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**AN ANALYSIS OF THE LEGAL PROBLEMS AND ISSUES
ARISING FROM THE EUROPEAN UNION'S CURRENT
ANTI-DUMPING LEGISLATION WITH REGARD TO
THE PEOPLE'S REPUBLIC OF CHINA**

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ABSTRACT

On 27 April 1998, the European Union (EU) removed the People's Republic of China from its list of non-market economies (NMEs) due to the progress made under China's economic reforms. After that, it has applied a hybrid anti-dumping policy towards imports from China, including the use of the analogue country method, conditional market economy treatment, one country one duty rule and individual treatment. However, there has been no significant change as far as the EU anti-dumping authority's practice is concerned. This is inconsistent with China's current economic status as a transitional economy with many sectors very close to a market economy.

This thesis analyses the implementation of the policy and explores its legal problems and issues from both a theoretical and practical standpoint. The study begins by examining the origin of EU anti-dumping legislation – the General Agreement on Tariffs and Trade (GATT) anti-dumping rules. It identifies the legal problems of EU anti-dumping practice in the context of China's economic reforms starting from 1979. In order to suggest solutions to several of the problems thus identified, comparative studies are made to reveal alternative strategies by illustrating the anti-dumping legislation of the U.S, Australia, New Zealand and Japan insofar as it is applicable to China. Due to China's accession to the World Trade Organization (WTO) on 11 December 2001, new issues and disputes may arise with regard to the EU's anti-dumping practice. With regard to all of these issues, this thesis finally attempts to propose solutions to both the EU and China.

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Table of Abbreviations

ACM	analogue country method
CFR	Code of Federal Regulations
CVM	constructed value method
DG	Directorate General
DSB	Dispute Settlement Body
DSU	Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Community
EIT	economy in transition
EU	European Union
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GNI	gross national income
IMF	International Monetary Fund
IT	individual treatment
LDC	least-developed country
MET	market economy treatment
MOFTEC	Ministry of Foreign Trade and Economic Cooperation, PRC
NIC	newly industrialized country
NME	non-market Economy
OCODM	one country one duty method

RPE	reforming planned economy
SOE	state-owned enterprise
STC	state trading country
STE	state trading enterprise
STD	special and differential treatment
STE	state trading enterprise
TRQ	tariff-rate quota
UODDM	use-out domestic data methodology
WB	World Bank
WTO	World Trade Organization
ZM	zeroing method

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Introduction

1. Purpose of the study

This thesis explores the legal problems and issues that have arisen in the application of the current European Union (EU)¹ anti-dumping legislation² as it is applied against the People's Republic of China. It analyzes these problems from both a theoretical and practical standpoint. The origin of EU anti-dumping legislation is found in the General Agreement on Tariffs and Trade (GATT)³ framework and, for this reason, it is important to recall the development of the GATT rules themselves. The study must be seen against the background and in the context of Chinese economic reforms that have been put in place since 1979. After more than twenty years' efforts, up to now, China has successfully transformed from a state trading country to a transitional economy. Failing to accommodate this change, the current EU anti-dumping legislation towards China has turned to be rather problematic in practice. These issues are analyzed in the chapters that follow. The thesis also attempts to suggest solutions to several of the problems thus identified. To reach such solutions, comparative studies are used to reveal alternative strategies and to provide useful insights into EU practice. Due to China's accession to the World Trade Organization (WTO), new issues and disputes may arise with regard to the

¹ Technically, the anti-dumping legislation is made under the power conferred on the EC by the Treaty establishing the EC. However, since EU is a commonly understood term, 'EU anti-dumping legislation' will be used instead of 'EC anti-dumping legislation' throughout this thesis unless otherwise explained.

² Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ 1996 L 56/1, amended by Council Regulation (EC) No 2331/96 of 2 December 1996, OJ 1996 L 317/1; Council Regulation (EC) No 905/98 of 27 April, OJ 1998 L128/18; and Council Regulation (EC) No 2238/2000 of 9 October 2000, OJ 2000 L 257/2; Council Regulation (EC) No 1972/2002 of 5 November 2002, OJ 2002 L305/1. They are all available from <<http://europa.eu.int/comm/trade/policy/dumping/legis.htm>> (1 December 2002).

³ The Uruguay Round Agreements, available from <http://www.wto.org/english/docs_e/legal_e/legal_e.htm#finalact> (1 December 2002).

EU's anti-dumping practice. Solutions to all of these issues are suggested for both sides in the conclusion of this thesis.

It is important for the purpose of this thesis to define some key concepts here. The first is based on a distinction between market economies (MEs) and non-market economies (NMEs). Generally speaking, NME refers to the country where goods and resources are allocated by government planning agencies rather than by prices freely set in a market.⁴ Normally, NME has the same meaning as state trading country or state-controlled country. The classification of NME and ME is not scientific nor sustainable in the reality of today, because there is no purely free market nor totally centrally controlled economy but rather a spectrum of national economies with more or less state control of certain economic activities.⁵ Further and worse, since the GATT did not define the concepts of ME and NME nor did it provide any guideline to the categorization, this issue is left to the national authorities of the GATT Contracting Parties with huge discretion. In fact, the room for flexibility has been so widely used that these countries categorize MEs and NMEs according to their own criteria. As a result, former Communist countries are normally regarded as having NMEs, while the developed western countries are viewed as having MEs.⁶

Like NME, ME is a very complex concept, but no international organization or agreement provides its definition. ME is a term to measure the certain level of economic development of a sector or industry. It stresses that transactions, including prices, are basically regulated by market forces rather than state control. Generally speaking, it asks for enterprises' rights to allocate their own resources and the freedom to make business decisions and a fair competition environment sustained by sound legislation.

⁴ John H. Jackson (co-editor), *Legal Problems of International Economic Relations* 3rd edn., (New York: West Publishing, 1995) at p 1139.

⁵ This issue is further analyzed in the section IV of chapter one.

⁶ This issue is fully illustrated in section II of chapter five.

In the wide spectrum of economic structures, different industries of a same country may have different economic development levels. Therefore, some sectors may be ME or close to ME while others are not. However, in the context of anti-dumping legislation, importing countries normally classify exporting countries into ME and NME. In that case, a country that has most of its industries as ME should be regarded as an ME, and ME treatment should be applied to these countries in default.

China was generally regarded as an NME when its economy was operated on a strict state-controlled basis before 1979. However, after more than twenty years' economic reform, it has become a transitional economy whose development of many sectors is very close to market economies. This fact is well recognised and confirmed in the world by its accession to the WTO.⁷

The second key concept is the concept of dumping itself. According to the GATT anti-dumping rules, a product is considered to have been dumped if the export price is lower than its normal value. In the ordinary course of trade, the normal value is based on the domestic sales price of the import.⁸ However, in case of 'imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State',⁹ GATT allows its contracting parties to adopt

⁷ China's economic reforms and progress obtained are illustrated in chapter four.

⁸ 'A product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or, in the absence of such domestic price, is less than either (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.'

Para 1, Art. VI of the GATT 1994. Available from:
<http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm> (1 December 2002)

⁹ The second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT.

other methods to determine the normal values of the imports. This provision provides the basis for national anti-dumping laws to establish the rules with regard to state trading.

Instead of being dropped, surprisingly, the rule enacted in 1947 has been automatically transposed into the WTO Anti-Dumping Agreement in 1994.¹⁰ Therefore, in contrast to significant advancements in many other areas covered by the GATT provisions, its current anti-dumping rules relating to state trading remain as vague as they were 50 years ago. As a result, most WTO Members apply different rules to calculate normal values of imports from NMEs, which will basically artificially increase the dumping margin of the products concerned.¹¹ Therefore, whether the exporting country is regarded as an NME is crucial to its trade interests in anti-dumping proceedings.

Under the GATT anti-dumping framework, the EU provides different rules to calculate normal values of products imported from MEs and NMEs respectively. With regard to the former, the normal values of their exports are ‘based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country’¹². While as to the NMEs, especially ‘those to which Council Regulation (EC) No 519/94 applies,¹³ normal values shall be determined on the basis of the price or constructed value in an ME third country, or the price from such a third country to other countries, including the price actually paid or payable in the Community for the like product.’¹⁴ In the meantime, since all imports from NMEs are considered to emanate from a single producer, a single rate is applied to all producers from NME exporting countries in order to avoid circumvention of

¹⁰ Article 2 (7), Agreement on Implementation of Article VI of GATT 1994 (WTO Anti-Dumping Agreement). Available from: <http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm> (1 December 2002).

¹¹ This issue is examined specifically in chapter one.

¹² Article 2 (1) of Council Regulation (EC) No 384/96.

¹³ Council Regulation (EC) No 519/94 of 7 March 1994 on common rules for imports from certain third countries and repealing Regulations (EEC) Nos 1765/82, 1766/82 and 3420/83, OJ 1994 L67/89.

¹⁴ Article 2 (7) of Council Regulation (EC) No 384/96.

the anti-dumping duties, that is the channelling of exports through the exporter with the lowest duty rate. This is the so-called one country one duty rule. Both the rule and the analogue country method are regarded as the EU's traditional NME treatments.¹⁵

The EU used to regard China as an NME for the purpose of anti-dumping.¹⁶ Due to China's economic reform since 1979 and the dramatic progress obtained afterwards, the EU eliminated China from its list of NMEs in 1998 and introduced conditional market economy treatment (MET).¹⁷ However, since the criteria for the new treatment are extremely stringent, only few Chinese exporters can actually get it.¹⁸ For this reason, most Chinese products involved in EU's anti-dumping investigations are still subject to the analogue country method and the one country one duty rule. Consequently, almost all of them are judged to have been dumped, so that they have to either make satisfactory undertakings to revise the price or to suffer anti-dumping duties for certain periods. As a result, most of these Chinese exporters have to give up their business in the European market.

Under the EU anti-dumping legislation, Chinese exports are subject to a disproportionately high number of anti-dumping measures. There are 170 anti-dumping measures in force covering 63 products and 33 countries determined by the EU institutions by 30 June 2002. Among them, 34 measures are concerned with China, which accounts for 20 percent of overall cases although imports from China only account for 7 percent of the total EU imports.¹⁹ So, it appears that China has now become the primary

¹⁵ This issue is fully analyzed in chapter three.

¹⁶ Council Regulation (EC) No 519/94.

¹⁷ Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community. OJ 1998 L 128/18.

¹⁸ The reasons are explained in chapter three.

¹⁹ 'Trade in Goods' EU International Trade Statistics
<<http://europa.eu.int/comm/trade/goods/stats.htm>> (1 December 2002).

target in the EU's anti-dumping practice among all exporting countries since August 1979 when the first anti-dumping investigation against Chinese exports²⁰ was initiated.

Furthermore, the anti-dumping duties charged by the EU on Chinese exports are very high. Up to 1 January 2002, there were 91 anti-dumping proceedings launched by the EU against Chinese exports. In 69 cases, Chinese exports were found to have been dumped and anti-dumping measures were subsequently taken towards them.²¹ Most of the anti-dumping duties imposed in these cases were very high – especially when the one country one duty rule was applied, i.e. a single duty rate was charged, there are only 8 cases whose rate of duty charged was under 20 percent.²²

Here, we should note three inconsistencies in EU practice by examining the relevant data.

1. The increasing anti-dumping measures taken by the EU do not agree with Chinese current economic status, which has fundamentally changed after reforms initiated in the last two decades.

The methods that the EU adopts to determine the normal value of products exported from China were based on the former Chinese economic structure and its government policy -- central state control twenty years ago. However, since 1992 when China officially confirmed its current policy to accelerate the transformation of the country into a market-oriented economy, reforms have been designed and implemented to make state-owned enterprises operate as independent economic entities and to be fully responsible for their profits and losses. As a result, dramatic changes in China's economic

²⁰ 80/1116/EEC: Commission Decision of 4 December 1980 accepting undertakings offered by the exporters of saccharin and its salts originating in China and the United States of America and terminating the proceedings concerning imports of saccharin and its salts from China, Japan and the United States of America. OJ 1980 L 331/41.

