed an antidumping petition against wooden bedroom furniture from China. Representing the largest ever value of an antidumping case in the U.S., the petition triggered a vehement debate between the two nations and even more vehement fireworks among groups within the importing country. This debate was closely related to the competition among the U.S. furniture producers, as well as between producers and retailers.

The domestic petitioners, a coalition of 27 domestic furniture makers, were seeking antidumping tariffs in their petition ranging from 158.74% to 440.96% upon imports from China, which covered approximately $1.16 billion dollars worth of exports. In January 2004, the ITC, which is responsible for finding of “injury” to domestic industry, published its preliminary determination indicating the injury was taking place. In the “less than fair value” (i.e. dumping) investigation, DOC issued the Q&V questionnaire to known Chinese exporters of subject merchandise, and received responses. Because China is classified as an NE, India was chosen as the surrogate country, and consumption data for materials, labour, and energy were used to estimate the costs of production in China. Half a year later, the DOC issued an affirmative preliminary determination in June 2004, finding the dumping margins of 198.08% as the PRC-wide

rate, and separate rates ranging from 4.90% to 24.34% granted to 59 Chinese exporters. After numerous back and forth amongst the petitioners, respondents, and the DOC, the final determination on dumping was published on November 17, 2004, with the separate rates changed to 0.79%–16.70% for 121 Chinese companies, and the same PRC-wide rate of 198.08% for the rest. It was followed by the ITC’s final determination on December 28, 2004 confirming the U.S. industry was “materially injured by reason of imports from China”. In January 2005, the DOC again amended the separate rate to 0.83%–5.78%, which marked the end of the antidumping case. What the case could tell us is a lot more than the procedural facts above.

The U.S. furniture industry was significantly divided on the case. It involved extraordinary circumstances from the outset as the U.S. furniture producers were closely split on the issue of bringing and supporting the initiation of this case. According to U.S. law, an antidumping petition can be filed on behalf of the domestic industry when domestic producers who support the petition account for at least 25% of domestic production, and they must account for more than 50% of the production of all those expressing support for or opposition to the petition. In this case, the 25% threshold was met, but the petition did not establish the 50% prerequisite. So the DOC polled the industry to gauge whether sufficient support existed by issuing polling questionnaires to 264 companies, from which 104 responses were received. The DOC concluded that producers supporting the petition accounted for more than 57% of the value of production by that portion of the industry required to express support for, or opposition to, the

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213 In antidumping proceedings involving NME countries, DOC has a rebuttable presumption that all companies within the country are subject to government control and thus should be assigned a single antidumping duty rate (i.e. the “PRC-wide rate” in the case of China). DOC assigns all exporters this single rate unless an exporter can demonstrate that it is sufficiently independent from government control so as to be entitled to a separate rate. In practice, the PRC-wide rate is applied to Chinese producers/exporters that failed to respond to the DOC Q&V questionnaire or Section A questionnaire, and to exporters which did not demonstrate entitlement to a separate rate. See for example DOC, Final Determination of Sales at Less Than Fair Value: Synthetic Indigo from the People’s Republic of China, 65 FR 3/5/2000, p 25706.


petition, thus initiating the case. 219 However, after the initiation, some producers changed their position, and how such a change would have affected the support percentage remains unknown. 220

What is interesting is that many of the petitioners were themselves involved in importing Chinese furniture to the U.S. in previous years. For example, Kincaid Furniture, a member of the petitioning coalition’s steering committee, is a subsidiary of La-Z-Boy’s Case Goods Group, which is a major importer of furniture and one of China’s best customers. Ironically, Steve Kincaid, the president of Kincaid Furniture, said he joined the antidumping action because “we want to support a petition that would stop this illegal activity.” 221 Similarly, Vaughn-Bassett Furniture Company (one of the largest U.S. producers) invited Lacquer Craft (one of the largest Chinese producers) to its factory to videotape production of bedroom furniture a few years ago, so that the latter could produce bedroom furniture in China for Vaughan-Bassett. 222 The ITC report shows that some companies within the petitioning group have imported increasing volumes of subject merchandise from China. 223 It thus appears that the U.S. producers were asking for protection from themselves.

4.1.2 Behind the Case

Let us trace the stories behind the case. In the 1990s, U.S. producers began to supplement their domestic production with furniture from China, where the production costs, which involve highly labour-intensive hand carving and inlaying, are much lower. The ITC actually found that the U.S. producers accounted for 35.4% of the U.S. imports of wooden bedroom furniture from China in 2003. 224 They imported and resold the low-cost,
high-quality Chinese products and they made profit. They “knew after traveling to China and seeing the infrastructure there that they could make certain bedrooms in China, bring it here, mark it up 30 to 40 percent to a retailer and still sell it for less than they could have made it for.”\textsuperscript{225}\ The import surge from China did not begin until years after U.S. producers started to cultivate the Chinese industry. The ratio (by value) of the Chinese imports to total U.S. production of wooden bedroom furniture increased from 25.7\% in 2001 to 62.7\% in 2003.\textsuperscript{226} Also the ratio (by value) of subject imports to U.S. producers’ domestically produced U.S. shipments grew from 7.8\% in 2001 to 25.6\% in 2003.\textsuperscript{227} Domestic producers, including many of the companies that supported the antidumping petition, have played a major role in the dramatic increase of imports from China. The ITC report shows that the 12 largest U.S. domestic producers of wooden bedroom furniture all imported reasonably substantial and increasing volumes of merchandise from China during the period of antidumping investigation.\textsuperscript{228}

U.S. retailers soon caught on. They went to China directly, recognizing the many benefits of purchasing from China. “They could cut out the middlemen (the U.S. producers) who were simply importing, marking up, and profiting; they could produce a greater variety of designs that were cost-prohibitive in the United States; they could respond to high levels of defects in U.S. production by switching to alternatives; and they could have custom designs mass-produced and labelled under their own brand names.”\textsuperscript{225}\ Thereafter the retailers started to eliminate the middlemen, dealing directly with Chinese manufacturers.

Not surprisingly, the antidumping petition filed by the group of producers provoked the American retailers. A coalition of U.S. furniture retailers – Furniture Retailers of America (FRA) – was immediately formed in January 2004 to fight the petition.\textsuperscript{230} They sharply pointed out “some of the petitioners have imported wooden bedroom furniture from China for years and profited by reselling these Chinese imports to major retailers. Once

\textsuperscript{225} Jeffrey Seaman (CEO, Rooms to Go), \textit{Testimony before the U.S. ITC in the Matter of Wooden Bedroom Furniture from China}, Preliminary Conference Report, 21/11/2003, p 149.
\textsuperscript{226} ITC, \textit{supra} note 223, Table IV-7.
\textsuperscript{227} \textit{Ibid}, Table IV-4.
\textsuperscript{228} \textit{Ibid}, Table IV-5.
\textsuperscript{229} Ikenson, \textit{supra} note 220.
\textsuperscript{230} See the FRA website http://www.furnitureretailers.org.
retailers went to China directly, thereby eliminating petitioners' middlemen profits, the group of domestic producers responded by filing this dumping case with the ITC."\textsuperscript{231} Whether or not this is the main reason for the petition by the 27 producers is uncertain. However, it is safe to say that the retailers' catching-up played a role in the petitioners' antidumping action, given the above background.

The essence of this case is summarized by representatives of Furniture Brands International (FBI), Inc., the largest U.S. producer and an opponent of the petition, that it was "a request by domestic producers who are significant importers of the subject merchandise to impose duties on imports that they have voluntarily made on the ground that their very own actions have caused them injury."\textsuperscript{232} It seemed that the real targets of the petitioners in filing the antidumping case were not Chinese imports themselves, but the competitor producers of the petitioners and the American retailers who were no longer paying the middleman fees. Hence, it is hard to say their intention was justified in the legal sense of trying to rescue the American manufacturers from "unfair" trade. Instead, it is fair to comment that they were attempting to use U.S. trade law to manipulate the marketplace in their favour by cutting off access to Chinese bedroom furniture imports for all, regardless of the consequences for other American producers, the retailers, and consumers.

As a matter of fact, the imported Chinese furniture appeared a positive competitive influence in the U.S. To begin with, in testimony before the ITC, retailers, importers, and trade experts testified that bedroom furniture from China had benefited domestic furniture manufacturers, retailers and consumers. It provided consumers with more competitive prices and greater product choices. More purchasers had been brought into the market by the Chinese products, and domestic furniture producers had themselves adopted combined production strategies, using both domestically produced and Chinese-made

furniture in bedroom suites, to maximize profits. Second, the Chinese had bought from America much of the oak, cherry, walnut, maple, and other hardwoods to make into furniture at market prices. The U.S. Department of Agriculture report states, "Between 1999 and 2003, hardwood lumber exports to China increased $80 million on the strength of China's growing furniture industry." A cursory examination of the furniture trade between China and the U.S. strongly suggests that the trade had been healthy and to the benefit of both sides, apparently until the antidumping petition was filed.

The hypocrisy of the petitioners can also be seen in their confining the origin country of the subject products to China. To understand this point, one have to note that the prices the American dealers were paying for products from China were "generally comparable to those being paid for products out of other countries in the Far East, [so] the assertion that Chinese manufacturers are engaged in unfair pricing is of questionable merit." In fact, the petitioners would not cut off all access to cheap sources, so that they could still shift to other low-cost countries. The actual story appears to support this idea. Evidence presented in the ITC investigation indicates that some petitioners had begun or were ready to begin importing from alternate sources. For example, the FRA pointed out in its brief to the ITC that, while rallying against China, some of the petitioners were at the same time searching for even cheaper sources in Vietnam and other places in Southeast Asia. The ITC report confirms this trend was likely taking place by showing that the imports from other countries like Indonesia, Brazil, and Vietnam had grown significantly during the antidumping investigation. For instance, the products from Vietnam, the smaller supplier, were worth $15.9 million in January–June 2003, and the figure shot up to $48.3 million in the same period of 2004 after the antidumping petition was filed.

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235 W. G. Holliman, the Chairman (President and CEO of FBI), in Rushford, supra note 221.
237 ITC, supra note 223, Table IV-1.
It is fair to say that the petitioners were asking the U.S. government to prevent their competitors from benefiting by following their lead in China while they themselves were planning to find ever-cheaper sources. An antidumping petition as such could not relieve the domestic industry from foreign imports and recover their workers’ lost jobs; it would only result in a source shifting. As Holliman has asserted, “Blaming the Chinese for the inevitable consolidation of our industry is merely a distraction from our real challenge of remaining competitive.”

4.1.3 The Antidumping Procedures Captured

The U.S. antidumping law seems to be captured as an attempt to eliminate competition made by the petitioners.

First, the way of identifying “domestic industry” in the case is not very convincing. According to the WTO rules, “domestic industry” shall be interpreted as “referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

(i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term “domestic industry” may be interpreted as referring to the rest of the producers;”

In the proceeding, the DOC still counted in these many producers who themselves were importers of the subject furniture. This was essential in the case with respect to the initiation of the investigation and the credibility of what these petitioners claimed.

Second, the way to prove “injury” and “unfair trade” by the petitioners was also questionable. To prove the producers had been “injured” by the Chinese exports, the

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238 Holliman, in Rushford, supra note 221.
239 Article 4, WTO ADA.
petitioners could cite their production shrinkage and job loss brought by their own decisions to source from China. To demonstrate the Chinese were engaging in “unfair” trade, they could cite the low cost and high capacity of the manufacturers in China as the evidence. In the petition, Lacquer Craft was cited as an example of China’s “unfair” furniture trade.\textsuperscript{240} Residing in Dongguan of the Pearl River Delta region in southern China, Lacquer Craft is expanding in Shanghai, and has invested “at least $25 million to purchase the brand name and sales and marketing network of Universal Furniture, which has long been a major player in the U.S. wooden furniture market,” as described by the petition.\textsuperscript{241} The Chinese company is engaging in supposedly market-based economic enterprises, while this commerce looks unfair to the petitioners. Apparently the Chinese manufacturer had been considered as a formidable competitor by the petitioners. The Pearl River Delta region in China is a large production base for furniture, and this was also criticized by the petitioners. They declare “This region is such a large producer of wooden furniture that Akzo Nobel, a Dutch-Swedish chemical producer that is one of the world’s largest producers of furniture finish, has closed plants in the United States and Europe and is opening three new factories in China.”\textsuperscript{242} To the petitioners, such business sounded like a conspiracy. It seemed that some had redefined “fair trade”, that any business posing a threat to them in their market has the potential to be unfair. Their claim found support from the DOC findings by showing the various “dumping margins” calculated out of intricate methodology where the use of a surrogate country helped a lot.

In fact in China, there is a common recognition that the furniture industry has been developed into a largely market-oriented industry, by vigorous competition of thousands of manufacturers in the country.\textsuperscript{243} Most of the manufacturers in the industry are private or foreign-owned, with little government control. During the antidumping investigation, the Furniture Sub-Chamber of China Chamber of Commerce for Import & Export of Light Industrial Products and Arts-Crafts (CCCLA) and the China National Furniture

\textsuperscript{241} Ibid.
\textsuperscript{242} Ibid.
\textsuperscript{243} Lezhen Huang, “Neiyouwaikun de zhongguo jiajuye (China’s Furniture Industry with Problems from Inside and Outside)”, \textit{Zhongguo jingji zhoukan (China Economy Week)}, no 19, 2004.
Association (CNFA) requested the DOC initiate an inquiry to determine the status of Market-Oriented Industry (MOI) for the wooden bedroom furniture industry in China. However it was refused by the DOC simply for the reason that they “have not had adequate time to consider this information.”\(^{244}\) Hence the production factors in China were ignored as in the surrogate approach and again an amount of data from India was used to estimate the cost in China. In this way, the real costs of factors of the Chinese producers have been more or less distorded by the approach.