²¹ It is collected by the author from the WTO and the EU's anti-dumping statistics <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm> and <<http://europa.eu.int/comm/trade/policy/dumping/reports.htm>> (1 December 2002).

²² Ibid.

structures and development took place, and the prices of over 90 percent of final goods are now determined by market forces, a factor which has been confirmed by the World Bank.²³ According to these significant changes, most countries (such as the United States, Australia, New Zealand and Japan) which used to regard China as an NME have changed their anti-dumping policies towards China and granted individual treatment to Chinese state-owned enterprises after the investigation is initiated. This has proved to be more rational and practical as can be seen in the cases discussed later.²⁴ However, the EU seems to have responded less to the fundamental changes resulting from the Chinese economic reform. Though in Council Regulation No. 905/98,²⁵ it deleted China from the list of NMEs and agreed to grant conditional MET to Chinese exporters who meet certain criteria. This is no doubt a big step forward, but things have not changed significantly because the criteria set in the new Regulation are too severe and impractical to meet the need of actual situations.²⁶ As a result, most Chinese companies involved in anti-dumping proceedings are still subject to the analogue country method in the calculation of their normal value and one country-one duty when determining anti-dumping duties. Furthermore, anti-dumping investigations initiated by the EU in 1999 reached 12, which is the highest number compared with the past years.²⁷ The fact shows that the EU's new anti-dumping policy against China has not achieved the objective to fit the changes resulting from the Chinese economic reform, and this also brings about the following two inconsistencies.

2. Considering the past twenty years, the number of the total EU's anti-dumping cases

²³ World Bank Discussion Paper No. 215, China: Reform and Development in 1992-1993.

²⁴ Alternative anti-dumping approaches towards China are examined in chapter five.

²⁵ Council Regulation (EC) No 905/98.

²⁶ This issue will be fully analyzed in chapter three.

²⁷ 'Committee on Anti-Dumping Practices – Semi-Annual Report under Article 16.4 of the Agreement – European Communities', WTO Document Code: G/ADP/N/59/EEC, 26/01/2000 <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm> (1 December 2002).

has gone down, while those against China has risen sharply. From 1979 to 1998, the number of the EU's anti-dumping cases against third countries decreased. The average cases initiated per year declined from 42 ten years ago to 33 within the residual ten years, while cases concerning China increased from an average 2.3 per year in the first ten years to 4.6 in the last ten years, which occupied from 5.5 percent of the total EU's anti-dumping cases for the former period to 13.8 percent for the later ten years.²⁸

3. The actual effect of the EU's anti-dumping policy towards China is not consistent with the objectives of anti-dumping policy (i.e. to restore fair competition, offset the injury and limit the sharply increasing quantity of dumped goods rather than exclude them from the EU). But, in fact, statistics of imports from China suffering from the effects of EU's anti-dumping measures show that they exceed their original purpose. Due to the factors discussed above, most Chinese exporters involved in investigations suffer very high anti-dumping duties so that they are virtually excluded from the European market since then.²⁹ For example, China exported more than 200 million bicycles to the EU in 1991, but since the anti-dumping duty as high as 30.6 percent was imposed in 1993, it has been excluded from the European market gradually. Similarly, colour televisions from China have almost disappeared from the European market now after being levied 44.6 percent anti-dumping duty³⁰. From this point, it is easy to see that the virtual effects of the EU's anti-dumping policy obviously deviate from its purpose!

These inconsistencies, both in the legislative framework of the EU and in the practical

²⁸ 'The EU's Anti-Dumping Practice against China' (Chinese)
<<http://www.ec3286.com/report/zhengce/002.htm>> (1 December 2002).

²⁹ 'There were still thirty-one Chinese products subject to anti-dumping measures in the cases initiated between 1988 and 1994. In the majority of these cases, the rates of duty were above 20 percent. In a number of cases, the rates of duty were even above 50 percent.' Donghui Fu, 'EC Anti-Dumping Law and Individual Treatment Policy in Cases Involving Imports from China' (1997) 31(1) *Journal of World Trade*, 73 at p 76.

³⁰ 'Anti-Dumping Measures against China Sharply Decrease Chinese Exports'
<<http://www.peopledaily.com.cn/zcxx/2000/08/082110.html>> (1 December 2002).

effects of the application of the rules, form the subject of study of this thesis. It is here argued that there is real urgency in providing such an analysis and a genuine need to formulate practical solutions. The needs are pressing on both sides. It is argued that the current rules undermine fair competition in the EU market and, eventually, may lead to retaliatory measures being taken against the EU. Furthermore, Chinese-EU relation may be undermined if the current policy continuous to be followed.

As previously discussed, the current EU's anti-dumping rules against China already exceed this purpose, which is to offset the injury and discourage increasing impacts of dumped imports. In fact, imports from China, where anti-dumping measure have been taken, have decreased rapidly. In the long term, this will have deleterious effects on the economic development of the EU itself.

In addition, the anti-dumping measures imposed on Chinese exporters by the EU are likely to stimulate trade retaliation actions by China in the future. China has developed its own anti-dumping legislation since January 21, 1997, when the Chinese State Commission for Economy and Trade announced it was setting up investigation mechanisms to combat dumped and subsidized imports into the People's Republic of China.³¹ On 25 March of the same year, China formally promulgated its legislation on anti-dumping – the Regulation on Anti-Dumping and Countervailing Measures. The current law was amended on 31 October 2001.³² Article 56 provides:

Where a country (region) discriminatorily imposes anti-dumping measures on the exports from the People's Republic of China, China may, on the basis of the actual

³¹ Craig Pouncey, 'The New Anti-Dumping Law of the People's Republic of China: the Dragon Bites Back' (1997) 3(4) Int. T.L.R., 143 at p 143.

³² Regulations of the People's Republic of China on Anti-Dumping, adopted at the 46th Executive Meeting of the State Council on 31 October 2001, promulgated by Decree No. 328 of the State Council of the People's Republic of China on 26 November 2001, and effective as of 1 January 2002. WTO Document Code: G/ADP/N/1/CHN/2. <http://docsonline.wto.org/gen_search.asp> (1 December 2002).

situations, take corresponding measures against that country (region).

Therefore, we should have the worry that China may use its anti-dumping legislation against products imported from the EU to retaliate against the latter's unjustified measures suffered by Chinese exporters. China entered the WTO on 11 December 2001, which will greatly strengthen its economic growth and increase its share of world trade. It is estimated that China's real imports from Western Europe will increase from 28,571 Million US Dollars in 1995 to 50,182 Million US Dollars in 2005,³³ and it will become the EU's second largest economy and trading partner next to the US in twenty years, rather than the 10th largest trading partner of today.³⁴ Therefore, if the EU does not adjust those undue points in its current anti-dumping legislation against China and if its anti-dumping measures are found to have been unduly imposed on Chinese exports, China will have the capability to adopt similar actions to imports from Europe and exclude the European exporters from the Chinese market. From this point of view, the consequence of such retaliation measures towards the EU cannot be underestimated.

Furthermore, when we consider the consequences of the EU anti-dumping legislation and practice against China, Chinese exporters are those who suffer the adverse effects directly. This constitutes the largest obstacle to the development of EU-China trade relations. Here, we should make one point clear: the development of exports from China to the EU is not only in the interest of China but also in the interest of the EU. The two sides are at different levels of economic development: the EU needs a large amount of cheap and low value-added products that can be well supplied by Chinese exporters, while China imports expensive and high-technology products from the EU. This means that a substantial part of Chinese products are not in direct competition with the products of EU

³³ D Bhattasali and M Kawai, 'Implications of China's Accession to the World Trade Organization' at p 18. < <http://www.worldbank.org.cn/English/content/wto-implications.pdf>> (1 December 2002).

³⁴ Yukon Huang, 'Realizing China's Potential' <<http://www.worldbank.org.cn/english/content/529z6146591.shtml>> (1 December 2002).

industry. Furthermore, Chinese products provide an economic advantage for the EU's processing industry and European consumers. Based on this point, to develop a sound trade relationship for closer cooperation between the EU and China is very important. The negative policy of the EU that encourages anti-dumping actions against Chinese products will definitely affect the interests of both sides and undermine their relations. Particularly now that China has entered the World Trade Organization, its economic reforms will be further deepened based on free market principles. So, if the EU does not adjust its current policy, the 'analogue country' and 'one country one duty' approaches for Chinese exporters will certainly stimulate greater controversies.³⁵

II. The structure of the thesis

This thesis consists of seven chapters. It begins by explaining the development and key concepts of the Agreement on the Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement), which provides a legal framework for the EU anti-dumping legislation. Chapter two examines the main substantive and procedural rules of the EU's anti-dumping regulations applicable to China. The following chapter identifies the legal problems and issues arising from the above legislation in practice. Together the first three chapters constitute the theoretical and practical analysis of the EU anti-dumping legislation towards China in this thesis. The following chapter elucidates China's current economic situation and prospects after more than twenty years' reforms. It thus presents the need for the EU to adopt an anti-dumping policy which corresponds to China's economic development. In order to suggest solutions to the problems and issues identified in chapter three, chapter five makes a comparative study of other developed countries' anti-dumping legislation applicable to China. Due to China's accession to the WTO, new legal problems and disputes may arise with regard to the EU's anti-dumping practice towards China. They are illustrated in chapter six. Finally, in chapter seven, the

³⁵ China's economic reforms and prospects are analyzed in chapter four.

thesis concludes by proposing solutions to all the issues identified above for both EU and China.

III. Chapter outlines

Chapter one focuses on the analysis of the GATT anti-dumping legislation, which provides the framework for EU's anti-dumping law. The legislation in force includes Article VI of the GATT and the WTO Anti-Dumping Agreement. This chapter analyzes the nature, history, objectives and main provisions of these rules, especially those regulating imports from state trading countries. It concludes by identifying two practical problems arising from the legislation with regard to state trading countries. First, the rules are too out of date to accommodate the current situation of transitional economies properly. Second, they are too simple and vague to be applied by the WTO Members fairly. They are also the key reasons behind the legal problems arising from the EU's current anti-dumping legislation towards China.

Chapter two elaborates the EU anti-dumping legislation. First, it examines the evolution of the rules, especially those applicable to China. Second, it introduces the objectives, key concepts and contents of the Regulations in force. Finally, it gives a general analysis of the enforcement of the rules with regard to China. Thus, this chapter provides a theoretical basis to further discuss problems and issues arising from these rules in the next chapter.

Chapter three focuses on unreasonable factors in the current EU's anti-dumping policy towards China. It examines four different methodologies adopted by the European Commission,³⁶ including: analogue country method, conditional market economy treatment, one country one duty rule and

³⁶ The European Commission is the authority in EU's anti-dumping investigations.

individual treatment. For each of them, the relevant rules in force, outcomes of the enforcement and legal problems arising in practice will be analyzed respectively. Therefore, this chapter constitutes a significant part of the thesis.

Chapter four examines China's economic reform of foreign trade, enterprise, pricing and financial systems and their development prospects after its accession to the WTO on 11 December 2001. Pre-reform conditions, progress made after the reform, relevant legislation, and commitments made on China's accession to the WTO are illustrated respectively for the four areas. Of crucial importance in this chapter is the Report of the Working Party on China's accession to the WTO.³⁷ This report provides the analysis – economic and legal – which corroborates the central argument of this thesis that the EU, by failing to take into account the very real changes that have occurred in the Chinese economy, is acting unreasonably in its application of its anti-dumping regime.

Chapter five examines alternative approaches to anti-dumping legislation applicable to China. First of all, it introduces anti-dumping legislation of the U.S., Australia, New Zealand and Japan briefly. It then enumerates the different approaches adopted by these countries to identify NMEs, calculate normal values of imports from these economies and determine anti-dumping duties for dumped products. In particular, it makes a comparative analysis of legislative amendments made by these countries due to China's economic reforms. Based on case studies, these approaches have turned out to be more reasonable and fair than that of the EU in practice, because these countries have adjusted their anti-dumping policy to the extent that can better accommodate the present economic situation of China as a transitional economy. The comparative study made in this chapter provides important references to proposals given to the EU in the conclusion of the thesis.

Chapter six explores new issues and disputes that may arise with regard to the EU's

³⁷ 'Report of the Working Party on the Accession of China', 1 October 2001, WTO Document Code: WT/ACC/CHN/49. <http://docsonline.wto.org/gen_search.asp> (1 December 2002).

anti-dumping practice after China's accession to the WTO as a developing country. First, it analyzes Article 15 of the GATT Anti-Dumping Agreement and its application in the Indian Bed Linen case.³⁸ This provision basically provides a developed country Member's obligation to actively consider the possibility of constructive remedies prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country. Second, it illustrates the special and differential treatment (SDT) for developing and least-developed country Members under the WTO dispute settlement system. After that, it enumerates three types of foreseeable EU-China anti-dumping disputes after China's accession to the WTO. Finally, it indicates potential difficulties for China to invoke the above-mentioned provisions to protect its trade interests against the EU's anti-dumping decisions. In this way, chapter six deepens the study of this thesis from a prospective point of view.

Chapter seven provides the conclusion to this thesis. First, it summarizes the legal problems and issues arising from the EU's current anti-dumping legislation towards China. Second, it emphasizes the urgency to find solutions to these problems. Third, it examines their underlying reasons from the perspective of both the EU and China. Finally, based on the study made in the previous chapters (i.e. the theoretical and practical analysis of the legislation, the illustration of China's economic development, the comparative study of alternative approaches of anti-dumping legislation towards China, and the deduction of new issues and disputes that may arise with regard to the EU's anti-dumping practice due to China's WTO membership), it attempts to propose corresponding solutions to the problems and issues posed previously. Thus, this chapter becomes the highlight of the thesis.

³⁸ 'European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India', Report of the Panel, WTO Document Code: WT/DS141/R. Available from: Available by searching through <http://docsonline.wto.org/gen_search.asp> (1 December 2002).

IV. Some comments on methodology

A. Analysis methods

Five different types of research methods will be used to analyze issues in this thesis: statistical, explanatory, descriptive, comparative and prescriptive analysis.

Statistical analysis is applied to identify legal problems and issues arising from the EU anti-dumping legislation towards China. They can be shown clearly by examining the statistics relating to EU-China trade of different years, such as the total anti-dumping measures taken by the EU vis-a-vis those imposed on Chinese exports, overall imports of the EU vis-à-vis those from China.

As to the explanatory analysis, it will be used to examine the nature of the EU's anti-dumping law against China. Those basic notions and fundamental questions will be explained in this way. They include:

1. What are the major principles and basic purpose of this law?
2. When and how should it be applied?
3. What kinds of problems and difficulties arising when it is put into practice and why?
4. Why we need to consider those side effects?
5. How can we attempt to adjust the current measures to offset the unfavourable effects?

The descriptive analysis is designed to examine some of the EU's typical anti-dumping cases against China, such as the Bicycles case in 1993,³⁹ in which the EU refused to grant

³⁹ Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty OJ 1993 L228/1.

individual treatment to Chinese producers/exporters, including joint-ventures with foreign investment, even many Hong Kong companies. This case set out the principles that were subsequently applied by the EU in dealing with Chinese exporters. Since that case, a single anti-dumping duty was imposed in respect of all exporters in China and applied to all Chinese products exported to the EU, regardless of the different dumping margins established for each of the producers or exporters concerned. In this way, a Chinese exporter who does not practice dumping is subject to an anti-dumping duty if other Chinese exporters are dumping their products. Such a description of cases is expected to support and to further understand the key ideas in this dissertation. Besides, I will use this method to describe the favourable results of China's economic reforms, which include those on price, enterprise, financial and traditional foreign trade systems.

With regard to the comparative and prescriptive analysis methods, they will be used in chapter five of this thesis. After examining and demonstrating the unreasonable factors in the current EU's anti-dumping measures against China, I will analyze the anti-dumping policies of the U.S., Australia, New Zealand and Japan. These countries, when compared with the EU, are much more flexible and therefore justified in their practices, because they are fully aware of the changes of China's economic structure after reform and they have made corresponding adjustments to their previous policies. This comparative approach yields insights into the approach taken by the EU and provides valuable pointers as to how the EU approach might be reformed. It is argued that the EU's anti-dumping practice should be consistent with the purpose of the anti-dumping measures: to offset the injury and restore fair competition.

B. Sources of the database.

As far as the database and references needed are concerned, they can be categorized into six types: opinions and suggestions from relevant officials and scholars directly through interviews, experience of positively involving EU's anti-dumping proceedings towards

NMEs by doing internship in relevant law firm, current legislation in force, typical cases of recent years and literature review.

1. Interviews

The EU's anti-dumping policy towards China is a very sensitive political issue to the EU-China trade relationship, particularly because there has been no significant change considering the implementation of the amended legislation, and the EU still treats China as an NME in most of its anti-dumping proceedings. Therefore, there is little official information relating to the disputes publicly available. For this reason, this thesis draws upon the legal and economic expertise, information and opinions obtained in interviews conducted with officials of the European Commission and the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China (MOFTEC).

The purpose of the interviews was to get opinions about the EU's current anti-dumping practice towards China, including: Chinese official standpoint towards the EU practice, real difficulties for Chinese exporters to get the conditional MET, the EU's response and arguments towards these issues, prospects of China's economy and the development of its anti-dumping legislation, proposals for possible adjustments of the EU policy and strategies suggested to Chinese exporters.

Information thus obtained has been incorporated into relevant sections of the thesis to support my argument. In particular, original analysis was extended and new ideas and issues were brought out through interviews. For example, chapter six examines new issues with regard to the EU's anti-dumping practice towards China after the latter's accession to the WTO. It also proposes necessary strategies for China and enumerates potential difficulties that it may encounter at that time. All of these ideas generated from interviews in Brussels with experienced anti-dumping lawyers. In addition, during interviews, communication with professionals and experts offered me opportunities to

test my argument in the thesis and the depth of my research. In this way, interviews constitute a very important part of this study.

These interviews were semi-structured and each lasted between 45 to 120 minutes. A list of these interviews is provided in tables one and two below. In the course of some meetings, certain officials provided insights relating to some of the key issues discussed in this thesis. They also requested that on certain sensitive issues I did not attribute the point they raised directly to them. Throughout this thesis, I have incorporated the analysis where relevant without attributing the points raised to any particular individual.

2. Internship in law firm

Anti-dumping is a very complex and technical issue. In order to identify the unreasonable factors of the EU's current anti-dumping practice towards imports from China, and to understand the real difficulties that Chinese exporters experience when they apply for the conditional MET in the EU's anti-dumping proceedings, experience of positively involving in these proceedings is necessary. Therefore, I did an internship under the supervision of professionals in Hammond Suddards Edge, Brussels. The law firm is famous for its excellence to representing exporters from NMEs in the EU's anti-dumping investigations.

The internship lasted for six weeks, during which I participated in filling anti-dumping questionnaires for exporters from NMEs and MEs, and analysing other issues of anti-dumping arising after the investigation ended, such as the continuation and reapplication of undertakings. Particularly, the practical issues that I encountered during my internship led me to consider new disputes that might arise towards the EU's anti-dumping practice after China's accession to the WTO.⁴⁰ Therefore, such experience significantly contributes to the study of this thesis.

⁴⁰ This issue is fully analyzed in chapter six.

3. Legislation in force.

They are the most important sources needed in this study. They include:

- GATT rules

The 'General Agreement on Tariffs and Trade 1947' and the 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Both will be considered because they provide the basic framework for GATT Members' anti-dumping laws'.⁴¹

- The EU anti-dumping legislation⁴²

The current EU anti-dumping legislation against China will be fully analyzed throughout this thesis.⁴³ They include: Council Regulation (EC) No 384/96, 2331/96, 905/98, 2238/2000 and 1972/2002,⁴⁴ and other legal documents establishing criteria to grant the individual treatment.⁴⁵

- Other developed countries' anti-dumping legislation relating to China.⁴⁶

They include the United States, Australia, New Zealand and Japan. Anti-dumping legislation of these countries will be analyzed and compared with that of the EU in chapter five.

⁴¹ They are examined in chapter two.

⁴² Available from <<http://europa.eu.int/comm/trade/policy/dumping/legis.htm>> (1 December 2002).

⁴³ The legislation is addressed in chapter two. Legal problems and issues arising from it are analyzed in chapter three.

⁴⁴ See *fn* 2 above.

⁴⁵ Proposal for a Council Regulation amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community /*COM/97/0677 final – ACC. OJ 1998 C70/15. Proposal for a Council Regulation amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community /*COM/2000.0363 final – ACC 2000/0160.

⁴⁶ These legislation is available by searching through <http://docsonline.wto.org/gen_search.asp> (1 December 2002).

- Chinese Foreign Trade Law and the Law on Joint ventures.

It is essential to study them when we consider the basis to calculate the normal values of products imported from China and to judge the nature of certain Chinese exporters (i.e. whether they are State-trading enterprises or not).

4. Typical cases of recent years (case studies).⁴⁷

They include anti-dumping cases against China initiated by the EU and other developed countries such as the U.S., Australia, New Zealand and Japan. They are used to explain both the principles used by anti-dumping authorities and to illustrate vividly the key ideas and problems outlined in the thesis.

5. Literature review.

The literature review needed in this study includes the research of anti-dumping textbooks, articles and reports from journals, websites of main international organisations, such as the EU, WTO and World Bank. All of these supply the latest information and arguments relating to the issues discussed in the thesis. They are listed in the Bibliography.

Throughout the literature search, I have not found any academic opinions opposite to my central arguments in the thesis. In fact, except for the EU's own analysis in its anti-dumping regulations and legal proposals, most of the literature is critical of the EU's over stringent anti-dumping practice towards imports from China. The secondary sources cited in this thesis support the central argument that the anti-dumping practices of the EU have the effect of protecting EU industry and act as a protectionist device rather than correcting the specific problem for which the anti-dumping regulations were designed.

⁴⁷ See 'Table of Cases'.

Table One: Interview details (China)		
10 July 2001	Beijing	Jingchun Shao, Professor of Law, University of Beijing.
12 July 2001	Beijing	Weiping Huang, Professor & Dean, School of Economics, Renmin University of China.
13 July 2001	Beijing	Dawei Chen, School of Economics, Renmin University of China.
17 July 2001	Beijing	Xiangjun Gao, Director of the Legal Department, Chinese Chamber of Commerce for Import and Export of Machinery and Electronic Products (CCCME). ⁴⁸
19 July 2001	Beijing	Yu Ma, Senior Research Fellow, Chinese Academy of International Trade & Economic Cooperation Ministry of Foreign Trade and Economic Cooperation.
23 July 2001	Beijing	Shuguang Xia, Bureau of Fair Trade for Imports and Exports, Ministry of Foreign Trade and Economic Cooperation, the People's Republic of China.
3 August 2001	Kunming	Pingwei Wu, Manager to the Import & Export Department, Yunnan Malong Chemical Construction Community., LTD. ⁴⁹

Table Two: Interview details (Brussels)	
24 June 2002	Lingchen Pu, Counsel and Lawyer, Eversheds.
25 June 2002	Jing Shen, Attorney at Law, Theodore goddard.
27 June 2002	Richard King, Lawyer, White & Case.
27 June 2002	Hui Zhao, Lawyer, White & Case.
12 July 2002	Martin Lukas, Administrator of the Directorate-General for Trade, European Commission.