In fact, when the final decision of the ITC was made, analysts in China commented it could be bad news as well as “good” news for Chinese companies: it is bad for those who failed to respond being levied the PRC-wide antidumping duty of 198.08%, which meant the U.S. market was to be shut off for them; yet it was “good” news for the 121 companies being levied separate tariffs of 0.83%-15.78% (with the weighted average of 6.65% for most of them), which meant they would survive and could still make a profit from exporting their furniture to the U.S. (as the average profit margin for Chinese furniture industry is 30-40%) while competitors from their home country turn less.\(^{245}\)

### 4.1.4 Summary

Given the above facts and comments, this case was all about competition and competitors, hence a perfect example showing the interface of antidumping and competition. It appeared to be a complaint about the legitimate advantages of Chinese wooden bedroom furniture by some U.S. producers being less successful in capitalizing on those advantages. It had little to do with market-distorting policies of foreign producers. What the case could probably bring to the U.S. is a greater cost burden for American producers and retailers, and higher prices for consumers, or some substitute imports from other countries. This kind of complaint was supported by the antidumping procedures that are


incapable of identifying fair or unfair trade and require a minimal evidentiary burden for petitioners to prove the case. No wonder the antidumping is notably used in increasing frequency to hamper legitimate competition, both foreign and domestic.

In this case, the petitioners have used the force of government and the rhetoric of fairness in enforcing the law to prevent others from exercising the freedom of action and choice of which they themselves took advantage. This strikes at the very nature of free enterprise, and shadows the alleged function of preserving fair trade of the U.S. antidumping law. The intention of the petitioners, which is to diminish normal competition in the market to recover their control of the marketplace, confirms again the potential use of antidumping as an anti-competition device.

4.1.5 Suggestion

To the Chinese producers, there seem to be no significant solutions as long as their large production is still of acceptable quality at low price, which is always a threat to producers in the importing country that might wield the antidumping weapon at times. In fact, if the Chinese producers suspect there is a chance for them to gain a market-oriented status to avoid the questionable surrogate country approach, they have to claim it as early as possible in the future investigations.

To the American furniture industry, perhaps they need to find a way to embrace the international marketplace, rather than “try(ing) to build walls around an industry that is changing.”\[246\] Like thoughts could be also found from within the American industry: “The proper course of action to take is to point out to our customers and competitors that using government to protect ourselves only hurts each of us by preventing all of us from acting and thinking. Instead, relying on our strengths, not bemoaning our temporary

\[246\] Lynn Chipperfield (Senior Vice President and CAO of FBI), in Susan Lorimor, “Filing of Furniture Antidumping Petition Sparks Controversy”, W&WP November 2003, online <http://www.iswonline.com/wwp/200311/antidumping.htm>
disadvantages, discovering new opportunities, taking risks, creating new ideas as the business landscape changes, is the just and satisfying way to run a business."  

4.2 Integrated Electronic Compact Fluorescent Lamps (CFL-i) from China: the E.U.

4.2.1 Background

The relationship between Royal Philips Electronics and China has undergone a dramatic change in recent years because certain antidumping investigations took place in the E.U. involving the two. The prestige Philips has had in China and the role Philips has played in the antidumping cases make the case different. It is the first occasion that raised broad public attention in China of how antidumping could be strategically used for a firm’s purpose.

To begin with, a brief history of Philips in China will be helpful. To the Chinese, Philips has been a symbol of reputable and successful multinationals. Its products have been introduced to China since 1920. Establishing its initial joint venture in Beijing in 1985, Philips was among the earliest and largest foreign giants entering China following the country’s open-door policy. It currently has 35 joint ventures and wholly-owned enterprises across the country with over 23,000 employees. China has now become Philips’s second largest global market after the U.S., with its 2004 business activity in China totalling $9 billion. At the same time the electronic giant has also established extensive cooperation with government agents, non-government organizations (NGOs), business enterprises, and research institutions in China. In short, Philips has had a fairly good reputation and return throughout the nation until recent years.

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247 Derek C. Gittler (Catawissa Lumber & Specialty Co., Inc.) in his letter to the editor of The WoodPro, Pennsylvania State University, online <http://woodpro.cas.psu.edu/WoodPro%20Word%20HTML%20files/Letter%20to%20Editor%20-%20Gittler.htm>
4.2.2 The Case and Stories Behind It

The issue between Philips and the Chinese industries was triggered by an antidumping petition filed to the European Commission in April 2000 by the European Lighting Companies Federation, which encompasses Philips Lighting BV (Netherlands), Osram GmbH (Germany) and SLI Lighting (UK). This petition was against the imports of integrated electronic compact fluorescent lamps (CFL-i, also called energy-saving lamp) originating in China. It was at that time disastrous news to the Chinese manufacturers who were booming while heavily relying on foreign markets, as the Chinese domestic consumption of subject products was limited. It was noted that Philips Lighting’s joint venture in China – Philips & Yaming Lighting Co., Ltd. In Shanghai – was among the Chinese respondents in the investigation. An antidumping petition is hardly breaking news nowadays for China for obvious reasons, but this case gathered wide attention in the nation.

Philips is actually the inventor of the energy-saving lamp, which is a high-tech product necessitating significant R&D effort, while at the same time a labour and resource intensive product. However, in the mid and low-end of CFL-i market, Philips has been lagging behind the Chinese competitors. The Chinese manufacturers, many of whom just seriously started producing CFL-i in mid-1990s, have put effort into developing the product by advancing the technique and offering more varieties. The price advantage of the Chinese lights as result of the low production costs has been furthered by the technological innovation that brought cost efficiency. China soon became the world’s largest producer and exporter of energy-saving lamps in 1998 and changed the structure of the world market, which used to be dominated by Philips, GE, and Siemens Osram.

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251 It was reported in 1998 that 80% of Chinese production of CFL-i was for exporting. See Qian Li, “Lyse zhaoming qianchengshijin (Bright Future of Green Lighting)”, People’s Daily (overseas edition), 21/5/1998.
The lamps “made in China” with good features and low price soon became popular in the E.U. market, in favour of the E.U.’s policy supporting energy and environmentally friendly products. It was estimated that the Chinese products shared 65.8% of the E.U. market in 1999, increased from 39.5% in 1996.\(^{255}\) Hence in Europe, Philips and the other two major European producers – Osram and Sylvania – were losing their market share in mid and low-end CFL-i for a few years before the antidumping petition. Not surprisingly, for years these European companies had supplemented their production range through purchasing the subject lamps made in China for sale in the international market. It shows that an average 14.6% of the total sales of CFL-i by these European producers in the Community originated in China from 1999 to 2000.\(^{256}\)

In Europe, the prices of CFL-i have decreased gradually since 1996, as a result of the improvement of its production efficiency and vigorous competition in the market. Since 1999, Philips’s business actions significantly furthered the declining price. Through its joint venture in China, Philips Lighting reportedly purchased the subject lamps in a larger quantity with lower quality than its previous years of procurement in China.\(^{257}\) A large number of 15 million energy-saving lamps were purchased by Philips in China in 1999, and this time Philips aimed at lamps with a lifetime of 3000 hours, which is below the Chinese national standards of minimum lifetime of 5000 hours.\(^{258}\) The procurement price thus was forced to a very low level as lifetime largely determines the quality and price of CFL-i, and the large pool of Chinese producers competed to sell their lamps to Philips by lowering their prices. As a result the purchaser could resell them in other markets at a competitive price. In fact, all the purchases in China were for export since Philips & Yaming, Philips Lighting’s only joint venture, had no domestic sale of CFL-i in China during the antidumping investigation period of 1999 to 2000.\(^{259}\) At the same time, in the European market, a large amount of cheap Philips lamps labelled “made in China”

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\(^{256}\) Ibid, p 13.

\(^{257}\) See the statement of Philips executives in Wang, supra note 253; also the statement of Zhongdian Lighting Co. (one of the largest Chinese CFL-i producers), in “Zhongdian zhaoming wei jielu feilipu fanqingxiao xianshenshuofa (Zhongdian Lighting’s Statement on the Antidumping Case Requested by Philips)”, Namfang dushi mao (South City Newspaper), 18/8/2000.

\(^{258}\) Wang, supra note 253.

flooded the low-end CFL-i market which used to be the main field of Chinese products. To survive the E.U. market, the Chinese exporters further cut down their prices causing a severe price war among the competitors from 1999 through 2000. It was confirmed in the antidumping investigation that the price of CFL-i dropped sharply after 1998. Clearly, Philips, coupled with the other European companies that had continuously supplemented their products with cheap Chinese products, played an important role in this price war.

In April 2000, when the Chinese exporters were hectic with their price competition, the suddenly antidumping petition struck them all. The investigation was subsequently initiated by the European Commission in the following May. The investigation on dumping and injury was set to cover a 15-month period from 1 January 1999 to 31 March 2000, which meant the import prices in this investigation period would be examined to determine if “dumping” has taken place. Hence the further cut prices of Chinese lamps in the recent price war were to be used as evidence to prove “dumping” in the European market. It was estimated that the average CFL-i prices originating in China in the E.U. market were about 40% less than those of the Community producers during the investigation period. Obviously the lower the importing price the larger possibility of finding the “dumping” of imports. The Chinese producers finally realized the “trap” and started to question Philips publicly in China.

What’s more, the public soon found out over the past few years, Philips had filed four major antidumping petitions against products originating in China, including the personal fax machine in 1996, cathode-ray colour television picture tubes in 1999, colour television receivers (review investigation) in 2000, and the CFL-i in 2000. All these

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cases led to definite antidumping duties and resulted in severe consequences for the Chinese industries. It suggested that while Philips was vigorously promoting its electronic products in the Chinese market, it tried hard to force the Chinese products out of its home market of Europe.

All of sudden, Philips found itself under fire across the nation, which seriously challenged its good image in China. Interestingly, it offered legal assistance for the Chinese lamp producers to answer the antidumping case it brought in the E.U.. It was reported that in June 2000, Philips initiated a meeting with the livid Chinese CFL-i exporters, industry association, and government agents, where Lourdes Catrain (trade lawyer from Hogan & Hartson LLP in Brussels), who was brought to Beijing by Craig Burchell (Senior Trade Representative of Philips), expressed her idea of representing the Chinese producers in the investigation free of charge.\textsuperscript{265} It is extremely rare in an antidumping case that the petitioner is willing to "help" out the respondent with winning the case. In fact, from the respondent's perspective, it is not wise in an antidumping case to employ the lawyer of the petitioner, as the lawyer will handle a large amount of sensitive business information required by the antidumping authority. It is most likely to cause much trouble in the future for the respondent once the confidential data are released to the petitioner, who is also a competitor. Particularly in this case, Philips is the competitor of the Chinese producers in both the E.U. and China markets. In my opinion, Philips, as a sophisticated operator, took this action on the grounds that 1) it shows its "sincerity" in helping the Chinese industry out of difficult situation, in order to save its fame and business in China; and 2) if the Chinese accept the offer, their production data gained from the antidumping investigation would be of use for future competition. Intelligently, the Chinese rejected the offer.

The backlash against Philips throughout the Chinese media and by industries and consumers cast a threat on its business and further development in China. Under the pressure in China and in Europe at the same time, Philips withdrew from the petitioners

\textsuperscript{265} "Philips fanqingxiao chesu toushi (Perspective on Philips's Withdrawal From Antidumping Complaint)", \textit{Renmin ribao (People's Daily)}, 10/1/2001.
in December 2000, allegedly for the reason that it would stop production of the subject products in the E.U., and thus no longer represent a European producer.\textsuperscript{266} In fact this action seemed not to make much difference to the whole situation. On one side, it would not change the on-going antidumping investigation on the Chinese CFL-i since the other two petitioners stayed. On the other side, Philips’s business in China has been allegedly affected after the case. Mark K. Hu, senior vice president of Philips Lighting, estimated a loss of RMB40 million (approx U.S.$4.82 million) in China after the start of antidumping conflicts.\textsuperscript{267} Hu also announced that Philips Lighting would shift its CFL-i R&D centre from the Netherlands to Shanghai (China), and would close its Dutch plant while moving the production line off E.U., to countries including Poland and China.\textsuperscript{268} This announcement tried to justify Philips’s withdrawal from the petition, while it actually disclosed its real intention of filing the antidumping petition. Normally, a decision of such large restructuring of a multinational company cannot be made overnight, given the sales of Philips Lighting accounted for around one-sixth of the whole sales of Philips worldwide. Logic dictates that if Philips seriously considered closing down the plants in Europe, there would be no necessity for it to file an antidumping petition several months before the announcement, to seek relief from imports surge. Therefore, antidumping investigation here was arguably instrumental for a strategic plan to diminish competitors in the E.U. market. When Philips had to move its production line out of the E.U. to some lower-cost places, the antidumping duties to be levelled on Chinese producers would help it reduce major competitors in the E.U. market, which would reinforce its own competitiveness there.