⁴⁸ This interview was carried out by phone.

⁴⁹ Yunnan Malong Chemical Construction Community, LTD is the first Chinese company which got the EU's market economy treatment.

Chapter One

The GATT Framework

Introduction

If a company exports a product at a price lower than the price it charges on its home market in the ordinary course of trade, the product is considered as being dumped. Since dumped goods are likely to cause material injury to domestic industries of the importing country, international trade policies recognize that dumping is a practice to be condemned. Therefore, governments of the importing country can take action against dumping in order to protect their domestic industries. Today, the Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 (often called the ‘Anti-Dumping Agreement’)¹ and Article VI of GATT operate together and provide the framework for the WTO Members’ anti-dumping legislation. They allow governments to take action against dumping where there is genuine (‘material’) injury to the competing domestic industry. Typically the action is to impose extra import duty on the dumped product from the exporting country, so that its price can be brought closer to the ‘normal value’ and the injury to the domestic industry of the importing country can be removed. Though the rules do not pass any specific judgment in any anti-dumping case, they discipline the Members’ anti-dumping actions and regulate how their governments can or cannot react to dumping.²

¹ ‘Anti-Dumping’ <http://www.wto.org/english/tratop_e/adp_e/antidum2.htm> (1 December 2002). The legislation is available from the WTO website. <http://www.wto.org/english/docs_e/legal_e/legal_e.htm#finalact> (1 December 2002).

² ‘Trade into the Future: the Introduction to the WTO Agreement on Subsidies, Safeguards: Contingencies, etc’ <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm> (1 December 2002).

This chapter focuses on the analysis of the GATT anti-dumping legislation. It consists of four parts. The first provides a concise description of the development of the rules. The rules in force at present have evolved over four stages: anti-dumping rules prior to GATT, Article VI of GATT 1947, the GATT Anti-Dumping Code and The Uruguay Round Anti-Dumping Agreement. I chart the progress and character of each of them. Part two is the key section of this chapter. In it I analyze the Anti-Dumping Agreement in detail. The nature and objective of the Agreement, its main contents, key concepts and procedural requirements are illustrated in this part. Since this study is about the EU anti-dumping legislation against China, which is based on the GATT anti-dumping rules with regard to state-trading countries, I illustrate provisions dealing with state trading issues in the General Agreement in part three. This section contains two types of rules: one is Article XVII of the GATT 1994 that focuses on state trading enterprises (STEs) specifically, another is the GATT anti-dumping rules with regard to state trading countries³. Some of the issues analyzed are not relevant to the theme of my thesis, but they are discussed here for the completeness of the description of the GATT rules, so they will not be dealt with further.

In the last part of the chapter, I analyze three practical problems that have arisen from the GATT anti-dumping provisions against exports from state trading countries.

1. They do not specify whether the anti-dumping authority or exporting country bears the burden of proof of state trading issues.
2. The rules are too old to regulate the current situation properly.
3. They are too simple and too vague to be applied by the WTO Members fairly.

These problems are noticeable because they leave wide discretion to the WTO Member's

³ It is the second interpretative note to paragraph 1 of Article VI in Annex I to 'General Agreement on Tariffs and Trade 1994'.

national authorities with regard to NME issues, and they are likely to lead to judgments which are particularly adverse to the so-called state-trading countries. In fact, under some WTO Members' NME methodologies, their authorities use 'nearly unlimited discretion to detect dumping where none exists and calculate related dumping margins at their will.'⁴ It no doubt undermines the fair competition principle of international trade.

In summary, this chapter analyzes the GATT anti-dumping rules in force, which provides the framework for the EU anti-dumping legislation with regard to China. It explains and analyzes key concepts and general procedural requirements for anti-dumping measures, and thus forms the conceptual basis for the dissertation.

1. The development of GATT anti-dumping rules.

'A product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.'⁵ Dumping is a traditional way to increase exports or capture a new market for a particular product. However, it is likely to cause material injury or to threaten the economic benefits of the home producers in the importing country. Consequently, the latter will take corresponding action to stop this dumping practice and offset the injury.

A. Development of anti-dumping rules prior to GATT.

At the beginning of the last century, many industrialized countries realized the unfavorable effects of dumping, and regarded it as an unfair method of competition that

⁴ Alexander Polouektov, 'Non-Market Economy Issues in the WTO Anti-Dumping Law and Accession Negotiations, Revival of a Two-Tier Membership?' (2002) 36 (1) *Journal of World Trade* 1 at p 31.

⁵ Art. 2 (1), Anti-Dumping Agreement.

should be curbed. So, it was held that the importing country has the right to protect itself by taking anti-dumping measures. In order to protect the domestic industry and limit the foreign exporter's dumping practice, Canada first pointed out in 1904 that an anti-dumping duty should be imposed on imported products whose export prices was lower than its fair market value in the exporting country.⁶ Since then, many other industrialized nations such as New Zealand, Australia, the United Kingdom and the United States have enacted anti-dumping laws. The purpose of the legislation was to offset the injury caused by dumped goods with anti-dumping duties.

B. Article VI of the GATT.

Due to the increasing volume and high speed development of global trade, dumping became an issue calling for international attention. Consequently, anti-dumping legislation was developed as binding international rules for the first time within the GATT framework when the latter came into force on 1 January 1948. The rules on the application of anti-dumping measures were set out in Article VI. They establish the criteria to determine dumping,⁷ state the purpose for which anti-dumping duties may be imposed⁸, and prescribe conditions under which the measures can be taken.

There are three important features of these rules which confine the application of anti-dumping measures. Article VI stipulates that anti-dumping measures may only be taken when products are introduced into an importing country at less than their normal value. So the definition of normal value is crucial to the appreciation of the rules. Article VI enumerates methods for the application of 'Normal Value' as:

- a. 'The comparable price, in the ordinary course of trade, for the like product

⁶ J. Viner, *Dumping.- A Problem in International Trade* (Chicago, University of Chicago, 1923) (Reprints of Economic Classics, New York, Kelley, 1966), 192.

⁷ Art. VI (1), GATT.

⁸ Art. VI (3), GATT.

when destined for consumption in the exporting country'; or

- b. 'The highest comparable price for the like product to any third country in the ordinary course of trade'; or
- c. 'The cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit'.⁹

Article VI then provides that before any anti-dumping or countervailing duty may be imposed by an exporting country, the importing country must have determined that the effect of the dumping 'is such as to cause or threaten material injury to an established domestic industry or to materially retard the establishment of such an industry'¹⁰.

Finally, the rules state the maximum level of the anti-dumping duty that can be levied, i.e. the duties imposed on dumped products may not be greater than the dumping margin¹¹.

Based on these points, on the one hand, we can state that the General Agreement set forth ground rules at the international level. It is clear that these rules are based on the purpose of anti-dumping measures, i.e. to offset injury caused by dumping and restore fair competition rather than limit normal exports. So, it was a significant step forward. However, practice shows that the rules were seriously flawed and were not precise enough to achieve the aim of anti-dumping legislation.

First, the GATT anti-dumping rules are not precise and complete enough. In particular, they ignored the procedures that should be followed when anti-dumping measures are taken. Therefore, the rules actually left too broad a scope for various interpretation and implementation by the GATT Contracting Parties. In short, they were not well

⁹ Art. VI (1), GATT.

¹⁰ Art. VI (6)(a), GATT.

¹¹ Art. VI (2), GATT.

implemented according to their purpose.¹²

Second, as one of the original Contracting Parties of the GATT, the United States took the advantage that it was exempt from the injury requirement under the GATT ‘grandfather clause.’¹³ Under it, the US only complied with part II of the Agreement ‘to the fullest extent not inconsistent with existing legislation.’ Consequently, Article VI was not binding on one of the main Contracting Parties. It reduced the effectiveness of Article VI in practice, because those GATT major Contracting Parties applied anti-dumping and countervailing measures far more than others. From this point of view, further improvement to Article VI of GATT was needed.

C. The GATT Anti-Dumping Code.

Due to the defects of the rules in Article VI, negotiations on anti-dumping issues were highlighted in the Kennedy Round which began in 1963. The conclusion of the ‘Agreement on Implementation of Article VI of the GATT’ (also referred to as the ‘GATT Anti-Dumping Code’) in Geneva, on 30 June 1967, was deemed to be a significant achievement. At first, it imposed binding obligations on all Contracting Parties, who pledged formally to revise their national legislation and make it consistent with the code¹⁴. Thus, the rules became more effective. Besides, it provided more precise rules governing the criteria and procedures to be followed when determining dumping and injury.¹⁵ In addition to that, the Code also established a permanent Committee on anti-dumping practices, whose task is to review regularly the anti-dumping legislation of the

¹² John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 2nd edn., (London : MIT Press, 1997) at p 256.

¹³ GATT, Basic Instruments and Selected Documents (hereinafter cited as GATT, BISD), Vol.1, at p. 81 (Geneva, 1952).

¹⁴ Art 14, 1967 GATT Anti-Dumping Code.

¹⁵ Arts. 2 and 3, 1967 GATT Anti-Dumping Code.

Contracting Parties and the measures that they take to implement it.¹⁶

The 1967 GATT Anti-Dumping Code was updated during the Tokyo Round mainly because of

the growing dissatisfaction of the European Community with the interpretation of the injury requirement by US authorities and the simultaneous realization in the Community that certain Code requirements, notably the causation standard, might be too stringent.¹⁷

Consequently, a new 'Agreement on Implementation of Article VI of GATT' was concluded on 30 June 1979. Compared with the former Anti-Dumping Code, it provided more realistic criteria of dumping by requiring the segregation of injury caused by dumping from injuries caused by other factors, and then an assessment of injury caused by the dumped products. Furthermore, the new code stipulated more explicit criteria for assessing the injurious effects of dumping on the importing country's domestic industry as well as more detailed rules about price undertakings.¹⁸

D. Uruguay Round Anti-Dumping Agreement.

Anti-dumping measures were an important subject in the Uruguay Round which concluded the 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994' (Anti-Dumping Agreement). It was included in Annex 1A of the WTO Agreement with other multilateral agreements automatically binding on all WTO Members. It revises the rules governing the application of anti-dumping measures contained in the 1979 Anti-Dumping Code, and takes over the proposals from two major

¹⁶ Art. 17, 1967 GATT Anti-Dumping Code.

¹⁷ Ivo Van Bael & Jean-Francois Bellis, *Anti-Dumping and other Trade Protection Laws of the EC* 3rd edn. (Bicester : CCH Europe, 1996) at p 28.

¹⁸ Art. 4, 1979 GATT Anti-Dumping Code.

groups in the negotiation: the US and the European Community (EC)¹⁹ as well as ‘Japan and most of the newly industrialized countries (NICs)’.²⁰

Although the basic foundations remain intact, the 18 Articles of the new Agreement substantially amend most of the 16 Articles of the 1979 Anti-Dumping Code, and there are two new annexes dealing with verification procedures and the use of best information available in cases of non-cooperation. Provisions dealing with issues such as sales below cost, ‘symmetry’ and ‘comparison of weighted average normal values to weighted average export prices or duty as a cost in refund cases’ were introduced in the new agreement.²¹ Besides, it changed some procedural provisions with regard to provisional duties and reviews. Finally and most important of all, a new Dispute Resolution Understanding (‘DSU’) replaced the old compromise and conciliation system of GATT panels. Compared with the latter, it is more powerful and effective in solving disputes through the new Dispute Settlement Body (‘DSB’).

From the analysis above, we can see that the GATT anti-dumping rules were revised better to meet the real needs of international trade. They were developed to be more precise and more easily applicable than before. They leave less scope for interpretation by the GATT Contracting Parties, and they attempt to avoid anti-dumping rules being utilized as a means of excluding exports from other countries to overprotect domestic industry. The rules have been revised several times because of an important fact: the GATT legislators stress that anti-dumping rules should be observed as a tool to restore fair trade rather than eliminate due competitive trade practice of foreign exporters. This is the original purpose of the GATT framework of anti-dumping rules. It is fundamental for the Contracting Parties to bear this in mind when they later codify and implement their

19 Here I use ‘European Community’ because the EU was not established until the Treaty on European Union entered into force on 1 November 1993.

²⁰ Bael & Bellis, *fn* 17 above at p 29.

²¹ *Ibid.*

own anti-dumping legislation. It also shows that according to the purpose of restoring fair trade, anti-dumping rules should be developed in the trend to better accommodate to new conditions and issues arising.

II. Current GATT anti-dumping rules in force.

A. Nature and objectives of the rules.

At present, both the GATT Article VI and the Anti-Dumping Agreement of 1994 operate together to standardize anti-dumping measures according to their nature: a tool to restore fair competition of international trade.

On the one hand, the rules recognize the possible adverse effects, i.e. material injury on industries of an importing country caused or threatened by dumped products.²² Therefore, they allow importing countries to take action against such practices to protect domestic producers and restore fair competition. These countries can achieve this objective by imposing anti-dumping duties or accepting price undertakings from exporters on a reasonable basis.

On the other hand, 'the important feature claimed in respect of anti-dumping legislation is that it does not restrict trade as such, but merely requires trade to operate fairly.'²³ So it regulates an importing country's anti-dumping action by both establishing standards to judge key factors concerned (such as the fact of dumping and injury) and by setting up anti-dumping procedures.

Based on these points, the rules justify importing countries' anti-dumping action and make it an exception to the GATT basic principles, i.e. non-discrimination

²² Art. VI (1), GATT.

²³ J Cunnane & C. Stanbrook, *Dumping and Subsidies: the Law and Procedures Governing the Imposition of Anti-Dumping and Countervailing Duties in the European Community*. (London: European Business Publications, 1983) at p 2.

with regard to all Contracting Parties. In most cases, anti-dumping measures are to impose extra import duty on certain product from the particular exporting country so as to remove the injury to domestic industries of the importing country and bring the dumped product's price closer to its normal value.

B. Main contents of the rules.

1. Article VI of the GATT.

As we analyzed in Part I.B above, Article VI of the GATT provides preconditions that have to be met before the importing state is entitled to impose an anti-dumping duty. The most important precondition is the requirement that before any action can be taken against any dumped product, the importing country should demonstrate that the product 'causes or threatens material injury to an established industry in the territory of a Contracting Party or materially retards the establishment of a domestic industry.'²⁴ Also, Article VI stipulates that the anti-dumping duties may not be greater than the margin of dumping or the estimated bounty or subsidy determined to have been granted. In addition, it provides that no product shall be subject to both anti-dumping and countervailing duties for the same situation of dumping or export subsidization,²⁵ and these duties may not be applied if the price difference is due to the exemption of the imported product from duties or taxes which would have been borne if the goods had been destined for consumption in the country of origin or exportation, or due to the refund of such duties or taxes.²⁶

2. Agreement on implementation of Article VI of the GATT 1994.

The Anti-Dumping Agreement clarifies and expands Article VI. It provides more precise legal definitions and procedures governing anti-dumping. According to GATT Article VI,

²⁴ Article VI (6)(a), GATT.

²⁵ Article VI (5), GATT.

²⁶ Article VI (4), GATT.

it also allows the government of an importing country to act against dumping where there is material injury to the competing domestic industry. But before doing that, the government has to show much more evidence that dumping is taking place. In addition to that, the government also should calculate the extent of dumping (how much lower the export price is compared to the exporter's home market price), and show the definite causal relationship between the two of them. Finally, it must follow the anti-dumping procedures specified in the Agreement, which is the most significant difference compared with the Article VI of GATT.

In this way, the Agreement comprises three kinds of rules: first, standards to judge the facts that constitute dumping; second, requirements to assess injury; third, procedures that governments must follow when they determine dumping and take anti-dumping action.

C. Substantive rules and key concepts.

Article 1 of the Anti-Dumping Agreement establishes the basic principle that 'an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.'²⁷ That is to say, an importing state can take anti-dumping measures only after it determines three facts according to the Agreement: dumped imports, material injury to domestic industries and the causal relationship between them.

1. Determination of dumping.

Article 2 provides detailed rules to determine dumping, which should be calculated on the ground of fair comparison between the export price of goods concerned and the normal

²⁷ Article 1, Anti-Dumping Agreement.

value. The latter refers to the price of the imported product in the country of origin or export in the ordinary course of trade.

It provides three methods to calculate a product's 'normal value'. The most applicable one is based on the price in the exporter's domestic market. When this cannot be applied, two alternatives are available: the price charged by the exporter in another country, or a calculation based on the combination of the exporter's production costs, other expenses and normal profit margins.

2. Determination of injury.

Article VI of GATT provides that material injury includes three situations:

- a. Material injury itself;
- b. Threat of material injury to an established industry in the territory of a Contracting Party;
- c. Material retardation of the establishment of a domestic industry.

Article 3 of the Anti-Dumping Agreement provides more detailed rules about the determination of injury. It specifies that it 'shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.'²⁸ It also contains rules as to the key factors that should be considered when the government of an importing country determines injury. In Article 3.5, it emphasizes that demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence. In addition to dumped imports,

²⁸ Article 3 (1), Anti-Dumping Agreement.

the authorities shall also examine other factors that may cause the injury, where the adverse effects on the domestic industry of the importing country cannot be attributed to dumped imports.

A new provision in the Anti-Dumping Agreement is Article 3.3 on cumulative evaluation. It authorizes cumulation of imports from countries which are simultaneously subject to anti-dumping investigations. In this matter, authorities must:

- a. determine whether the volume of dumping from each exporting country is not negligible;
- b. carry out a cumulative assessment on the effects of the dumped imports ‘in light of conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.’

3. Definition of domestic industry.

In Article 4 of the Anti-Dumping Agreement, the domestic industry is interpreted for the purpose of assessing injury and causation. It refers to ‘the domestic producers as a whole of the like products²⁹ 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;
- (ii) in exceptional circumstances the territory of a Contracting Party may, for the production in question, be divided into two or more competitive markets and the

²⁹ According to Article 2.6 of the Anti-Dumping Agreement, in the absence of a like product, the one that has characteristics closely resembling those of the imported dumped products will be considered.

producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.³⁰

D. Procedural requirements.

The objective and original purpose of the GATT anti-dumping procedural rules is to ensure the transparency of proceedings, a full opportunity for both the exporting and importing state's domestic producers to defend their interests, and sufficient explanations made by investigation authorities for their determination.³¹

1. Initiation and subsequent investigation.

With regard to anti-dumping investigations, the detailed procedural requirements of the Agreement focus on the sufficiency of petitions, establishment of time limits for investigations, access to information needed by all parties concerned and opportunities for them to present their views and arguments.

Article 5 of the Anti-Dumping Agreement stipulates requirements for the initiation of an investigation. It provides that such investigations should be initiated with a written request submitted by or on behalf of a domestic industry. 'If it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total

³⁰ Article 4 (1), Anti-Dumping Agreement.

³¹ 'Anti-Dumping' <http://www.wto.org/french/tratop_f/adp_f/antidum2.htm> (1 December 2002).

production of the like product produced by that portion of the domestic industry³², this application can be regarded as the request which is made by or on behalf of the domestic industry. However, no investigation can be initiated if domestic producers who support the request are less than 25 per cent of the total production of the like product produced by the domestic industry. The article also specifies that in special circumstances without such a written application, the authorities concerned can decide to initiate an investigation only if they have sufficient evidence of dumping, injury and a causal link to justify the initiation of an investigation.³³ In order to avoid meritless investigation being continued, Article 5.8 provides for immediate termination of investigations if the volume of dumped imports is negligible³⁴ or the dumping margin is de minimis.³⁵ As well, the duration of investigations is set in Article 5.10, which requires the authorities concerned to complete investigations within one year or no more than 18 months after the procedure is initiated.

Article 6 specifies detailed rules on the process of investigation. It includes rules on the notification to interested parties and the collection of evidence. They operate together to ensure the transparency of investigations and the sufficiency of opportunities for parties concerned to comment. Furthermore, the Article stipulates the application of sampling. An individual dumping margin normally should be determined for each known exporter or producer, but when the number of exporters, producers, importers or types of products involved is too large to be determined as usual, the authorities are entitled to apply sampling techniques.³⁶

³² Article 5 (4), Anti-Dumping Agreement.

³³ Article 5 (6), Anti-Dumping Agreement.

³⁴ i.e. dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing state. Article 5 (8), Anti-Dumping Agreement.

³⁵ I.e. dumping 'margin is less than 2 per cent, expressed as a percentage of the export price.' Article 5 (8), Anti-Dumping Agreement.

³⁶ Article 6 (10), Anti-Dumping Agreement.

2. Provisional measures.

Article 7 specifies conditions under which provisional measures can be imposed and the relevant time limits that should be observed. Under the rule, provisional measures may be applied only after:³⁷

- a. an investigation has been initiated and carried out lawfully according to the Anti-Dumping Agreement;
- b. a preliminary affirmative determination on dumping and consequent injury to domestic industry have been made;
- c. such measures are regarded necessary to prevent injury caused by dumped imports during the investigation.

It also provides that provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.³⁸

3. Price undertakings.

Article 8 relates to undertakings to revise prices or cease exports at dumped prices, which may suspend or terminate an investigation without imposing provisional measures or anti-dumping duties.³⁹ However, such price undertakings can be accepted only after a preliminary affirmative determination of dumping, injury, and causality has been made by the authorities of the importing state.⁴⁰ It also emphasizes that undertakings suggested by the authorities of the importing state should be made by the exporter on a voluntary

³⁷ Article 7 (1), Anti-Dumping Agreement.

³⁸ Article 7 (3), Anti-Dumping Agreement.

³⁹ Article 8 (1), Anti-Dumping Agreement.

⁴⁰ Article 8 (2), Anti-Dumping Agreement.

basis.⁴¹ After a satisfactory undertaking is accepted by the former, the investigation should be continued at the request of the exporter or the authorities. If a negative determination of dumping, injury or causality is found in the end, the undertaking shall lapse automatically.⁴²

4. Imposition and collection of duties.

Article 9 stresses that an anti-dumping duty should be less than the margin of dumping if such a lesser duty is adequate to remove injury of the domestic industry in the importing state⁴³. In order to ensure that the anti-dumping duties do not exceed the dumping margin calculated during the investigation, Article 9.3 introduces a new method to be applied in respect of the collection of duties and refunds for the two collection systems operated in the world at present: the retrospective assessment of duties and the prospective determination of duties. Article 9.4 sets forth rules for the authorities of an importing state to calculate the amount of duties by using sampling according to Article 6.10. Finally, an accelerated review by the authorities of the importing state to calculate individual margins of dumping for new exporters is required in Article 9.5. The new exporters refer to those who did not export during the original period of investigation and is not related to any exporter subject to anti-dumping duties.