The antidumping procedures facilitated this plan. The European Commission continued the investigation after the withdrawal of Philips, and reached a definitive final decision in July 2001. Because China was considered as an NE, Mexico was used as the “analogue country”, of which the CFL-i price was used as the substitute of the Chinese domestic


\textsuperscript{267} This statement was made in a press release of Philips China on December 22, 2000, in “Philips turan chechu oumeng fangqinxiao diaocha (Philips Withdraws from The E.U. Antidumping Investigation)”, Beijing qingnian bao (Beijing Youth), 23/12/2000.

\textsuperscript{268} Ibid.
price to compare with the E.U. importing price in determining the “dumping margin”. A five-year duty of 66.1% was imposed on the Chinese exports, except those from eight companies granted individual rates ranging from 0% to 59.5%.

During the investigations, two Chinese exporting producers were granted “market economy treatment (MET)” after the Commission’s scrutiny, so that their own domestic prices in China could be used as the comparable prices, instead of those of substitute countries. In 1995, the E.U. changed its Anti-dumping Regulation by granting individual Chinese producers MET on the ground that they met the series of rigorous criteria set out in the Regulation 384/96. The MET requests are examined on a case-by-case basis, and the Commission continues to apply the traditional NME methodology for companies not fulfilling the conditions. In this case the two firms obtaining MET include Philips & Yarning Lighting Co., Ltd., and Lisheng Electronic & Lighting (Xiamen) Co. Ltd, a wholly foreign-owned company in China. When the price for domestic sales in China was used as normal value for determining dumping margin for Lisheng, a margin of de minimus was found, hence only 0% antidumping duty applied on its exports. Meanwhile, as Philips & Yaming did not have domestic sales in China, the Commission calculated a “constructed normal value” based on the figures from the other Chinese MET company, and reached a dumping margin of 61.8% though in the end an antidumping duty of 32.3% was applied. Hence Philips & Yaming indeed engaged in dumping, but it finally got a “better” rate than most of the other Chinese producers.

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

the comparison for calculating the dumping margin for all other non-MET Chinese firms.274

4.2.3 The Result

The result of the antidumping case was that hundreds of Chinese makers lost the E.U. market. It was estimated by the China Association of Lighting Industry (CALI) that half of Chinese energy saving lamp producers went bankrupt in 2001, which cut the number of such manufacturers from 4,000 to around 2,000, and further to around 1,400 in 2002.275 Obviously the antidumping issue is not just about the export of the Chinese industry, but also about the industry’s overall competitiveness. It is pointed out by Weiguo Wang, a notable Chinese legal scholar, that the competitiveness of Chinese industries was adversely affected by the attack from foreign firms in the international market, which increased the overall costs for the Chinese industries.276 Consequently, in cases like CFL-i, many Chinese firms could do nothing but transfer the risk to the home market by closing down their plants in the absence of a substitute market for their products.

On the contrary, multinationals often have more options in the international market. Philips continues to purchase Chinese lamps to supplement its low-end production exporting to the world market including the E.U. It also shows that the base in China for Philips Lighting has been solidified in the following years.277 The antidumping measures are likely to highlight the insufficient competition in the E.U. market, where only Philips, Osram, and Sylvania have been the major lamp manufacturers. In 2000 when the three companies lodged the complaint, they represented more than 95% of the total Community

274 For more information on this debate, see Council Regulation (E.C.) No 1470/2001, supra note 270, p 8.
275 Shengping Liu (secretary-general of CALI), in Yang, supra note 254.
production, of which the production of Osram and Sylvania accounted for 85%. \(^{278}\) Competition of the multinational giants has not always been perfect. It was noted that in Denmark, Philips and Osram co-ordinated their prices of lamps between 1990 and 2000, which led to a reprimand by the Danish competition authorities. \(^{279}\) It is uncertain whether or how has the coordination affected the prices of the subject lamps of the antidumping investigation. After Philips closed its last plant in Europe, there remained fewer Community competitors in the market. Considering that Osram GmbH acquired the Sylvania lighting and precision materials businesses in North America in 1993, which created Osram Sylvania, the competition between the remaining two lamp producers in the E.U. is likely to be weakened.

### 4.2.4 Comments

The CFL-i case has given the Chinese industries a good lesson on antidumping mechanisms. First of all, the antidumping investigations just focus on the appearance with little concern about the various underlying causes. The domestic producers in this case could ask for protection through the legal procedures of the importing country, no matter whether they played roles in the decreasing domestic price. This represented unfair treatment for foreign competitors, who on the contrary were likely to be penalized by the same behaviour.

Second, the competition approach of price-cutting applied by the Chinese producers might be of use to survive or expand in a foreign market, but it induces a high risk of antidumping investigation by the importing government. Hence for the Chinese, price competition has to be carried on carefully under the threat of an antidumping system, though such competition is essentially not inappropriate in a free market.


Third, it is important for Chinese producers to gain ME treatment under the E.U. legal framework, which most likely will lead to different results in antidumping investigations. However, once again, the ME issue is sensitive economically and politically, and needs joint work by the Chinese industry and government.

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

In theory, a healthy market is based upon good competition rather than exercising of market power. If an antidumping device actually improves market dominance, this legal system should be challenged. The question remained for the antidumping authorities to carefully ponder over is whether antidumping investigations are aiming to attack unfair trade or are manipulated to facilitate market power.

4. 3 Automotive Laminated Windshields from China & Glyphosate from China

4.3.1 Automotive Laminated Windshields from China: Canada and the U.S.

On December 18, 2001, The Canada Customs and Revenue Agency (CCRA) launched an antidumping investigation following a complaint filed by PPG Canada Inc. against imports from China of automotive laminated windshields for the automotive replacement market (also called automotive replacement glass windshields, or ARG windshields). The CCRA reached a final determination on July 31, 2002, that imports of ARG from China had been dumped in the Canadian market. However, this case ended up with zero tariffs on the Chinese imports as the result of no injury to the domestic industry found by the Canadian International Trade Tribunal (CITT) on August 30, 2002.

This case is particularly notable for two reasons. First, it was the first antidumping case against Chinese products following China’s accession to the WTO in December 2001. Second, it represented the first time that a Chinese industry was recognized under market conditions in North America, thus the approach of "surrogate country" did not apply.

In the investigation, the CCRA held that China's windshield industry, mostly operated by private sectors, is operating under a market economy subsequent to its verification visits in China.\(^{282}\) Hence the provision requiring special rules in determining dumping from NME in Section 20 of the Special Import Measures Act \(^{283}\) ceased to apply here. Consequently, normal values were determined for the four cooperating Chinese exporters, which accounted for 98% of the Chinese exports to Canada, based on their sales in China. Three of the four companies were found to have a dumping margin of zero, and the remaining one had a weighted average dumping margin of 24.09%.\(^{284}\)

While the evidence showed that imports from China had significantly increased their share of the Canadian market for ARG windshields during the investigation period, the CITT was not convinced that they had caused or threatened to cause injury to the Canadian domestic industry. The production capacity at PPG's plant remained relatively stable and its prices were not affected by the Chinese imports. In fact a significant part of the increase in subject imports from China was at the expense of sales from imports from the U.S. and Mexico.\(^{285}\)

So why did the PPG Canada ask for protection from the Canadian government if there was no injury to it at all? The reason was closely related to the plant’s status in the PPG group and its competition strategy. To begin with, the CITT found that PPG Canada in Hawkesbury, as one of many plants in the PPG group, was mandated by its parent in the U.S.. In fact, 60% of PPG Canada's total sales in the Canadian market were imported

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\(^{282}\) CCRA, \textit{supra} note 280, p 75.23.
\(^{284}\) CCRA, \textit{supra} note 280, p 75.24.
from the U.S.; while close to 90% of its production was actually exported to the U.S. Therefore, the CITT insisted that “SIMA does not envisage protection of goods not produced in Canada”, which showed the lack of sufficient evidence of injury to “domestic industry” claimed by PPG Canada in the case. Across the border, PPG Industries, Inc., together with some other American companies, petitioned the U.S. authorities against ARG windshields from China in February 2001, just before the complaint in Canada. When the case was in process and likely to be proved, PPG filed the petition in Canada in December, assuming that the Chinese products would find substitute markets including Canada once antidumping duties were imposed by the U.S. In order to “prepare” itself for the assumed imports surge in Canada, the multinational company resorted to the Canadian antidumping legal procedures, which were in fact used to serve the company’s purpose of eliminating import competition.

4.3.2 Glyphosate from China

The above-mentioned practice of a large firm is not uncommon in the world. On March 26, 2001, Monsanto Europe Ltd, as the main complaint, requested the European Commission to initiate an investigation on circumvention of existing antidumping measures on glyphosate from China, which led to an extending of an antidumping duty of 48% on the imports. It was the third time that Monsanto, the multinational agricultural company headquartered in the U.S., had requested antidumping measures in the E.U. on Chinese glyphosate. In order to block the Chinese products from other markets, in the same year of 2001, Monsanto filed other three antidumping petitions targeting Chinese glyphosate in Australia, Brazil, and Argentina in May, August, and November respectively. It has been apparently a massive movement to eliminate the emerging

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287 Ibid, p 17.
291 For final finding of the case in Australia, see Australian Custom Service, Trade Measures Branch Report No. 45, 27/2/2002. For the case in Brazil, Department of Trade Defence (DE.COM), Investigation no. 52100-008067/2001-57. For the record of the case in Argentina, see Committee on Anti-Dumping
Chinese producers from their major exporting markets. The Brazilian authority started to impose an antidumping duty of 35.8% on Chinese glyphosate on February 12, 2003.\textsuperscript{292} Meanwhile in Argentina no antidumping measure was eventually applied as the antidumping authority terminated the investigation in February 2004 under lobbying of domestic interest groups and diplomatic influence from China.\textsuperscript{293}

In Australia, the Australian Customs Service (ACS) reached the final finding of zero dumping margin on Chinese glyphosate on February 27, 2002. It was the second time that Monsanto resorted to Australian antidumping procedures scrutinizing Chinese glyphosate, and also the second time the Australian authority found no dumping existed in the Australian market. In 1996 the ACS initiated the first antidumping investigation on the glyphosate from China.\textsuperscript{294} Monsanto Australia, the solo complainant in that case, requested this investigation following an initial antidumping petition in the E.C. in 1995 by Monsanto Europe. However, the plant in Australia was challenged as not representing “domestic industry”. The ACS’s final finding of March 1997 concluded that Monsanto Australia did not meet the “local content” requirements of subsection 269T(2) of the Customs Act 1901, which requires that “not less than 25% of the factory cost of the goods is represented by the sum of the value of labour in Australia, the value of materials in Australia and the factory overhead expenses incurred in Australia in respect of the goods.”\textsuperscript{295} Hence the complainant could not represent the Australian domestic industry to claim the injury, if any, caused by imports. At the same time, the report of ACS in 1997 marked the first time in the industrialized world of treating the Chinese industry as operating under market condition, and accordingly the Authority assessed normal values in China, which led to zero dumping margin.\textsuperscript{296}

\textsuperscript{293} Yang, Wang, and Chen (ed.), supra note 69, p 423.
\textsuperscript{294} For final finding of the antidumping investigation initiated in 1996, see ACS, Anti-Dumping Authority Report No. 159, 19/3/1997.
\textsuperscript{295} Ibid, p 1.
\textsuperscript{296} Ibid, p 2.
4.3.3 Summary

It seems multinational firms are eager to take the chance of trying out antidumping procedures since it would bring them large benefits if their petitions were proved. These antidumping actions taken by the companies in different jurisdictions in fact show their efforts to eliminate competition from Chinese producers in the world market. Their resident companies in different jurisdictions make their elimination on a larger scale possible.

For the country conducting the antidumping investigations, it is not always the case that affirmative antidumping measures would be to the benefit of the “domestic industry”, when the major complainant is just a local resident of the foreign firm, especially that with market power. Just as in the multiple glyphosate cases, the main complainant Monsanto Co. is actually the primary global producer of such a product. The main purpose of these multinationals applying antidumping devices is to maximize their own commerce, which might not be necessarily coincident with the interest of the residing country. If affirmative antidumping measures facilitate their market dominance by eliminating competitors, the residing country might have to face their exercise of enhanced market power. During the glyphosate investigation in Argentina, the farmers group expressed their concern about paying Monsanto an extra U.S.$100 million if the cheap Chinese products were squeezed out by antidumping measures.\textsuperscript{297} Similarly, after the glyphosate investigation in Australia in 2002, it was estimated that the case cost Australian farmers more than one million dollars due to the price rise by Monsanto (the only complainant) during the investigation, while other importers and retailers began to pull out of the glyphosate market, fearing that they would be slapped with an import tariff if Monsanto won the case.\textsuperscript{298}

For the antidumping authorities, it should raise their attention when this kind of petition is

\textsuperscript{297} Statement of Wenhui Gong (vice GM of Trading Company of Jiangnan Chemistry, one of the three respondents in the glyphosate investigation in Argentina), in Zhuohua Li, “Fanqingxiao buda wuzhunbei zhi zhang (Antidumping: Be Prepared)”, Nanfang ribao (South Daily), 2/12/2004.
filed, especially when the plants of foreign multinational giants are the main or solo complainant, or they are simply mandated by their foreign parent companies. The question for the government authorities is whether the antidumping measures will be taken to protect their own “domestic industry”, or just the interest of multinational companies. Although in the history of antidumping systems there used to be examination on the intention of dumpers, there has been always an absence of examination of the real intention of complainants, which has been supposedly simplified as defending the domestic industry. However, in the existing antidumping systems, once a petition is accepted, the injury to the “domestic industry” would easily be substituted by that to the “petitioners”, hence opening the door to the abuse of antidumping procedures by some international enterprises. WTO ADA defines the domestic industry in Article 4 as “the domestic producers as a whole of the like products”, and sets the gauge of representing domestic industry for antidumping initiation in its Article 5. |[^299] Unfortunately the provisions fail to identify the complainant’s “nationality” and their further intention in bringing forward the antidumping investigation. Nevertheless, there are such provisions in national laws of some countries (e.g. Australia) as observing the “local content” of complainants, which could help with this identification. In fact this examination is not a universal practice and antidumping authorities have broad discretion in applying their antidumping laws. Thus how antidumping authorities in different jurisdictions deal with this kind of antidumping petitions remains uncertain.