Article 10 states that both provisional and final anti-dumping duties cannot be imposed unless the facts of dumping, injury and their causality have been determined⁴⁴. It specifies that if the determination of the anti-dumping duty is based on the fact of material injury, the anti-dumping duty may be collected since provisional measures were imposed. The difference between the definitive anti-dumping duty and the provisional duty should be

⁴¹ Article 8 (5), Anti-Dumping Agreement.

⁴² Article 8 (4), Anti-Dumping Agreement.

⁴³ Article 9 (1), Anti-Dumping Agreement.

⁴⁴ Article 10 (1), Anti-Dumping Agreement.

refunded if the former is less than the latter⁴⁵. Article 10.6 also stipulates that in certain exceptional situations (such as massive dumped products appear within very short periods), a definitive duty ‘may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures’.

5. Duration, termination, and review of anti-dumping measures.

Article 11 addresses the duration and termination of anti-dumping duties as well as requirements for periodic review of the measure. It provides that any interested party has the right to request the authorities to examine the necessity of the continued imposition of the duty. If, as the result of such a review, the authorities determine that the injury is unlikely to continue if the anti-dumping were removed or varied, then it shall be terminated immediately.⁴⁶ The ‘sunset’ review is specified in Article 11.3 that any definitive anti-dumping duties are to be terminated no later than five years after they are first applied, unless the authorities determine after a review that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. Any review shall be carried out according to provisions of Article 6 and shall normally be concluded within 12 months from the date when it is initiated⁴⁷. These provisions on review also can be applied to price undertakings⁴⁸.

6. Public notice.

Article 12 provides detailed rules on public notice. Notice is given by the authorities of the importing countries, and shall be forwarded to exporters concerned and other

⁴⁵ Article 10 (3), Anti-Dumping Agreement.

⁴⁶ Article 11 (2), Anti-Dumping Agreement.

⁴⁷ Article 11 (4), Anti-Dumping Agreement.

⁴⁸ Article 11 (5), Anti-Dumping Agreement.

interested parties known to the authorities. This is intended to increase the transparency of anti-dumping procedures and the determination of the measures, so that decisions on the imposition of anti-dumping measures can be based on sufficient facts.⁴⁹

When an anti-dumping investigation is initiated, the authorities shall give public notice, and the GATT Contracting Parties whose products are subject to the investigation as well as other interested parties will be therefore notified⁵⁰. Public notice shall also be given of the determination of preliminary measures. It includes detailed explanations for the preliminary determination of dumping and injury, and relevant law and non-confidential facts referred to⁵¹. When an investigation is concluded with a negative determination of dumping, public notice will be given. If an affirmative imposition of a definitive anti-dumping duty is determined or a satisfactory price undertaking is accepted, a public report will be set forth to notify the suspension of the investigation. Article 12.3 also stipulates that its provisions on public notice ‘shall apply mutatis mutandis to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively’.

7. The committee and dispute settlement.

Article 16 establishes a Committee on Anti-Dumping Practice. Its composition, time for conference and responsibility are provided in the first paragraph of the Article. GATT Contracting Parties shall report all its preliminary or final anti-dumping actions taken to the Committee on time, and semi-annual reports are required to be submitted by the Contracting Parties to notify anti-dumping actions taken within the preceding six months.

Article 17 sets forth that the Dispute Settlement Understanding is applicable to

⁴⁹ ‘Anti-Dumping’, see *fn* 31 above.

⁵⁰ Article 12 (1), Anti-Dumping Agreement.

⁵¹ Article 12 (2), Anti-Dumping Agreement.

consultations and settlement of disputes under this Anti-Dumping Agreement. If a GATT Contracting Party considers that its due benefit under this Agreement is nullified or impaired directly or indirectly, it may request in writing consultations with the Contracting Party(s) concerned. If the Contracting Party initiating the consultations considers that they fail to achieve a mutually agreed solution, and final actions are finally taken by the importing country, it may refer the matter to the Dispute Settlement Body (DSB). According to paragraph 5 and 6 of the article, the DSB shall establish a panel at the request of the complaining party. It shall examine disputes from both fact and interpretation of the Agreement. A special standard of review is established to prevent dispute settlement panels from making decisions which are unreasonable.

8. Final provisions.

Article 18 stresses that GATT Contracting Parties shall take anti-dumping actions according to this Agreement strictly. They must ensure the conformity of their anti-dumping laws with the Agreement, and they shall inform the Committee of any changes in their anti-dumping laws and regulations. Meanwhile, the Committee shall review the implementation and operation of the Agreement annually.

Among all of the above rules, those governing the determination of normal value, undertakings and anti-dumping duties are particularly important to the research of the EU anti-dumping legislation towards China. Therefore, they will be further discussed throughout this thesis.

III. GATT rules on state trading.

Generally speaking, international trade is based on the theory of comparative advantage, and countries can reap economic benefits by expanding their international trade. In the context of GATT principles, it shall be carried out on a fair and non-discriminatory basis.

However, if a government controls an enterprise directly or interferes in its decision-making indirectly, it may act through the firm to provide protection against imports or to advance exports to the detriment of foreign producers. As a result, it will influence world trade in an uneconomic direction and demolish the principles observed in the GATT. Thus, the drafters of the General Agreement paid special attention to the state trading issue. They attempt to place the state trading enterprise in the same competitive position with private traders, and thus to remove the possible trade distortion resulting from the government involvement in an enterprise's decision-making and trade activities.⁵²

Consequently, Article XVII of the GATT 1994 focuses on state trading enterprises (STEs) specifically, and numerous other Articles refer either directly or indirectly to state trading under different topics. They are essentially to ensure that STEs 'operate on the basis of commercial considerations and in a non-discriminatory manner', and 'do not serve to implement otherwise WTO-inconsistent measures, such as quantitative restrictions or subsidies'.⁵³

A. Article XVII of the GATT 1994 and the definition of STEs.

Article XVII is the principal article dealing with STEs and their operations. It sets out the basic idea that STEs' purchases or sales involving either imports or exports should be in accordance with the GATT general principles of non-discrimination and transparency.

The Article does not attempt to make an actual definition of STEs but, in its first paragraph, it enumerates three types of enterprises that they refer to:

- (i) 'State enterprises' (that is, owned by the State);

⁵² 'STR: Why Regulate State Trading?' <http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_9.htm> (1 December 2002).

⁵³ 'STR: The Rules' <http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm> (1 December 2002).

- (ii) Enterprises granted special privileges by the State (for example a subsidy or subsidy equivalent);
- (iii) Enterprises granted exclusive privileges (i.e. a monopoly in the production, consumption or trade of certain goods).

From this point of view, if a private corporation or enterprise receives some special right or privilege from the State, which results in a position to influence the level or direction of trade, it could also be considered as a state trading enterprise.

In order to increase the transparency of the use of state trading to implement various trade-related policies, it also requires that GATT Contracting parties shall notify their STEs to the WTO annually. So, a clear definition of a state trading enterprise which is notifiable is necessary. As a result of the Uruguay Round of multilateral trade negotiations, the Understanding on the Interpretation of Article XVII of GATT 1994 was concluded. One of its main features is the ‘working definition of state trading enterprise’ contained in paragraph 2 of the text as:

‘Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports’.

From this definition, we can once again infer the important criteria for a STE are that it enjoys exclusive or special rights or privileges, which are normally unavailable to other private enterprises in the same field. These rights and privileges give the enterprise advantages over others, and thus influence imports or exports by its buying and selling activities.

Here, we should also stress one point that ‘the WTO does not seek to prohibit or even

discourage the establishment or maintenance of STEs, but rather to ensure that they are used and operated in a manner consistent with WTO principles and rules'.⁵⁴

B. GATT anti-dumping rules with regard to state trading.

In addition to the core provisions in Article XVII and the Understanding, a number of other GATT Articles also deal with state trading under different topics. In the context of the GATT anti-dumping rules, this issue is taken into special account when products exported from a state trading country are initiated with an anti-dumping investigation by an importing country's domestic industry. In that case, the GATT anti-dumping rules are applied to state trading countries and non-state trading countries in a similar way except that the methods to calculate normal value of products exported from the former are different.

The second interpretative note to paragraph 1 of Article VI in Annex I to the GATT 1994 states that:

It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of Paragraph 1, and in such case importing Contracting Parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

This provision provides the basis for national anti-dumping laws to establish the rules with regard to state trading. It points out the possible difficulties when calculating the normal value of products from a state trading country. However, it does not specify whether the anti-dumping authority or the exporting country bears the burden of proof of state trading issues. Furthermore, it is too simple and does not provide any alternative

⁵⁴ Ibid.

criteria or methods to establish it.⁵⁵ Unfortunately, this rule remained unattended, was conveyed by negotiators to a new text and linked to Article 2.7 of the WTO Anti-Dumping Agreement.⁵⁶ Therefore, the GATT rules on dumping actually give the importing country the discretion to determine normal value of allegedly dumped imports originating in state trading countries in the way that they like.

When we refer to this rule, we should notice that it is applicable only ‘in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State’. It has a fundamental problem with the implementation of this provision because today, no country would practically qualify under the criteria.⁵⁷ So, great care should be taken when determining the normal value of products exported from countries that are in a transitional period from NMEs to MEs. That is to say, their products’ normal value cannot be treated exactly in the same way as goods exported from those countries described above, and the domestic price should be the main reference to determine the normal value of exports from these countries in this case.

IV. Practical problems arising when the GATT anti-dumping rules are applied to state trading countries.

Nowadays, Article VI of the GATT and the Anti-Dumping Agreement work together and govern the application of anti-dumping measures taken by Members of the WTO. They provide a framework for the Member’s anti-dumping legislation. Considering their effects at the world level, the most noticeable practical problem arising when the GATT anti-dumping rules are implemented is that they are likely to be used by an importing

⁵⁵ These issues will be further discussed in section IV of this chapter.

⁵⁶ Alexander Polouektov, *fn* 4 above at p 13.

⁵⁷ p 14. *Ibid.*

country as a way to protect its domestic industry. It can be seen that some countries apply their anti-dumping laws as a method of creating a new barrier to trade.⁵⁸ For example, when a provisional duty is levied after an investigation is initiated by an importing country, a period of risk and uncertainty to exporters of certain products concerned is created at the same time. In this way, anti-dumping measures can virtually cause restrictions and distortions on international trade flows. However, with regard to exports from state trading countries which are involved in an anti-dumping investigation, far more practical problems appear when the GATT anti-dumping rules are applied.

A. No provision identifies the burden of proof of state trade issues in the GATT.

The GATT anti-dumping rules do not specify which side in anti-dumping investigations bears the burden of proof with regard to state trading identification. So, GATT Contracting Parties with relatively stronger economic strength such as the EU and U.S. introduce a unilateral interpretation of this sensitive issue. They take the lead to determine which economies are state-trading countries all by themselves. In this way, they transfer the burden of proof to these so-called state-trading countries or NMEs. As a result, according to the current anti-dumping legislation of most WTO Members, if an exporter from an NME asks for MET in anti-dumping investigations, it bears the very heavy burden of proof to demonstrate that it operates under market principles and meets the criteria for the MET established by the authority of the importing country.⁵⁹

This gap of the GATT anti-dumping rules, therefore, becomes the principal factor resulting in the discriminatory treatment towards NMEs and transitional economies in anti-dumping proceedings of today.

⁵⁸ Jackson, *fn* 12 above at p 256.

⁵⁹ This issue is fully illustrated in section II of chapter three.

B. The GATT anti-dumping rules on the state trading issue⁶⁰ seem to be out of date and impractical.

The Protocol was enacted together with the General Agreement on Tariff and Trade 1947, and it has been in force since 1948. While half a century has passed, most state trading countries of these early days have turned to become transitional economies, but the Protocol still is the basis for WTO Member's anti-dumping legislation dealing with exports from these countries.