For the Chinese producers, the unpredictability of the result of antidumping investigations as the result of the broad discretion of antidumping authorities in different jurisdictions with different legal procedures, makes them have to expend much effort answering the charges in different countries brought by the same competitors. It in fact multiplies the overall cost of the Chinese producers, the emerging competitors in the world, even when they win the cases as the legal fees are always enormous and their export activities would be affected more or less. This “antidumping burden” always casts a shadow on the Chinese exporting companies, especially those that are newly established private firms. Not surprisingly there are still a large number of Chinese exporters failing

[^299] Article 4.1 and Article 5.4, WTO ADA.
to participate in overseas antidumping investigation. In the windshield case, just four “co-operating exporters” out of twenty-three identified Chinese exporting producers responded to the CCRA antidumping investigation.300

4.4 Colour Television Receiver: A Lesson for the Chinese

On July 29, 2002, the Commission of the E.C. announced its agreement of an undertaking with the China Chamber of Commerce for Import and Export of Machinery and Electronics Products (CCCME) and seven Chinese companies in connection with antidumping measures review on colour television receivers (CTV) from Malaysia, China, Korea, Singapore and Thailand.301 This announcement came with the E.C.’s determination, dated August 14, 2002, of imposing an antidumping duty of 44.6% on CTVs from China.302 These two documents together indicated that the seven largest Chinese producers – Haier, Hisense, Konka, Changhong, Skyworth, TCL, and Xiamen Overseas Chinese – were allowed to export CTVs into the E.U. market at minimum agreed prices under agreed quantitative ceilings in defined periods, while products from any other Chinese producers would be levied with the tariff of 44.6%. The detailed data of price and quota in the agreement were not revealed in the above-mentioned Commission publication for confidential reasons. A breach by any of the Chinese exporters or the CCCME would lead to the activation of the antidumping duty upon all exporters, as this agreement was a joint undertaking that breach by any member shall be considered as breach by all signatories.303

This case is notable not just because, as many have noted, it opened the door for the Chinese CTVs to resume their export to the E.C.’s market after the long-lasting antidumping measures that shut off Chinese products since 1991, but also because it had given the Chinese a lesson on “collusion”.

300 CCRA, supra note 280, p 75.24.
The bilateral agreement for suspension of antidumping measures in exchange for price and quantity undertakings already sounds like collaboration on product sales between the government and the foreign exporters. What’s more, the Chinese exporters themselves had to deal with the agreement collaboratively because of the joint nature of the undertaking. It was reported that on September 18, 2002, following the E.C.’s announcement, the seven Chinese companies and their lawyers had their joint meeting at the CCCME office in Beijing, discussing how to “cooperate” in regard to prices and quantities set out in their agreement to avoid any penalty.304 Again, detailed information on the cooperation was not published immediately after the meeting.

It is interesting to see the comments of CCTV, the Chinese official media, on the “improvement” of the Chinese exporters,

“Our producers used to squash into a newly developed overseas market often leading to price war among them, while this time the CTV producers, with the assistance of the CCCME, jointly discuss a rational allotment of the E.U. market.”305 (emphasis added)

Over ten years ago, competition, especially price competition which ended up with antidumping measures, resulted in the loss of the E.U. market for Chinese CTV producers. Now they learned “cooperation” instead of competition to survive the foreign market. Is this progress? The Chinese producers appeared enthusiastic about the undertaking since at least they start exporting to the E.U. again although in a limited quantity. In fact any answer of just “yes” or “no” to the question seems too simple. In spite of the WTO Agreements, quantitative ceilings re-emerge in the context of undertaking agreements. Faced by the threat of high antidumping duties and the stopping of purchase orders by importers, the Chinese exporters were pressed to accept commitments to set their exports

305 CCTV, supra note 304.
in a minimum level and to respect domestic prices. Generally collusion among producers on prices or quantities is in violation of antitrust law, for they break the core of competition. However, it is allowed and apparently publicized in the antidumping procedures, in order to “eliminates the injurious effects of dumping”. Whether or not it is a justifiable reason is a question.

In addition, a couple of factors remain questionable in this case. First, was the “dumping” convincing enough given the dumping margin of Chinese producers was based on data from Turkey as the “analogue country”? Second, was there concrete evidence of “injury” to the European industry by the reason of Chinese CTVs, as there were no exports directly from China since the previous continuous E.C. antidumping measures starting in 1991? Even though a handful Chinese CTVs were detected in the E.U. market from Turkey, their market share in the E.C. was just 3.9% during the investigation period of the review proceeding. Above all things, is the price agreement still justifiable even if “dumping” and “injury” did occur, given the competition restrictive nature of the agreement? It can be expected that such a solution will lead to secondary effects on competition beyond the direct price and volume limits on imports, as they favour the formation of international cartels or cartel-like behaviour.

**4.5 Policy Recommendation**

**To the Chinese Government**

To protect the interests of Chinese industries, the Chinese government should aggressively pursue their rights under the WTO framework and the protocol of accession. This option may be the most productive course to pursue in the near term. The discussion of how China is treated by some of its major trading partners shows that certain countries are already providing a regular opportunity for Chinese enterprises to argue that they operate in a market economy context. China might take further steps to press the U.S. and any other countries currently applying an inflexible across-the-board approach to follow

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the lead of the others.  

Second, China could be more active in the antidumping club and form its strategic alliances. An active participation in the reform of WTO antidumping rules would be an effective way to balance the application of antidumping in the world.

**To the Chinese Industries**

It is necessary for the Chinese companies and those working with them, including accountants, lawyers, and industrial associations, to take measures before they are subjected to antidumping investigations, in order to ensure that they can properly document authentic price and cost data. For instance, accounting information often presents a problem when examining data of the Chinese firms, so it is important for them to improve their accounting management to get prepared.

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Chapter 5. Antidumping and Competition: Laws and Practices in China

While many countries continually bring Chinese products under their antidumping investigations, China, on the other hand, has already started exercising its own legal devices in dealing with imports from overseas. An examination of antidumping practices in China will fulfill curiosity about how China reacts in its own legal system when facing overwhelming charges overseas. Similarly, the interface of antidumping and competition can be found in the Chinese context. What make it worth notice is that China has not yet had a sophisticated antidumping and competition legal regime which could address the issue in a consistent manner. The ever-changing political and economic system, along with the advocacy of reform by the nation, have brought our attention to how China itself will apply antidumping devices, and how the county will deal with the inconsistency of antidumping effects and competition promotion.

5.1 Antidumping in China

5.1.1 Antidumping Legislation

Before 1997, the only provision of antidumping legislation was one paragraph in the Foreign Trade Law of the People’s Republic of China (1994), authorizing the state to take action against dumping imports. No antidumping case had ever been brought forward, as there was no specification of the application until 1997. Suffering the pain of overwhelming numbers of antidumping claims against its exports, as well as in preparation for its WTO accession, China promulgated its first antidumping legislation in 1997 – Antidumping and Anti-subsidy Regulations. Following China’s entry into the WTO in 2001, the Regulations of 1997 was restructured so that it became two separate laws: the Antidumping Regulations (ADR) and the Anti-subsidy Regulations. Similar

to the initial draft, the ADR 2001 was elaborated within the framework of the WTO ADA, and again under a minor amendment in 2004. A series of supporting legal documents has been enacted since 1997, so that the antidumping legal system appears to be established.

Table 4. Existing Antidumping Legislation of China

<table>
<thead>
<tr>
<th>Enacting year</th>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001 (amended in 2004)</td>
<td>Antidumping Regulations</td>
</tr>
<tr>
<td>2002</td>
<td>Provisional Rules on Initiation of Anti-dumping Investigation</td>
</tr>
<tr>
<td>2002</td>
<td>Provisional Rules on Public Hearing of Antidumping Investigations</td>
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<tr>
<td>2002</td>
<td>Provisional Rules on Sampling in Antidumping Investigations</td>
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<td>2002</td>
<td>Provisional Rules on Questionnaire in Antidumping Investigations</td>
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<td>2002</td>
<td>Provisional Rules on Information Release in Antidumping Investigations</td>
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<td>2002</td>
<td>Provisional Rules on Referring Public Information of Antidumping Investigations</td>
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<tr>
<td>2002</td>
<td>Provisional Rules on Antidumping Field Verification</td>
</tr>
<tr>
<td>2002</td>
<td>Provisional Rules on Price Undertaking in Antidumping</td>
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<tr>
<td>2002</td>
<td>Provisional Rules on Antidumping Interim Review on Dumping and Dumping Margin</td>
</tr>
<tr>
<td>2002</td>
<td>Provisional Rules on Antidumping Review on New Shipper</td>
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<tr>
<td>2002</td>
<td>Provisional Rules on Antidumping Duty Refund</td>
</tr>
<tr>
<td>2002</td>
<td>Provisional Rules on Procedure of Adjusting Antidumping Investigating Product Range</td>
</tr>
<tr>
<td>2002</td>
<td>Provisions of Supreme People’s Court on Issues Concerning Application of Law in Hearing Anti-dumping Administrative Cases</td>
</tr>
<tr>
<td>2003</td>
<td>Rules on Investigations and Determinations of Industry Injury for Antidumping</td>
</tr>
<tr>
<td>2003</td>
<td>Rules on Public Hearings with regard to Investigations of Injury to Industry</td>
</tr>
<tr>
<td>2004</td>
<td>Notice on Consulting Public Information of Investigations of Industrial Injury</td>
</tr>
</tbody>
</table>

Source: MOC: China Trade Remedy Information (as of 31/12/2004)

In terms of the Chinese antidumping authorities, originally China’s MOFTEC was in charge of “dumping” investigations, while the State Economic and Trade Commission
(SETC) was in charge of the determination of "injury" to domestic industry. After the restructuring of Chinese central government in 2003, the MOC became responsible for all antidumping investigations. Two internal agencies of MOC—the Bureau of Fair Trade for Import and Export (BRTIE), and the Bureau of Industry Injury Investigation (BII) — are now in charge of "dumping" and "injury" respectively.

The ADR 2001, including 59 articles, is basically in light of WTO ADA, and is similar to standard rules and practices. There are three notable features with the Chinese law.

First, it has no provision of "surrogate country" in determining normal value of imports from NME. This is hardly surprising, given the strong accusation by the Chinese government re the "surrogate country" approach of other countries. Therefore, modelling the approach outlined in the WTO ADA, the MOC calculates normal values of imports based on their domestic sales, third country export price, or constructed value.\(^{311}\)

Second, ADR 2001 has incorporated a "public interest" clause in 2004, reading, "If considering that a price undertaking made by an exporter is acceptable and in the public interest, the Ministry of Commerce may decide to suspend or terminate the anti-dumping investigation without applying provisional anti-dumping measures or imposing anti-dumping duties." (Article 33) and "Imposition and collection of anti-dumping duties shall be in the public interest." (Article 37)\(^{312}\) Like most nation’s, the Chinese law has no guidelines on application of the public interest clause; hence it is uncertain how the Chinese authorities will apply it.

Third, in the Chinese law, a reference to the possibility of retaliation has raised some concerns from overseas. Article 56 of the law states that "Where any country (region) discriminatorily applies antidumping measures on the exports from the People’s Republic of China, the People’s Republic of China may, based upon actual circumstances, take

\(^{311}\) Article 4, ADR 2001.

\(^{312}\) Article 33, 37, ADR 2001.
corresponding measures against that country (region).” But how China will adopt “corresponding measures” is not specified in the legislation. This provision has been challenged as going beyond the WTO rules. So far, no example is found in China based upon this provision.

5.1.2 Antidumping in Action

December 1997 saw the first antidumping case initiated by former MOFTEC. It was brought by the Chinese newsprint industry, represented by the nine largest manufacturers, targeting imports from the U.S., Canada, and Korea. This case caught international attention as the first attempt of China in this field. The rest of the world was curious about how China would deal with such cases. It was not until June 1999 that MOFTEC made the final decision by imposing antidumping duties varying from 9% to 78% on the different foreign producers according to their margins of dumping. The significance of this case was not just in protecting the Chinese newsprint industry, but also in setting an example for other domestic industries that might also have suffered from dumped imports. What’s more, it showed that Chinese industries would eventually resort to the law for resolving certain trade problems across the border, rather than relying on governmental measures such as quotas or tariffs as before. It also marked legal history in China, demonstrating that the Chinese operators had learnt the international rules and joined the international antidumping club.

In antidumping practice, Chinese authorities generally follow the regulations: case information (non-confidential) is accessible to the public through the Internet and public reading rooms; legal documents are updated on the authority’s web site; decisions are made based on required data following the international practice. Antidumping

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313 Article 56, ADR 2001. The same provision was included in the initial law of 1997. Russia’s antidumping law contains a similar provision.
315 MOC China Database of Trade Remedy Cases, Case No. 0001AC2219971210, online <http://www.cacs.gov.cn/DefaultWebApp/caseDetail.jsp?case_id=0001AC2219971210>
investigations are relatively transparent and fair compared with other administrative cases in China, although the transparency and accessibility of information is still questioned by some foreign observers. The language problem is felt to be acute.\textsuperscript{316}

Since 1997, the number of investigations has increased overall. (Table 4) As of December 31, 2004, China has filed 112 antidumping initiations.\textsuperscript{317} (Table 6) Thirty three investigations were initiated before December 2001, when China entered the WTO, and another 79 investigations were carried out since then. It shows that China has intensified its antidumping applications since its WTO accession, which implies that the Chinese government and industries are becoming more familiar with utilizing antidumping mechanisms. Although they are still new for many Chinese, an increasing number of Chinese firms are getting acquainted with antidumping and its functions as the number of cases grows.

Table 5. Antidumping Initiations by Year: China (1997-2004)

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|}
\hline
\hline
Initiations & 3 & 0 & 7 & 6 & 17 & 30 & 22 & 27 \\
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\end{tabular}
\end{table}

Source: MOC: \textit{China Database of Trade Remedy Cases} (as of 31/12/2004)

Rapid tariff reductions, lower market access, and import expansion during and after the WTO accession partly explain the increasing antidumping usage. Prior to and following its commitments under the WTO agreements, China has been reducing the general level of tariff protection. The average MFN tariff rates in China, for all goods, decreased from

\textsuperscript{316} For example, see U.S. questions to China, WTO doc. G/ADP/W/441.
\textsuperscript{317} Source from MOC website of trade remedies: \textit{China Trade Remedy Information}, online search <www.cacs.gov.cn>
nearly 24% in 1996 to 17% in 2000 and to 10.5% in 2004. For industrial goods, the MFN rates fell 56% between 1996 and 2004 and by 60% for textiles and clothing.\textsuperscript{318} The weighted average (by trade volume) has also decreased significantly in the past eight years. For most industrial goods, the target level for most products will be reached in 2005. Motorcars and parts thereof (target date June 2006), certain chemicals, e.g. some unfinished plastics (2008), and synthetic woven fabrics (2010) are exempted from this rule. Among the tariff commitments of special interest is the acceptance of both the Information Technology Agreement which provides for duty free entry of a wide range of IT products and the Chemical Tariff Harmonization Agreement setting tariff rates for most products at 0%, 5.5% or at 6.5%. The door of China’s market has being widely open for the past decade. From 1995 to 2003, Chinese merchandise imports increased at an average annual rate of 15% (faster than its export grow rate of 14%) and at a faster pace most recently (e.g. the imports grew by 21% in 2002 and 40% in 2003), along with the realization of China’s commitments on tariff reduction in the WTO.\textsuperscript{319} China, the small trader two decades ago, has now become the third largest importer in the world, as the only developing country in the top ten importers worldwide.\textsuperscript{320} The massive and fast import expansion has made Chinese industries feel the tension more or less from import competition.

The antidumping petitions in China concentrate on raw materials, especially chemicals, accounting for about 77%, followed by the paper industry (10%), base metals (steel, 7%), electrical goods (optical fiber, 3%) and textiles (yarn, 2%).\textsuperscript{321} Not surprisingly, China has trade deficits in these industries where antidumping investigations occur.\textsuperscript{322} This reflects the pressure of import competition on them. Some sectors have thus become active in the

\textsuperscript{318} TRAINS database, World Integrated Trade Solution (WITS), World Bank. The MFN Tariff Rate is, as the applied tariff rate, the lowest tariff rate among the General Tariff Rate, Provisional Tariff Rate, WTO Concessionary Tariff Rate and Concessionary Tariff Rate under bilateral tariff negotiation.
\textsuperscript{319} Source from WTO Trade Profiles: China, online <http://stat.wto.org/CountryProfiles/CN_e.htm>
\textsuperscript{320} The top ten importers in the world in 2003 are: U.S., Germany, China, UK, France, Japan, Italy, Netherlands, Canada, and Belgium. Source from WTO International Trade Statistics, online <http://www.wto.org/english/res_e/statis_e/its2004_e/section1_e/i05.xls>
\textsuperscript{321} Source from MOC China Trade Remedy Information, online search <www.cacs.gov.cn>. See Table 6 for details.
antidumping club. For instance, in July 2002 the Working Committee for the Coordination of International Trade Disputes in the Petroleum and Chemical Industry was established in China.\(^{323}\) The committee, reports to the China Petroleum and Chemical Industry Association, and aims to organize the research and formulation of antidumping, anti-subsidy, and other remedy measures for the Chinese petroleum and chemical industry.

The high concentration on chemicals is due to – other than the universal reasons for the industry mentioned earlier – the following brief factors.

a. The chemical industry, as a capital-intensive sector which has been largely invested in by the government, has been one of China’s key industrial establishments since the economic reform.\(^{324}\) The newly established, mostly state-owned enterprises (SOE), are very sensitive to import competition.

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

c. The concentration of producers in the chemical industry makes it easy to meet the requirements of representing “domestic industry” set out in the Chinese antidumping law to request antidumping investigations.\(^{325}\)

Since Chinese chemical and metal industries will not be likely to rebound from the global recession and vigorous competition in the world market, the concentration within such industries will remain.\(^{326}\) In contrast, the low concentration of antidumping initiations in

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\(^{324}\) Wang, *supra* note 58, p 29


China on machinery/electrical goods and textiles, which are on the contrary frequently targeted worldwide, implies China’s comparative advantage on these manufactures.

Countries in the Asia-pacific region and other major traders are the main targets of Chinese antidumping investigations. Korea accounts for 24 investigations, followed by Japan (20), the U.S. (17), Russia and Taiwan (7 each).\(^{327}\) It has been noted that China has trade deficits with both Korea (U.S.$23 billion deficit in 2003) and Japan (U.S.$9.7 billion in 2003), which particularly develop the market of China for some of their products, resulting in import pressures on the Chinese counterparts.\(^{328}\) Quite a few countries/regions in Asia, such as Taiwan, Indonesia, Thailand, and Malaysia, have been affected by China’s antidumping measures. They all share some manufacturing similarities with China, so competition between their producers and Chinese counterparts in certain markets are obvious.\(^{329}\) Most of them also have had a trade surplus with China in recent years. This supports what was previously discussed, that antidumping investigation is likely to occur where the nation has a trade deficit with its trade partner.

The antidumping applicants are mainly SOEs and a few resident plants of multinational corporations. The antidumping charges from the former imply SOE vulnerability in facing import competition. The multinationals, in some sense, use antidumping as their market strategies, since antidumping can effectively reduce competition in the domestic market.\(^{330}\)

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

\(^{327}\) Source from MOC China Trade Remedy Information, online search <www.cacs.gov.cn>
\(^{328}\) Wang, \textit{supra} note 58, p 30.
\(^{329}\) Joint Research Group, \textit{supra} note 326, p 23.
5.2 Competition Policy in China

5.2.1 Competition Laws and Policies

The issue of antidumping and competition has not yet raised enough attention in China. This is partly due to its lack of a comprehensive competition regime given the absence of concrete antitrust law to date. There was no role for competition under central planning before China’s economic reform, thus no room for competition law then. The government did not have a competition policy until the early 1980s following its commencement of reform. Since then some kinds of competition laws, together with various policy measures, have been used to promote competition in China. Notably the long-awaited antitrust law is now developing in the country.

a. Major Acts

In many of the industrial countries, competition policy has been developed as the result of the economic monopoly developed in a free market. Unlike them, China’s competition rules are being developed during its decentralization and transformation to a market economy, while a free market has yet to be fully established. Therefore, the main problems with competition in China have been the disorderly competition among competitors and administrative monopoly as the result of China’s old economic system, instead of market dominance by private firms.\textsuperscript{331} Many of these issues have been addressed by Chinese laws and policies.

a.a State Council Preliminary Regulations on Promoting and Protecting Socialism Competition (1980)

1980 saw the first Chinese administrative document on competition: the State Council Preliminary Regulations on Promotion and Protection of Socialism Competition.\textsuperscript{332} The

\textsuperscript{331} For more information on Chinese antimonopoly development, see Xiaoye Wang (ed.), \textit{Fanlongduan fa yu shichang jingji} (Antimonopoly Law and Market Economy) (Beijing: Law Press, 1998).

\textsuperscript{332} Promulgated by the State Council (the PRC cabinet), 17/10/1980.
document, as a guideline including ten articles, marked the first occurrence of recognizing and promoting competition in communist China. A series of supporting administrative documents came out in the following years, attempting to regulate competition in the emerging Chinese market.

**a.b Law against Unfair Competition (1993)**

The most comprehensive competition law in China is the Law Against Unfair Competition of 1993, which includes 33 articles.\(^{333}\) Aimed at improper competition practices emerging in China during the early stage of freeing the domestic market, LAUC mainly deals with competition-distorting practices including deceit, discrimination, and other restrictive behaviour. However, economic monopoly, or market dominance, does not feature in the law since private monopoly had barely come into existence in China when the law was drafted. Therefore many forms of market power exercise, which were then developed along with Chinese economic evolution, such as oligopsonies, are not disciplined under the law.

LAUC sets up its objective as “safeguarding the healthy development of the socialist market economy, encouraging and protecting fair competition, stopping acts of unfair competition, and defending the lawful rights and interests of operators and consumers.”\(^{334}\)

Business practices that are outlawed by the act are summarized as follows:

- Deceiving consumers with false trademarks (Article 5);
- Forcing sales by operators with market dominance (Article 6);
- Abuse of government administrative power (Article 7);
- Trade associated with bribery (Article 8);
- False advertisements (Article 9);
- Infringing business secrets or reputations of competitors (Article 10 and 14);
- Under-cost predatory pricing (Article 11);

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\(^{333}\) Law Against Unfair Competition (hereinafter LAUC), adopted by the NPC Standing Committee, promulgated by Presidential Decree No.10, 2/9/1993.

\(^{334}\) Article 1, LAUC.
- Tie-in sales and some forms of prize-attached sale (Article 12 and 13); and
- Bid rigging (Article 15).

Remedy measures provided by the law are limited. Violation of the law often results in monetary fines, which apply to all the above-mentioned practices, and less frequently administrative measures, such as suspension of business license. Criminal sanctions are not provided by the law, except in cases of deceit and bribery where Criminal Law applies in serious circumstances.\(^{335}\)

The State Administration for Industry and Commerce (SAIC), a department of the State Council, enforces the law in the national level through its internal agency of Fair Trade Bureau. SAIC’s subordinate agents – Administration for Industry and Commerce (AIC) – at provincial, city, and county levels under relevant governments are responsible for enforcing the law at the relevant levels. The SAIC and its agents have the authority of investigation, determination, and enforcement of remedy measures, which are subject to judicial review upon request.\(^{336}\)

Supporting administrative regulations have been issued at different levels to better serve the purpose of the Law, including but not exhaustive the following:

- Provisions on Prohibiting Unfair Competition Activities in Prize-Attached Sales (1993)\(^{337}\)
- Provisions on Prohibiting Restrictive Competition Practices of the Public Utilities Companies (1993)\(^{338}\)
- Provisions on Prohibiting Unfair Competition Activities of Imitating the Specific Package or Decoration of Well-Known Products (1995)\(^{339}\)
- Provisions on Prohibiting Infringement of Business Secrets (1995)\(^{340}\)

\(^{335}\) Article 21 and 22, LAUC.
\(^{336}\) Article 29, LAUC.
\(^{337}\) SAIC Decree No. 19, 24/12/1993.
\(^{338}\) SAIC Decree No. 20, 24/12/1993.
\(^{339}\) SAIC Decree No. 33, 6/7/1995.
China’s Special Phenomenon of Unfair Competition: Administrative Monopoly

The Chinese government structure generates the administrative monopoly (AM), which is recognized as the hardest part of restrictive market behaviour in China. It is the legacy of the planned economy and is still a widespread phenomenon regardless of years of efforts in economic reforms. This monopoly is the use of administrative powers, legal or extra-legal, by government at all level to promote, manipulate, or impede economic activities. It has been criticized by the Chinese academics as creating waste and inefficiency and the call for discipline has been advocated for many years. Two main kinds of behaviour represent the AM – regional blockade (or local protectionism), and sectoral monopoly.

The former, regional blockade, exists under protection of trade barriers erected by local governments at different levels, which hinder trade flow across provincial or municipal boundaries, in order to protect the local interests (e.g. differential taxation applied to goods from different territory). Governmental intervention in commercial ventures and

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[341] SAIC Decree No. 60, 15/11/1996.
protection of regional interests still continues at the local level. Regulatory efforts have been tried by the central apparatus to break down the local blocks, notably the above-mentioned State Council Provisions on Prohibiting Regional Blockade In Market Economic Activities of 2001.

The latter, sectoral monopoly, is featured by large enterprise groups that also assume a regulatory role over an industrial sector (e.g. tie-in sales by gas providers). The groups usually have ties with government organizations and receive preferential treatment, including operators in sectors like public utilities, postal service, telecom, civil aviation, and rail transport. Admittedly China has been trying to break down certain sectoral monopolies in recent years to fit the WTO framework. Notable movements including power system reform, railway operator’s separation, civil aviation restructuring, and telecom de-concentration have reduced their market dominance by bringing more competition into the market. A few administrative regulations have also been enacted, facilitating competition in certain industries.