Here, state trading countries have the same meaning as non-market economies (NMEs), which generally refer to the character of those centrally planned and state-controlled countries. At the time when the Agreement was concluded, most of them were developing countries. Compared with others, they were less developed, and their economic development was completely based on strict government control and budget. Free market and fair competition principles were ignored, and products' prices were determined by the state rather than the market. Under those circumstances, the drafters of the GATT took these issues into account and put forward corresponding resolutions to offset the unfair trading factors that may arise when those developing countries participated in international trade. As a result, they enacted the provision discussed above⁶¹, and it was effective indeed, well observing the international trade principles (i.e. free trade and fair competition).

However, after more than 50 years' development, the world's economy has undergone fundamental changes, especially in those developing countries and communist countries, such as China and the former Soviet controlled states. They were completely NMEs in the 1950's, while after half a century's reform and construction, they have seen tremendous progress in their economic field. As a result, most of them are now in a transitional period

⁶⁰ i.e. the second interpretative Note to Article VI of the GATT.

⁶¹ Ibid.

towards market economies (MEs). The governments do not impose strict control and rigid management on their countries' economy anymore. As the basic rules to develop the economy, free market and fair competition principles have gained more and more attention from the government. They are better respected than ever before, and prices of products are determined by them rather than states. With regard to international trade, their export prices are also mostly constructed by the market.

Here, a good example can be given by examining the economic development of the People's Republic of China, of which dramatic changes have taken place due to economic reform policies since 1979. The reform was designed to accelerate the transformation of the country into a market-oriented economy. Consequently, the prices of over 90 percent of its final goods are now determined by market forces rather than government. This is a fact which has been confirmed by a World Bank Report.⁶² Furthermore, China entered the WTO on 11 December 2001. By negotiating and offering specific commitments relating to all WTO disciplines, including trading rights, pricing policies and state trading, it is no longer a state trading country within the meaning of the second supplementary provision to Article VI, GATT. Based on these facts, though today China is not yet a fully market-oriented economy, it is a country in transition from a centrally government planned economy to a market-oriented economy. So, it definitely cannot be regarded and treated as a state trading country like before.

Generally speaking, countries of this kind are defined as 'transitional economies'. They have the characteristic of market and NMEs, but they develop to the direction of the former and have much less control on the economy than before. This definition covers a wide spectrum of economic structures. Some states are nearer to the traditional definition of state trading than others who are closer to free MEs. Furthermore, within each

⁶² 'China: Reform and Development in 1992-1993', World Bank Discussion Paper No. 215, <http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000009265_3970716144524> (1 December 2002).

transitional economy, some aspects are more liberalized than others. Thus, the situation is highly complex. From this point of view, these states cannot be simply treated as state-trading countries by using the 'analogue country' method to calculate the normal value of their exports when judging whether the products are dumped. With regard to this issue, a set of more fair and reasonable methods and rules specifically for transitional economies should be adopted.

The GATT anti-dumping legislation towards NMEs was enacted in 1947.⁶³ Instead of being dropped, it has been automatically transposed into the WTO Anti-Dumping Agreement in 1994.⁶⁴ Therefore, in contrast to significant advancements in many other areas covered by the GATT provisions, it is almost as vague as it was 50 years ago. Reconsidering the current GATT anti-dumping rules, they regulate exports from either MEs or NMEs, however, they have nothing to say with regard to transitional economies. This is a gap in the rules, and it becomes a great deficiency which results in intense disputes these days, because today only a few completely state-trading countries exist while more and more transitional economies appear on the world stage. From this point of view, the GATT rules do not set forth new provisions, so it cannot accommodate these changes of the transitional economies. Consequently, the gap of the rules leaves too broad a scope for the GATT Contracting Parties, and allows them to apply the rules for NMEs to transitional economies. In this way, they can easily reach the conclusion that exports from those countries are dumped. Obviously, it is neither fair nor reasonable.

C. The GATT anti-dumping rules on the state trading issue are too simple and vague to be applied by WTO Members properly.

The second interpretative Note to Article VI of the GATT is the only rule specially

⁶³ It mainly refers to the second supplementary provision to paragraph 1 of Article VI in Annex I to GATT 1947.

⁶⁴ Article 2 (7), Agreement on Implementation of Article VI of GATT 1994.

providing for exports from state trading countries in the legal context of the GATT and the Anti-Dumping Agreement.

From the definition of dumping analyzed above, we can see that the normal value of a product is the key factor to judge whether it is dumped. As to products exported from non-state trading countries, their normal values are usually decided by their prices in their domestic markets. But with regard to state trading countries, the note⁶⁵ merely provides that ‘a strict comparison with domestic prices in such a country may not always be appropriate’ without giving any further suggestion. This is obviously too vague.

A simple recognition of ‘inappropriateness’ of a strict comparison with domestic prices in state-trading countries has over the years evolved into a trade policy instrument that not only is absurd from the economic viewpoint, but also eminent in its unfairness.⁶⁶

Besides, the rule does not give any guidance regulating the procedure of calculating the normal value of exports of these countries. As a result, it virtually gives the WTO Members the freedom to determine the normal value of allegedly dumped imports originating in state trading countries and corresponding dumping investigation procedures in the way that they regard proper. This is likely to result in unfair judgement against those exporting countries indeed.

For example, in the absence of a GATT regulation on how to determine the normal values of exports from a state-trading country, the EU often uses the analogue third country method to calculate them (i.e. select an ME third country and refer to its domestic sales price of the like product concerned to determine its normal value). Article 2(7)(b) of the EU’s Anti-Dumping Regulation⁶⁷ provides that the exporters in a state-trading country

⁶⁵ i.e. the second interpretative Note to Article VI of the GATT.

⁶⁶ Alexander Polouektov, *fn* 4 above at p7.

⁶⁷ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ 1996 L056/1.

are only granted 10 days to comment on the selection after the Commission's notice indicates the reference country contemplated. 'Given the complexity of the comparison of production processes in different countries and the difficulties in gaining access to detailed information, this period of 10 days will be far too short to submit meaningful comments.'⁶⁸ It will definitely decrease the chance for exporters to participate in the process of the selection of the analogue third country, and will increase the discretionary power of the EU authorities to determine the normal value of products concerned. As a result, a dumping practice is likely to be found under this circumstance, and it is definitely unfair to state-trading countries.

From these points of view, the GATT anti-dumping rules with regard to state-trading countries have some practical problems, so that when they are assimilated by the WTO Members into their own legislation, they may result in unfair factors which are adverse to state-trading countries involved in anti-dumping investigations. This violates the purpose and the trend of development of anti-dumping rules that we discussed before. Consequently, the fair competition principle of international trade is undermined to some extent, and it is harmful to the world's overall economic development.

Conclusions

This chapter analyzes the history, purpose and provisions of the GATT anti-dumping rules, which provides a framework for its Contracting Parties' anti-dumping legislation. It especially focuses on the rules regulating exports from state trading countries.

The GATT anti-dumping rules in force include Article VI of the GATT and the Anti-Dumping Agreement. They work together and govern the application of

⁶⁸ P.V. Schueren, 'New Anti-Dumping Rules and Practice: Wide Discretion Held on a Tight Leash?' (1996), 33(2) Common Market Law Review, 282.

anti-dumping measures taken by Members of the WTO.

The rules are applied to state trading countries and non-state trading countries in a similar way except that the methods to calculate normal value of their exports are different.⁶⁹

There are several practical problems arising from the current GATT anti-dumping legislation with regard to exports from state trading countries arising from the fact that the law does not specify who bears the burden of proof of state-trading, the rules are too out of date to accommodate the current situation of transitional economies properly, and they are too simple and vague to be applied by the WTO Members fairly. In that case, they sometimes result in unfair factors when the WTO Members determine dumping and take anti-dumping actions against exports from the so-called state trading countries, which consequently undermine the fair competition principle of international trade.

In this chapter, the GATT anti-dumping rules are analyzed as a base to discuss one of its Contracting Parties – the EU anti-dumping legislation later on. In the next chapter, the development and provisions of the EU's anti-dumping rules with regard to the People's Republic of China will be examined. Due to the legal gap of the GATT anti-dumping rules, there arise some problems when the EU takes anti-dumping measures against exports from China. These issues will also be considered in the next chapter.

⁶⁹ The second interpretative note to paragraph 1 of Article VI in Annex I to the GATT 1994.

Chapter Two

The European Union's Anti-Dumping Legislation with regard to the People's Republic of China

Introduction

Though the General Agreement on Tariffs and Trade (GATT) anti-dumping rules provide the legal framework for its Member's anti-dumping legislation, only after they are incorporated by the European Union (EU) anti-dumping rules, will they have binding effects on the EU's Member States.

I elaborate the EU anti-dumping legislation in this chapter. The chapter focuses on three issues: the evolution of the rules, their main content and the enforcement of the EU's anti-dumping rules with regard to the People's Republic of China.

In the first section, the development and history of the EU anti-dumping legislation will be analyzed. This anti-dumping legislation is enacted in the form of Council Regulations by the European Community (EC)¹ and Commission Decisions by the European Coal and Steel Community (ECSC) respectively. The two sets of rules used to govern different imports. The EC anti-dumping Regulations are applicable to dumped imports from third countries outside the EC, and the ECSC anti-dumping Decisions govern imports listed in the Annex to the Treaty establishing the European Coal and Steel Community (ECSC Treaty)² and related instruments. The ECSC

¹ I use 'European Community' here in order to distinguish it from the European Coal and Steel Community.

² Annex 1, ECSC treaty.

Decisions have been progressively amended to bring them into line with EC anti-dumping Regulations.³ Therefore, in this section, I will discuss the evolution of the EC anti-dumping Regulations first, then analyze the amendments made for the rules applicable to China in recent years, and finally briefly introduce the development of the ECSC anti-dumping Decisions.

The second part of the chapter will make a general introduction to the EU anti-dumping legislation. Since the ECSC Treaty expired on 23 July 2002, Council Regulation (EC) No 384/96⁴ replaces Commission Decision No 2277/96/ECSC,⁵ and governs products listed in the Annex to the ECSC Treaty.⁶ That is to say, Regulation 384/96 is the EU's current anti-dumping legislation in force. Therefore, its objectives, key concepts, main substantive rules and procedural rules will be explained carefully in this part.

In the first two sections, the terms 'EC' and 'Community' are used instead of 'EU' for two reasons. First, it needs to be distinguished from the ECSC when their anti-dumping legislation is compared. Second, since the EU was not

³ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ 1996 L 56/1, amended by 'Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community', OJ 1998 L 128/18; 'Council Regulation (EC) No 2238/2000 of 9 October 2000 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community', OJ 2000 L 257/2; and 'Council Regulation (EC) No 1972/2002 of 5 November 2002 amending Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Community,' OJ 2002 L305/1.

⁴ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ 1996 L 56/1.

⁵ Commission Decision No 2277/96/ECSC of 28 November 1996 on protection against dumped imports from countries not members of the European Coal and Steel Community OJ 1996 L 308/11.

⁶ Council Regulation (EC) No 963/2002 of 3 June 2002 laying down transitional provisions concerning anti-dumping and anti-subsidy measures adopted pursuant to Commission Decisions No 2277/96/ECSC and No 1889/98/ECSC as well as pending anti-dumping and anti-subsidy investigations, complaints and applications pursuant to those Decisions. OJ 2002 L 149/3.

established until the Treaty on European Union entered into force on 1 November 1993, I use the term 'EC' when analyzing its Regulations published before that date.

The last section of this chapter is about the enforcement of the EU's anti-dumping rules with regard to China. In this part, first, the general situation relating to enforcement will be introduced. Second, main features of the enforcement of the rules will be summarised and analyzed. Finally, problems of the EU anti-dumping legislation towards China will be indicated by enumerating three inconsistencies of facts.