The Implementation of LAUC

It is reported that SAIC and its subordinate agents have handled 195 thousand cases, involved value RMB15 billion (approx. U.S.$1.8 b), in ten years of implementing the LAUC between 1993 and 2003. The cases concentrate on imitation, false advertisement, commercial bribes, and most lately forcing trade by public market power. Most of them were settled through administrative procedures, while only a small number of them have been through judicial procedures. Through the enforcement, the law has appeared to function in regulating the competition in Chinese market, protecting interests of consumers and many competitors.

347 For more information, see Pengcheng Zheng, “Lun woguo ziran longduan hangye de longduan tezheng yu falv guizhi (Monopoly Characteristics of Natural Monopolistic Industries in China and Legal Countermeasures),” Faxue pinglun (Law Review), no 6, pp 32-37.
348 See section 5.2.1.b of this chapter.
However, given the vast administrative monopolistic powers in China, the LAUC was not effectively implemented, nor did its implementation extend much beyond large cities. This is mostly due to the limitation of SAIC and AICs as the result of China’s institutional arrangement. As we know, in many industrial countries, the competition authorities, such as the U.S. Federal Trade Commission (FTC) and the E.C. Competition Directorate General, enjoy a significant degree of independence and authority to oversee competition issues. In contrast, SAIC is one of the parallel departments in the ministerial level under the State Council, and similar status for AICs at different levels under relevant local governments. Generally SAIC has no authority to monitor the activities of other ministries where many administrative monopolies exist. Similarly a local AIC will find it hard to deal with a regional monopoly or blockade exercised by a local government, which appoints the head of the relevant AIC. Local governments, motivated by economic and political interests, often protect local firms with trade barriers and by putting pressure on competition authorities investigating these firms. SAIC/AICs have been faced with serious difficulties when intervention comes from governments or their agents.

In addition, the SAIC and its subordinate agents have long been established for governing market order, with many other duties, including administration of business licences, registration of trademarks, enforcement of other laws such as the Trademark Law and the Advertisement Law, and so on. In short, the lack of authority and expertise of SAIC/AICs in fact casts shadow on the implementation of the LAUC.

**a.c Price Law (1997)**

The Price Law of 1997, which took effect in 1998, set out the objective to “discipline pricing behaviours, amplify the price function of resource allocation, stabilize general market price, and protect the interests of consumers and operators.” It regulates the

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352 Article 1, Price Law, Adopted by NPC Standing Committee, Promulgated by Presidential Decree No. 92, 29/12/1997.
behaviour of business operators and government agencies in pricing goods and services. The pricing practices of business operators subject to the Law are listed in its Article 14, including price collusion, predatory pricing, deceptive pricing, price discrimination, deceptively driving up prices, among others. The Price Law, in some sense, supplements the LAUC (e.g. definition of predatory pricing). The Law also controls the overuse of pricing practices of government agencies, since most of the practice is the legacy of the central planning system that needed to be curbed when China was transforming to a market economy. Again, criminal sanctions cannot be imposed under the Price Law, unless the subject practice violates the Criminal Law. Administrative and monetary penalties are the main sanctions, where fines can be imposed up to five times the illegal gains from price fixing.

The enforcement authorities of the Law are the State Price Administration (SPA) and its subordinate agencies in governments at provincial, city, and county levels. It seems that an overlap of enforcement authorities occurs in certain respects, such as controlling predatory pricing also subject to SAIC’s authority according to the LAUC. Admittedly, the Price Law plays a role in China’s price reform to establish a market-oriented pricing system. It reports that 1.71 million of cases across the country were recorded dealing with “illegal pricing” within five years of implementing the Law between 1998 and 2003. It covers illegal gain of RMB26.73 billion (approx. U.S.$3.22 b), with monetary sanction amount to RMB16.99 billion (approx. U.S.$2.05 b), of which RMB8.77 billion (approx. U.S.$1.06 b) was refunded to consumers and industrial users. At the same time, the overuse of pricing power by the government has also been restrained. The commodities subject to government pricing have shrunk significantly, and administrative approval for private pricing has been largely reduced.

353 Article 18, Price Law.
354 Article 46, Price Law.
355 Article 39, Price Law.
357 Ibid.
In 2003, a supplementing legal document – Provisions on Restricting Price Monopoly – was enacted by the State Development and Reform Commission (SDRC).\textsuperscript{358} This 16-article regulation specifically disciplines price fixing and predatory pricing exercised by market power. As a response to pricing problems that emerged along with China’s further reform, the Provisions make it more applicable with regulating monopolistic behaviour in pricing.

As a matter of fact, the government pricing that is passed down from the central planning times used to feature the Chinese market and to be the main factor that distorts the market price. Along the economic reform, this government practice has been virtually reduced, and the market-based pricing system takes the main role. According to an official report, 96% of Chinese retail commodities and 87.6% of production factors in 2001 represent a market-oriented price.\textsuperscript{359} The government pricing remains in 13 kinds of goods and service, including utilities, arms, certain fertilizers, textbooks, basic post services, basic telecom services, etc..\textsuperscript{360} To regulate the pricing practice of the government, the Provisional Rules on Government Pricing Behaviour was enacted in 2002. It helps with bringing such practice onto a more transparent stage, though whether or not the law will be effectively implemented remains to be seen.

Coupled with another report showing that the market occupation rate of the Chinese economy reached 73.8% in 2003, the above statistics support China’s claim of ME status in overseas antidumping investigations against its products.\textsuperscript{361} Although the specific context of each case might be different, countries should take into careful consideration China’s development of its pricing system and market economy, when they choose their

\textsuperscript{358} State Development and Reform Commission Decree No. 3, 18/6/2003.
calculation method determining "normal value" in antidumping investigations against China.

b. Other Competition Laws and Policies

Some other acts relating to domestic competition were enacted in the 1990s, notably the Law of Protecting Consumer's Rights and Interests (1993)\textsuperscript{362}, and the Tender and Bid Law (1999)\textsuperscript{363}. They regulate different forms of competitive behaviours under certain circumstances in the Chinese marketplace. Also, the Report of the 15th National Congress of the Chinese Communist Party (1997), as a guide to the Chinese market economic framework, outlines the competition policy in light of globalization and the WTO framework.

In addition, a few sectoral regulations have incorporated competition provisions to discipline competition practices in their domains. They include notably the following regulations:

- Telecommunication Ordinance, issued by the State Council in 2000\textsuperscript{364}
- Provisions on Prohibiting Unfair Competition Activities in the Market of Civil Aviation, by the General Administration of Civil Aviation of China (GACAC) in 1996
- Circular on Regulating Competition in the Banking Market, by the People's Bank of China (China's central bank) in 2002

These regulations play special roles in disciplining market competition of China. On one side, they supplement the competition policies in certain areas or sectors, with detailed provisions governing their sectoral markets. On the other side, they pose a threat to the authority of the SAIC as the general competition authority, since these industrial sectors intend to govern the competition-related practice in their markets under their own

\textsuperscript{362} Adopted by the NPC Standing Committee, promulgated by Presidential Decree No. 11, 31/10/1993.
\textsuperscript{363} Adopted by the NPC Standing Committee, promulgated by Presidential Decree No. 21, 30/8/1999.
authorities. For example, the GACAC has taken over the role of competition authority within the sector of civil aviation according to its Provisions of 1996.\textsuperscript{365} Similarly, the Telecommunication Ordinance of 2000 specifies that anti-competitive practices within the telecommunication industry, which was previously under the SAIC’s authority, should be investigated by the Ministry of Information Industry.\textsuperscript{366} There was a recorded case in 2001 in Xinglong (a county in Hebei province), whereby the local AIC had to drop a case after investigation against local telecom companies that exercised tie-in sales, when they realized that the AIC had no authority under the newly issued Telecommunication Ordinance.\textsuperscript{367} Also, under the Tender and Bid Law, unspecified government agencies have the responsibility of enforcing the Law. These legal arrangements have in fact undermined the authority of the SAIC as the general competition governor in China. There exists a need to establish a truly independent enforcement agency empowered to implement competition laws in a consistent and effective way.

**Control of Mergers & Acquisitions**

Since the 1990s, M&A have been persistently encouraged by the Chinese government to reform loss-making state owned enterprises (SOEs), as well as to improve international competitiveness of some domestic firms. Not surprisingly, China has not yet equipped itself with a comprehensive antimonopoly law governing M&A, since most domestic M&A were government managed. The recent market oriented M&A wave has been created partly by the development of domestic industries, and partly by foreign investors for their strategic positioning in the Chinese market. Hence, a series of administrative regulations on M&A have recently been introduced, most of which have to do with listed companies and foreign companies, at the desire to attract and regulate foreign direct investment (FDI). Major administrative documents were enacted in recent years, particularly in 2002 and 2003, including:

\textsuperscript{365} Article 4, Provisions on Prohibiting Unfair Competition Activates in The Market of Civil Aviation.  
\textsuperscript{366} Article 3, Telecommunication Ordinance.  
\textsuperscript{367} "Dianxin zijiashi, gongshang guanbuzhao: xinglong gongshang chachu dianxin longduan zaoyu ganga (Xinglong AIC Encounters Embarrassment in Investigating Telecom Monopoly)" \textit{Fazhi ribao (Legal Daily)}, 6/6/2001.
- Administrative Rules on the Acquisition of Listed Companies (2002)
- Circular on Transferring State-owned Share and Legal-person Share to Foreigner (2002)

The enactment of these regulations in recent years shows the progress that China has made in M&A legislation. However, they aim at regulating FDI, rather than addressing competition issues. A close look at the laws will find that they in fact serve the industrial policy of the Chinese government. In other words, M&A can only take place within the industrial policy framework. Coupled with the fact that most of these laws are newly promulgated, the features mentioned make it not easy for now to judge how much these regulations will contribute to competition promotion and to the establishment of competition legal system in China.

c. Antimonopoly Law in Process

China has been preparing to introduce a comprehensive antimonopoly law into its legal system for a long time. Since 1994 the central government has been considering the

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369 Promulgated by the State Securities Supervisory Committee of China (SSSCC), SSSCC Decree No. 10, 28/9/2002.
370 SSSCC Decree No. 11, 28/9/2002.
antimonopoly law. State organs – mainly SAIC and SETC – have been studying competition regimes across the world, and help has been sought from multinational organizations including the OECD, the World Bank, UNCTAD and APEC, as well as countries with established competition laws such as Germany, the U.S., and Australia. So far the legislation has been in preparation for more than ten years. The long delay is mainly attributable to the extensive debate in the Chinese community on introducing such a law into the nation, and more importantly great pressures from interest groups in government sectors which fear further restraint of their administrative power. A sound opposition to the law holds that the government should enhance the competitiveness of Chinese enterprises by promoting economies of scale, rather than restraining it by a law. It seems to take time to reach a consensus about the best time to introduce an antimonopoly law. In fact, along with China’s continual economic development and deeper integration into the world market while fulfilling its WTO commitments, introduction of such a law is just a matter of time, and it is indeed on the way.

In 1999, an outline Antimonopoly Law was prepared for comment. Views were sought from industrial ministries, industries, academics, and international communities. After the restructuring of the State Council organs in 2003, the duties of “planning and drafting administrative regulations disciplining market system, and governing market monopoly, sectoral monopoly and regional blockage” have fallen into the scope of the newly-established MOC, which took over the job of drafting antitrust law since then. The draft law has been submitted by the MOC to the State Council for review in March 2004, while it is still uncertain when the law will be officially promulgated. In addition to controlling the universal anti-competitive practices such as restrictive agreements, abuse of dominance, and certain combinations, the draft law covers the “Chinese special” of administrative monopoly. MOC also implies that it will take the role of an antitrust

375 Lin, supra note 350, p 11.
377 Since the draft law is not officially published, the information is from an interview with Ming Shang, Director of the MOC Antimonopoly Investigation office, in Xiaobo Wang, “Fanlongduan lifa malasong gai chongci le (Antimonopoly Legislation Process Should Speed Up)” Jingji cankao bao (Economy Reference), 23/12/2004.
authority in enforcing the antimonopoly law likely under its new Antimonopoly Investigation Office. In late 2004, the SAIC produced its first report on restrictive practices of multinational companies in China, which is seen as a preamble for the enactment of the Chinese Antimonopoly Law.

Comments on Implementing the Law

As the current LAUC and its enforcement agency of SAIC are still valid, the recent legal trend raises the question of how to deal with the relationship of the two competition laws – LAUC and Antimonopoly Law – as well as the relationship of SAIC and the MOC in playing the roles of competition authorities. Also, the independence and authority of the potential antitrust enforcement agency – the Antimonopoly Investigation Office in the MOC – are still under doubt, given the existing Chinese government bureaucracy. In fact in China, the legal text itself does not mean too much at most times, since China is not yet a society with established rule of law. The implementation of a law poses a real problem in the real life. Given the existing Chinese cultural and political structure with various barriers in implementing a law, the law can hardly function well if the enforcement authority is short of strong authority and enough independence, and more importantly political support. Another important factor for effectively implementing a law is the personnel, especially in the case of competition policy. As pointed out, in a country the size of China, a national body capable of enforcing a competition law will need a group of highly qualified economists, accountants, and lawyers ideologically committed to competition law. It is doubtful if China has such a pool of professionals at present, or even if it does create one through a training process, it will still remain a question as to whether these professionals will be attracted to the low civil-service salaries currently offered by the central government.

378 Ibid.
380 Williams, supra note 376, p 316.
Meanwhile, the Chinese community has to recognize that a competition statute, by itself, cannot create a competitive economy or effectively serve as a comprehensive body of competition law. A free market is a pre-requisite for competition laws to have a function. Kenneth Davidson, former Senior Attorney of the U.S. FTC, points out,

"The most serious problem faced in creating effective competition agencies in transitional economies has to do with how much transition there has been towards the creation of a free market. Absent a market based economy, there is not much role for a competition agency and there is likely to be little understanding of what constitutes a violation of a competition law. Where there is a commitment to a free market by the government and the business community, a competition agency can help to institutionalize market norms by educational programs and enforcement actions."

In the Chinese context, therefore, both a profound institutional restructure and true establishment of a free market are needed in order to create a firm competition legal system and authority.

d. International Cooperation

China has not been seriously involved in international cooperation on competition policy, while many nations and international organizations have been working on it for a long time. From the point of view of the Chinese government, China is for voluntary international cooperation on capacity building on its antitrust system and creating a competition culture in the Chinese community. The international cooperation of competition law has been listed on the WTO agenda as one of its key "Singapore issues", whereas it seems the Chinese government has not yet been well equipped for it. The competition legal system of China has lagged behind mainly on two major WTO general

principles – transparency and non-discrimination – although it has noticeably improved in the past decade. Meanwhile, as was already discussed, the competition policies and laws in different respects and levels lack compatibility and are segmented to date. There thus remains a great deal for China to work on in order to effectively participate in the international cooperation of competition policy.
Chapter 6. Antidumping and Competition: China's Arrangements

6.1 Legal Arrangement

As previously mentioned, not enough attention has yet been raised within China regarding the relationship of, or how to reconcile, its antidumping and competition laws. This is reflected by the lack of literature in China on such issues in the Chinese context, although recently a few introductory writings appeared referring to the practice of industrial nations. \(^{383}\)

In fact, this is an emerging issue since China is furthering its integration into world trade, and is involved in more and more international or regional FTAs, which often encourage non-discrimination or national treatment in cross-border trade.

“China, like other large powers in the trading system (the U.S. and the E.U.) has clear incentive to commit to multilateral disciplines like the WTO as a way of gaining non discriminatory access to large markets and head off discrimination against her either in both these or smaller third country markets by fellow large powers. But closer to home (and as with the U.S. and E.U.) China has equally clear incentive to negotiate supplemental regional agreements which deal with interests in local markets in ways which go beyond WTO disciplines.” \(^{384}\)

If the members of the FTAs are extensively engaging in creating non-discriminatory markets, they will find that their antidumping mechanisms are hardly supportive and so they might then seek other solutions. Admittedly, there exist difficulties for China in flexibly reconciling its antidumping system in adapting such scenarios. First, it is not certain, as I mentioned, how China will implement the “public interest” clause in its antidumping regulations in order to reach a fairer result in antidumping investigations.

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Second, China has rarely applied other WTO-allowed trade remedies, particularly the safeguard measures as the suggested alternative mentioned in earlier chapter.\textsuperscript{385} Hence there is not enough information, based on which prediction could be made of how China will enforce it. Third, the lack of comprehensive competition laws and a firm authority in China hinders the replacement of antidumping laws with competition laws if possible, as another alternative, in any FTA.

**China’s Current Arrangement and Movement in FTAs regarding Antidumping**

With respect to antidumping in the Asia-Pacific region, Prusa finds evidence that new antidumping users account for about 60% of all cases against nations in this region, and that more than half of these cases are initiated by other Asia-Pacific nations.\textsuperscript{386} The intra-regional nature of the cases leads the author to suggest that regional trade agreements, which would potentially ban the use of antidumping between signatories, would help Asia-Pacific nations to curb antidumping.

So far China has negotiated agreements, or initial frameworks of agreements with Asia-Pacific countries/regions including Hong Kong, Macao, ASEAN, New Zealand, Australia, Chile, and Pakistan.

**China-Hong Kong/Macao**

Mainland China and Hong Kong agreed on zero tariffs in goods trade in The Mainland-Hong Kong Closer Economic Partnership Arrangement (CEPA-Hong Kong), which was signed on June 29, 2004. Similarly, CEPA-Macao was signed October 17, 2003. Articles 7,8 and 9 of the two CEPA s preclude the application of trade remedies of antidumping,

\textsuperscript{385} The only “safeguard measure” case of certain steel products in China was initiated on March 23, 2002, affirmative determination reached on September 24, 2002, while the duties were terminated on December 26, 2003. See MOC, *China Database of Trade Remedy Cases*, Case No. 0021SC3220020323, online <http://www.cacs.gov.cn/DefaultWebApp/caseDetail.jsp?case_id=0021SC3220020323>.

anti-subsidy, and safeguard measures towards each other.\textsuperscript{387} Also, the two CEPA\textsuperscript{s} agree that section 15 and 16 of the Protocol on the Accession of the People’s Republic of China to the WTO and paragraph 242 of the Report of the Working Party on the Accession of China will not be applicable to trade between the Mainland and Hong Kong as well as Macao. Section 15 of the Protocol outlines the price comparability in determining subsidies and dumping against Chinese products, valid until 2016, while section 16 is about the China-specific safeguard mechanism, valid until 2013.\textsuperscript{388} Paragraph 242 of the Report allows WTO members to limit imports of Chinese origin of textiles and apparel products.\textsuperscript{389} They are considered by China as discriminatory clauses that could potentially cause abuse by trading partners. Hence China has tried to eliminate those clauses in FTA negotiations.

\textit{China-New Zealand}

The Trade and Economic Cooperation Framework between New Zealand and the People’s Republic of China was signed on May 28, 2004, which initiated an FTA negotiation between the two countries. Paragraph 10 of the Framework reads “New Zealand recognises that China, after 25 years of reform and opening up, has established a market economy system,”\textsuperscript{390} which marks NZ as the first industrial country to recognize China as an ME. Both countries retain their rights to antidumping action. Henceforward, no NME treatment would occur in antidumping cases against Chinese products in NZ, though NZ has not frequently exercised its antidumping mechanism towards China (5 cases recorded in the past ten years). At the same time, NZ agreed not to apply Sections 15 and 16 of the Protocol of China’s WTO accession, as well as paragraph 242 of the Report mentioned in the last paragraph in relation to bilateral trade between the two countries.

\textsuperscript{387} For details, visit the CEPA-Hong Kong website: <www.tid.gov.hk/english/cepa/>


\textsuperscript{390} For details, visit New Zealand – China FTA website <www.mft.govt.nz/tradeagreements/nzChinafka/nzchindex.html>
China-Australia

On April 18, 2005, Australia and China agreed to commence negotiations on an FTA following consideration of their joint FTA Feasibility Study. In the Memorandum of Understanding signed by the two countries, Australia grants China MES as a prelude to the start of formal trade negotiations for an FTA, and precludes the application of the three articles in the above-mentioned China’s WTO accession documents. Also, both countries would retain their WTO rights to antidumping action, except Australia could no longer use the NME methods when dealing with imports from China. This change would have some impact on Australian antidumping against China, as Australia is among the top ten countries suing Chinese products and it often applied the NME methods in antidumping investigations. Considering their own competitiveness, Australia’s minerals, energy, and steel sectors, as well as farming groups, are strongly supportive of an FTA with China; while not surprisingly, the manufacturing sector in general, the plastics and chemical industry, and small producers remain unconvinced and fearful.

China-ASEAN

Ten nations of ASEAN started to negotiate on FTA with China in 2003 when ASEAN decided to initiate the “ASEAN 10+3” FTA with China, Japan, and South Korea. An extensive FTA including ASEAN nations and China is expected to be completed in 2015. The negotiations on tariff cut are still in process, while the ten countries agreed to the MES of China. There have been only a few antidumping charges from ASEAN nations (e.g. Indonesia and Malaysia) against China in the past ten years. Not surprisingly, there is no sign of either China or ASEAN nations changing their antidumping provisions in the FTA, as ASEAN members themselves do not even have arrangement on their antidumping measures towards each other.

391 For details, visit Australia - China FTA website <http://www.dfat.gov.au/geo/China/fta/>
393 ASEAN countries include Singapore, Malaysia, Thailand, Indonesia, Philippines, Brunei, Cambodia, Laos, Myanmar, and Vietnam.
China-Chile

China and Chile started their FTA negotiation in 2005. In regard to antidumping mechanisms, the two nations have not included any change of their antidumping acts, except Chile joined the club of recognizing China as an ME, though there has been only one case filed by Chile against China in the past decade.

Other to-be-FTAs

China has started the negotiation towards FTA with Pakistan, and discussions on potential FTAs with India, the Gulf Cooperation Council countries, and South Africa are underway. Among them, Pakistan and South Africa have agreed to China as ME. Pakistan did not file any antidumping cases against China in the WTO era, while South Africa filed 20 cases in the same period though there has been no sign that the “surrogate country” approach was applied in South Africa.

6.2 Case Study on Antidumping and Competition: Practice in China

6.2.1 Antidumping Actions by the Chinese Steel Industry

The Chinese steel industry has petitioned three antidumping charges on steel products from eight countries so far: cold-rolled silica steel sheet from Russia (1999)\(^{394}\), cold-rolled stainless steel sheet from Korea and Japan (1999)\(^{395}\), and certain cold-rolled steel products from Russia, Korea, Ukraine, Kazakhstan, and Taiwan (2002)\(^{396}\). All of them resulted in affirmative antidumping measures or undertakings. (Table 6) The duties on cold-rolled silica steel sheet were terminated after it expired in December 2004. Those on

\(^{394}\) Case No. 0002AC3219990312, MOC China Database of Trade Remedy Cases, online <http://www.cacs.gov.cn/DefaultWebApp/caseDetail.jsp?case_id=0002AC3219990312>
\(^{395}\) Case No. 0004AC3219990617, Ibid, online <http://www.cacs.gov.cn/DefaultWebApp/caseDetail.jsp?case_id=0004AC3219990617>
certain cold-rolled steel products were terminated by the MOC on September 10, 2004 after a year of imposition, for the reason of supply shortage in Chinese market.\textsuperscript{397}

The tension of antidumping measures and competition is reflected by the cases in the steel industry. In dealing with these cases, the Chinese authorities have to play carefully with the antidumping procedures to balance the interests of different groups. The domestic producers produce insufficient amount of the steel for the Chinese market. Meanwhile, China is criticized for imposing duties on sheet steel for the appliance market, because “many of the injured end users, such as appliance makers, are among China’s most competitive companies. It makes little sense for China’s authorities to weaken other industries’ international competitive advantage to protect the steel industry.”\textsuperscript{398} The above-mentioned decision of termination made by the antidumping authority on September 10, 2004 agreed to the positive effect of imports competition in the particular Chinese market, where the end users’ interests were considered and prevailed over the injury to the Chinese steel producers. In fact, in the earlier case of cold-rolled stainless steel sheet, the former MOFTEC (the previous Chinese antidumping authority) determined to exempt certain steel sheet products from imposition of the antidumping duty. Those exempted are used for making parts of CTV picture tube, shaver, car exhaust system, washing machine and microwave, of which China is a massive producer.\textsuperscript{399}

\textbf{6.2.2 Chloroprene Rubber from Japan, the U.S. and the E.U.}

On November 10, 2003, the MOC initiated an antidumping investigation on chloroprene rubber from Japan, U.S. and E.U., upon the request from two Chinese producers – Chongqing Changshou Chemical Industrial Co., Ltd. and Shanxi Synthetic Rubber Group

\textsuperscript{399} MOC, Final Determination on Cold-rolled Stainless Steel Sheet, 18/12/2000, online <http://www.cacs.gov.cn/DefaultWebApp/showNews.jsp?newsId=300130000010>
Co., Ltd. — that represent 100% domestic industry. In its final determination dated May 10, 2005, the MOC found dumping margins ranging from 2-151% for the exports, and material injury to domestic industry.

The final outcome of this recent case raises two issues. One represents the different results between respondents and non-respondents on the accused side. Two cooperative Japanese companies—Denki Kagaku Kogyo Kabushiki Kaisha and Tosoh Corporation—are found to have dumping margins of 3% and 2% respectively, as well as a German producer (LANXESS Deutschland GmbH) and a French one (Polimeri Europa Elastomères France S.A.) found to have 11% and 53% respectively, while all the other non-respondents are determined dumping margin of 151%.

The other issue is that the case demonstrates in how limited a way, under current legislation, rational principles from an economy-wide perspective (such as a broader public interest inquiry and active intervention) are incorporated into antidumping enforcement practice. During the investigation, opposition opinions were heard from downstream users. In January 2004, the China Adhesives Industry Association submitted to the MOC the “Disagreement to Antidumping on Chloroprene Rubber Used for Chloroprene Adhesives”. A meeting was held in March 2004 for complainants and downstream users to express their opinions, and a field investigation was made by the MOC on users in Guangdong province in September. For the “injury” investigation, 15 companies registered as respondents, including 5 foreign producers that export the subject product and 10 Chinese downstream intermediate producers, which tried to defend their interests. However, in the final determination, the authority still drew the conclusion of “material injury” to domestic industry upon a not-so-convincing base. A close reading of the data will find among others, during the “injury” investigation period (1/1/2000-30/6/2003), slim change of imports market share (less than 3%), fluctuation of

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400 Case No. 0027AC2620031110, MOC China Database of Trade Remedy Cases, online <http://www.cacs.gov.cn/DefaultWebApp/caseDetail.jsp?case_id=0027AC2620031110>
402 Ibid.
the imports price (not always a decrease), and that the domestic industry's production and sales still grew (although the growth rates failed to catch those of the demand).\footnote{Ibid.}

The case highlights the dependence of a public interest inquiry on an exceptionally strong lobby of users or intermediate producers. It would probably bring more consideration of public interest if there were room for a strong competition authority's participation.\footnote{For an example on how competition authority could make a difference in an antidumping investigation, see the case of \textit{automobiles from Korea}, Canadian Import Tribunal 1988b, p 28-29.}

Important improvement in the existing antidumping legislation and competition policies and a strict compliance of them would likely be called on, before principles in line with an economy-wide perspective could be established and consistently applied in China. These requirements seems demanding for China under the current political and legal system, but they will lead the Chinese legal system in the right direction towards social welfare in a larger scale.
Chapter 7. Conclusion

There is strong evidence of the increasing use of antidumping policies in the liberal trading regime that has been achieved in the global economy. However, antidumping may not be the best approach in dealing with corporate abuse of market power when compared with competition policy. There have been conflicts between antidumping and competition. Antidumping facilitates market power in certain circumstances, which can be seen from the cases demonstrated in the paper. From an economic point of view, the distortions induced by antidumping decrease a country’s welfare. However, redistribution of income and rent and their associated benefits make antidumping a very convenient tool for interest groups and policy makers. Except in the unordinary instance of predatory behaviour, there seems to be no economic justification for antidumping laws. Eliminating antidumping would probably yield benefits to the world economy. In defence of antidumping, its elimination could make countries targets of predatory behaviour or victims of unfair trade. The former (predatory pricing) might not be a big concern, however, as such a strategy seems very difficult to pursue at an international level, while the latter (fair trade) is rather a subjective topic. A political economy approach seems to be the only way to explain the persistence of antidumping systems. How legal arrangements, particularly antidumping and competition laws in this paper, could address the issue in a proper manner should be seriously considered by legislators.

Consequently, we have sought out solutions to the conflicts of antidumping and competition. A supranational application of competition policies might be considered the optimum alternative policy on efficiency grounds, but it is not considered politically feasible for most nations. In the real world, a national welfare clause included in antidumping rules could be promoted, although there is limited evidence of its success in practice. Probably FTA can offer an intermediate solution as in improving regional antidumping legislation in a pro-competition manner. National authorities are pushed to relinquish their powers at a regional level, which may encourage countries in the long run to eliminate antidumping on a larger scale. There is the possibility that the WTO
Agreement will be effective in controlling the existing abuse of antidumping, if significant reform of WTO rules takes place.

In the case of China, the enormous antidumping charges worldwide against it typically reflect the above-mentioned global intensive use of antidumping measures. It also presents many facts and special features of China's trade and practice. When the antidumping authorities in different countries try to protect their domestic industries by carrying out antidumping investigations against Chinese products, they cannot simply ignore the interests of other interests groups (such consumers and industrial users) that might be contradictory. How to implement their antidumping procedures to preserve competition and social welfare, therefore, needs to be better addressed by the authorities.

In China, the issue of antidumping and competition is an emerging challenge faced by the Chinese authorities, considering that China is a still a developing nation with many emerging industries under various stages of growth. In fact it is even a tougher task for the Chinese administrators and legislators, given the developing and ever-changing economic and legal system of the nation. Its fast integration into free trade agreements will bring the question onto the stage. However the lack of comprehensive competition policy and strong authority, and deficiencies of the Chinese antidumping law are the main procedural block to reconciling antidumping and competition. Admittedly enormous efforts have been made by the Chinese government to complete and improve its legal system. Profound economic, institutional, and legal reforms are essential to better serve the social fairness addressed by the law so it may reach its effectiveness.
Annex

Table 6. China’s Antidumping Investigations against Imports (1997-2005)

<table>
<thead>
<tr>
<th>Date of Initiation</th>
<th>Product</th>
<th>Affected country/region</th>
<th>Preliminary determination</th>
<th>Final determination</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/12/1997</td>
<td>Newsprint Paper</td>
<td>US, Canada, Korea</td>
<td>9/7/1998</td>
<td>Antidumping duty 9-78%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Dumping margin 17.11-78.93%</td>
<td></td>
</tr>
<tr>
<td>12/3/1999</td>
<td>Cold-Rolled Silica Steel Sheet</td>
<td>Russia</td>
<td>30/12/1999</td>
<td>Antidumping duty 6-62%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Dumping margin 11-73%</td>
<td></td>
</tr>
<tr>
<td>16/4/1999</td>
<td>Polyester Film</td>
<td>Korea</td>
<td>29/12/1999</td>
<td>Antidumping duty 13-46%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Dumping margin 21-72%</td>
<td></td>
</tr>
<tr>
<td>17/6/1999</td>
<td>Cold-rolled Stainless Steel Sheet</td>
<td>Korea, Japan</td>
<td>13/4/2000</td>
<td>18/12/2000 Antidumping duty 17-58% &amp; undertakings by 6 companies</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Dumping margin 4-75%</td>
<td></td>
</tr>
<tr>
<td>10/12/1999</td>
<td>Acrylic Ester</td>
<td>US, Japan, Germany</td>
<td>23/11/2000</td>
<td>9/6/2001 Antidumping duty 31-69% (termination on Germany)</td>
</tr>
<tr>
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<td></td>
<td>Dumping margin 24-74%</td>
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<td></td>
<td>Dumping margin 7-75%</td>
<td></td>
</tr>
<tr>
<td>9/2/2001</td>
<td>Polystyrene</td>
<td>Korea, Japan, Thailand</td>
<td>6/12/2001 Termination (no injury)</td>
<td></td>
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<tr>
<td>14/6/2001</td>
<td>Feedstuffs Grade L-Lysine Hydrochloric Acid Salt</td>
<td>Korea, US, Indonesia</td>
<td>29/9/2002 Termination (no injury)</td>
<td></td>
</tr>
<tr>
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<td></td>
<td>Dumping margin 8-52%</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>Dumping margin 4-48%</td>
<td></td>
</tr>
<tr>
<td>10/10/2001</td>
<td>Acrylic Ester</td>
<td>Korea, Malaysia, Singapore, Indonesia,</td>
<td>5/12/2002</td>
<td>10/4/2003 Antidumping duty 2-49%</td>
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<td></td>
<td></td>
<td>Dumping margin 11-49%</td>
<td></td>
</tr>
<tr>
<td>7/12/2001</td>
<td>Caprolactam</td>
<td>Japan, Belgium, Germany, the</td>
<td>7/1/2003</td>
<td>6/6/2003 Antidumping duty 5-28%</td>
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<tr>
<td></td>
<td></td>
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<td>Dumping margin 5-38%</td>
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<td>Date</td>
<td>Product/Commodity</td>
<td>Countries/Regions</td>
<td>Dumping Margin/Resolutions</td>
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<td>--------------------------------------------------------------------------------------------</td>
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<tr>
<td>6/2/2002</td>
<td>Coated Art Paper</td>
<td>Korea, Japan, U.S., Finland</td>
<td>Dumping margin 5.58-71.02% (termination on Finland)</td>
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<tr>
<td>6/8/2003</td>
<td></td>
<td></td>
<td>Antidumping duty 4-71% (termination on US)</td>
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</tr>
<tr>
<td>1/3/2002</td>
<td>Catechol</td>
<td>EU</td>
<td>Dumping margin 50-92%</td>
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<tr>
<td>27/8/2003</td>
<td></td>
<td></td>
<td>Antidumping duty 20-79%</td>
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<tr>
<td>6/3/2002</td>
<td>Phthalic Anhydride</td>
<td>India, Japan, Korea</td>
<td>Dumping margin 14-66%</td>
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<tr>
<td>3/9/2003</td>
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<td></td>
<td>Antidumping duty 0-66%</td>
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<tr>
<td>19/3/2002</td>
<td>Styrene Butadiene Rubber</td>
<td>Russia, Korea, Japan</td>
<td>Dumping margin 0-46%</td>
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<tr>
<td>9/9/2003</td>
<td></td>
<td></td>
<td>Antidumping duty 0-38%</td>
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<tr>
<td>20/3/2002</td>
<td>Cold-rolled Steel Products</td>
<td>Russia, Korea, Ukraine, Kazakhstan, Taiwan</td>
<td>Dumping margin 8-55%</td>
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<tr>
<td>24/9/2003</td>
<td></td>
<td></td>
<td>Antidumping duty 0-55% (terminated in 2004 after an annual review)</td>
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</tr>
<tr>
<td>29/3/2002</td>
<td>Polyvinyl Chloride</td>
<td>US, Japan, Korea, Russia, Taiwan</td>
<td>Dumping margin 10-115%</td>
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<tr>
<td>29/9/2003</td>
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<td></td>
<td>Antidumping duty 6-84%</td>
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<tr>
<td>22/5/2002</td>
<td>Toluene Disocyanate (TDI)</td>
<td>US, Japan, Korea</td>
<td>Dumping margin 6-49%</td>
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<tr>
<td>22/11/2003</td>
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<td></td>
<td>Antidumping duty 3-49%</td>
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<tr>
<td>1/8/2002</td>
<td>Phenol</td>
<td>Japan, Korea, US, Taiwan</td>
<td>Dumping margin 7-14%</td>
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<tr>
<td>1/2/2004</td>
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<td>Antidumping duty 3-144%</td>
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<tr>
<td>20/9/2002</td>
<td>MDI</td>
<td>Japan, Korea</td>
<td>Termination (withdrawal)</td>
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<tr>
<td>14/5/2003</td>
<td>Ethanolamine</td>
<td>Japan, US, Germany, Iran, Malaysia, Taiwan, Mexico</td>
<td>Dumping margin 9-137% (termination on Germany)</td>
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<tr>
<td>14/11/2004</td>
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<td>Antidumping duty 9-74%</td>
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<tr>
<td>30/5/2003</td>
<td>Chloroform</td>
<td>EU, Korea, US, India</td>
<td>Dumping margin 0-96%</td>
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<tr>
<td>30/11/2004</td>
<td></td>
<td></td>
<td>Antidumping duty 32-96% &amp; undertakings by 5 companies</td>
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<tr>
<td>1/7/2003</td>
<td>Dispersion Unshifted Single-Mode Optical Fiber</td>
<td>US, Japan, Korea</td>
<td>Dumping margin 7-46%</td>
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<td>1/1/2005</td>
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<td></td>
<td>Antidumping duty 7-46%</td>
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<td>30/10/2003</td>
<td>Nylon 6, 66 Filament Yarn</td>
<td>Taiwan</td>
<td>Termination (de minimis dumping margin)</td>
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<td>10/11/2003</td>
<td>Chloroprene</td>
<td>Japan, US, EU</td>
<td>Termination (de minimis dumping margin)</td>
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<tr>
<td>10/5/2005</td>
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</table>

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<table>
<thead>
<tr>
<th>Date</th>
<th>Product</th>
<th>Countries/Countries</th>
<th>Dumping margin</th>
<th>Antidumping duty</th>
</tr>
</thead>
<tbody>
<tr>
<td>17/12/2003</td>
<td>Rubber</td>
<td>France, Korea, US, Japan</td>
<td>0-151%</td>
<td>2-151%</td>
</tr>
<tr>
<td>31/3/2004</td>
<td>Unbleached Kraft Liner/Linerboard</td>
<td>Korea, US, Taiwan, Thailand</td>
<td>28-184%</td>
<td>28-184%</td>
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<tr>
<td>16/4/2004</td>
<td>Trichloroethylene (TCE)</td>
<td>Russia, Japan</td>
<td>7/1/05</td>
<td>22/7/2005</td>
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<tr>
<td>12/5/2004</td>
<td>Bisphenol—A (BPA)</td>
<td>Russia, Korea, Japan, Taiwan, Singapore</td>
<td>Pending</td>
<td>Pending</td>
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<tr>
<td>16/7/2004</td>
<td>Dimethyl cyclosiloxane</td>
<td>Germany, US, Japan, UK</td>
<td>Pending</td>
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<tr>
<td>10/8/2004</td>
<td>Ethylene-Propylene-non-conjugated Diene Rubber, (EPDM)</td>
<td>Korea, the Netherlands, US</td>
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<td>Pending</td>
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<tr>
<td>12/11/2004</td>
<td>Disodium 5′-Inosinate, Disodium 5′-Guanylate and Disodium 5′-Ribonucleotide</td>
<td>Japan, Korea</td>
<td>Pending</td>
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<tr>
<td>28/12/2004</td>
<td>Epichlorohydrin</td>
<td>Russia, Korea, Japan, US</td>
<td>Pending</td>
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<tr>
<td>13/4/2005</td>
<td>Polyurethane</td>
<td>Korea, US, Japan, Taiwan, Singapore</td>
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<tr>
<td>31/5/2005</td>
<td>Pyrocatechol</td>
<td>US, Japan</td>
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<td>6/6/2005</td>
<td>Polybutylene-Terephthalate Resin(PBT)</td>
<td>Japan, Taiwan</td>
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<tr>
<td>13/6/2005</td>
<td>Wear Resistant Overlay</td>
<td>US, EU</td>
<td>Pending</td>
<td>Pending</td>
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</table>

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