With regard to rules analyzed in the first two parts, some of them are not relevant to the central argument of my thesis. They are discussed here for the completeness of the description of the EU anti-dumping legislation, so they will not be dealt with further. Those applicable to non-market economies (NMEs) and China are the highlights of this thesis, and they will be fully examined in the next chapters.

In short, this chapter elaborates the EU anti-dumping legislation by analysing its evolution, key concepts, substantive and procedural rules, main differences between provisions applicable to market economies (MEs) and those for NMEs. Also, the current situation and problems of the enforcement of the rules applicable to China are examined. Thus, it provides a solid theoretical base for the next chapters, where problems and issues of the current EU anti-dumping legislation towards China will be further explored and analyzed.

1. The development of EU anti-dumping legislation.

The EU is committed under international law to observe the rules of the GATT, so its anti-dumping legislation is based on GATT provisions. As we discussed

in the first Chapter, relevant provisions include Article VI and the Agreement on the implementation of Article VI of GATT 1994 (Anti-Dumping Agreement). However, they only take effect to the extent that they are incorporated by the EU's legislation.⁷

The EU anti-dumping legislation is enacted as Council Regulations of the EC and Commission Decisions by the ECSC respectively. But since the latter Decision has been codified according to the current EC⁸ anti-dumping Regulation⁹, and its rules are quite similar to the provisions of the latter, so, in the following section, I will discuss the evolution of the EC anti-dumping Regulation at first, then explore the changes of the rules applicable to China, and introduce the development of the ECSC Decision briefly afterwards.

A. The evolution of the EC anti-dumping rules.¹⁰

The history of the EU anti-dumping legislation can be traced as early as 1957, and its development can be divided into two stages.

1. The transitional period from 1958 to 1968.

In 1957, the Treaty establishing the European Community (Treaty of Rome) was signed in Rome. For the first time, it established a customs union between Member States, which aims to contribute to the progressive abolition of restrictions on international trade and the lowering of customs barriers.¹¹ It

⁷ J Cunnane & C. Stanbrook, *Dumping and subsidies: the law and procedures governing the imposition of anti-dumping and countervailing duties in the European Community*. (London: European Business Publications, 1983) at p 10.

⁸ 'EC' is used here to be distinguished from the ECSC.

⁹ Council Regulation 384/96 as amended.

¹⁰ I use 'EC' in this section in order to distinguish it from the ECSC.

¹¹ Article 131 (ex Article 110), Treaty establishing the European Community.

also states that the Common Commercial Policy shall be based on uniform principles to take measures protecting trade in case of dumping or subsidies.¹² In this way, the Treaty of Rome provides an important legal base for the development of the EC's¹³ anti-dumping legislation.

According to the Treaty, the transitional period was from 1958 to 1972. Within the time limit, since the Community did not have a uniform anti-dumping regulation, Member States took protective measures against dumped imports according to their own anti-dumping laws. They included rules of the following countries:

Belgium—the Import, Export and Transit of Goods Law of September 11, 1962.¹⁴

France—Article 19 of the Customs Law.¹⁵

Germany—paragraph 21 of the Customs Law.¹⁶

Italy—Law No.39 on the Imposition of anti-dumping and Countervailing Duties of January 11, 1963.¹⁷

Luxembourg—the Import, Export and Transit of Goods law of August 5,

¹² Article 133 (ex Article 113), Treaty establishing the European Community: 'The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.'

¹³ I use 'EC' here in order to distinguish it from the ECSC.

¹⁴ *Moniteur Belge* of October 27, 1962.

¹⁵ *Journal Officiel* of December 18, 1966.

¹⁶ See *Siebentes Gesetz zur Änderung des Zollgesetzes* of June 30, 1966, BGB11542.

¹⁷ *Gazetta Ufficiale* No. 40 of February 12, 1963, at p.761.

1963.¹⁸

Netherlands—the Import and Export of Goods Law of July 5, 1962.¹⁹

However, the need for uniformity of laws arose soon due to the fact that any anti-dumping duty imposed nationally could be circumvented by indirect imports from other Member States, because there is free movement of goods within the Community. That is to say, imposition of anti-dumping or countervailing duties by individual Member States was inconsistent with the objectives of the Customs Union. This led the European Commission to submit a proposal to the Council in May 1965 for a uniform Regulation on protection against dumped or subsidized imports from countries which were not members of the EEC.²⁰ Later, the European Communities concluded the agreement on the first anti-dumping Code²¹ with other GATT Contracting Parties in 1967.²² The provisions thus became binding on individual Member States. At the end of 1967, the Commission revised its 1965 proposal. It was approved by the Council as Regulation (EEC) No. 459/68²³, which came into force on July 1, 1968.

The EC's²⁴ first anti-dumping Regulation basically incorporated the 1967 GATT anti-dumping Code into EC law and allocated the task of enforcing the

¹⁸ Memorial Lux. of August 10, 1963.

¹⁹ Staatsblad No. 295/1962.

²⁰ Beseler & Williams, *anti-dumping and Anti-subsidy Law: The European Communities*. (London: Sweet & Maxwell, 1986) at p 22.

²¹ The first Agreement on Implementation of Article VI of the GATT (also referred to as the 'GATT Anti-Dumping Code') was signed in Geneva on 30 June 1967.

²² 68/0411/EEC: Council Decision of 27 November 1967 concluding multilateral agreements signed as a result of the conference on trade negotiations of 1964- 1967 OJ 1968 L305/1.

²³ Regulation (EEC) No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community OJ 1968 L93/1. Eng. Spec.Ed. p.80.

²⁴ 'EC' is used here in order to be distinguished with the ECSC. In addition, the EU was not established until 1993.

new legislation among the institutions.²⁵

2. *The development of the EC's anti-dumping legislation from July 1, 1968 to March 6, 1996.*²⁶

In the following years, the Community's first anti-dumping Regulation was amended several times.

The first amendment was made by Regulation (EEC) No. 2011/73²⁷ on some procedural points in order to intensify the role of the Community institutions in this area and to supplement the procedure for consultation.

The rules were revised with Regulation (EEC) No. 1411/77²⁸ for the second time in 1977 following the accession of the United Kingdom, Denmark and Ireland to the EC.²⁹

In 1979, significant changes were made to Regulation 459/68. Regulation 1681/79³⁰ gave a revised interpretation of causality and introduced new rules to determine the normal value of imports from NMEs. Following the conclusion of the Agreement on Interpretation and Application of Articles VI, XVI and XXII (Subsidies and Countervailing Measures Code) as a result of

²⁵ Ivo Van Bael & Jean-Francois Bellis, *Anti-Dumping and other Trade Protection Laws of the EC* 3rd edn. (Bicester : CCH Europe, 1996), 38.

²⁶ I use 'EC' in this section because the EU was not established until 1993.

²⁷ OJ 1973 L206/3.

²⁸ Council Regulation (EEC) No 1411/77 of 27 June 1977 amending Regulation (EEC) No 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community OJ 1977 L160/4.

²⁹ Beseler & Williams, *fn* 20 above at p 23.

Here I use 'EC' because the EU was established later.

³⁰ Regulation 1681/79, OJ 1979 L196/1.

the Tokyo Round negotiations, the new Community legislation—Regulation 3017/79³¹ not only consolidated various amendments made before, but also made several very important innovations on legislation about subsidy and countervailing duties. Considering the experience gained by the Community and other major trading countries in an anti-dumping and countervailing field, it brought in some new rules to determine injury, which simply required that ‘dumped or subsidized imports were causing material injury, rather than proof that they were the major cause of injury as required under Regulation 459/68’³². Besides, procedural amendments were made for more transparency of anti-dumping proceedings, which entitled parties to the right to acquire information used against them. In addition, the procedure for extending provisional duties was simplified.³³

In 1982, Regulation 3017/79 was revised to stipulate that reviews of anti-dumping measures could not be held until one year after the conclusion of the proceedings.³⁴

The Regulation was replaced by Regulation 2176/84³⁵ in July 1984. The new rules brought in a ‘sunset clause’ for the first time, i.e. anti-dumping duties will lapse automatically five years after imposition.

In June 1987, the Regulation was amended again by introducing rules on circumvention. It allowed the extension of anti-dumping duties to products

³¹ Regulation 3017/79, OJ 1979 L339/1.

³² Van Bael & Bellis, *fn* 25 above at p 39.

³³ Beseler & Williams, *fn* 20 above at p 27.

³⁴ Regulation 1580/82, OJ 1982 L178/9.

³⁵ Regulation 2176/84, OJ 1984 L201/1, corrected at OJ 1984 L227/35.

assembled within the Community³⁶ by companies related to an exporter who is subject to anti-dumping measures at that time.³⁷

Regulation 2176/84 was replaced by Regulation 2423/88 in July 1988,³⁸ in which several changes were made. One of them was:

The introduction of the possibility of increasing the duty where it was proven that the exporter bore the cost of it (the anti-absorption duty). Another provision clarified the treatment of discounts and rebates when normal value and export prices were determined on the basis of prices actually paid.³⁹

Other changes included the treatment which should be given to trading companies; guidelines to grant allowances (i.e. the adjustments for differences in level of trade and quantities were formally abolished). In addition, the procedure about sunset reviews was clarified as was that concerning the calculation of refunds.⁴⁰

Regulation 2423/88 was amended in March 1994 from two aspects: first, it prescribed that definitive anti-dumping measures would be adopted by majority vote rather than by a qualified majority as in the past.⁴¹ Second, US-style strict time-limits were introduced.⁴²

³⁶ I use 'Community' here in order to distinguish it from the ECSC.

³⁷ Regulation 1761/87, OJ 1978 L167/9.

³⁸ Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community OJ 1988 L209/1, corrected at OJ 1988 L264/58.

³⁹ Van Bael & Bellis, *fn* 25 above at p 39.

⁴⁰ *Ibid.*

⁴¹ Regulation 522/94, OJ 1994 L66/10.

⁴² Regulation 521/94. OJ 1994 L66/7.

On 31 December 1994, Regulation 3283/94⁴³ replaced Regulation 2423/88. It strengthened amendments made before and incorporated the provisions of the Uruguay Round Agreement. Experience in the application of Regulation 3283/94 showed the need for further amendments in order to facilitate its application. These amendments were incorporated into Council Regulation 384/96.

In March 1996, the new Regulation was published as a consolidated version of anti-dumping legislation of the EC.⁴⁴ For the first time, the new Regulation separated out the rules relating to anti-dumping from those relating to subsidies. It also introduced several significant new rules. They are: the re-introduction of the adjustments for differences in quantities and level of trade (abolished in 1988), the re-introduction of anti-circumvention rules and the elimination of anti-absorption provisions.⁴⁵

The Regulation took effect after it was published on 6 March 1996. It is the basis of the EU anti-dumping legislation in force, and I will analyze its main provisions later in this chapter.

3. Amendments made in recent years.

a. Council Regulation (EC) No 2331/96.⁴⁶

On 2 December 1996, the EC⁴⁷ amended Council Regulation (EC) No 384/96

⁴³ Regulation 3283/94, OJ 1994 L349/1, as amended by Council Regulation 355/95, OJ 1995 L41/2.

⁴⁴ I use 'EC' here in order to distinguish it from the ECSC.

⁴⁵ Van Bael & Bellis, *fn* 25 above at p 41.

⁴⁶ Council Regulation (EC) No 2331/96 of 2 December 1996 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community. OJ 1996 L317/1.

⁴⁷ I use 'EC' here in order to distinguish it from the ECSC.

with Council Regulation (EC) No 2331/96. It mainly revised the rules applied to comparison of normal value and export price. These amendments need not be discussed further in the context of this thesis since they are not directly relevant to the main argument.

b. Council Regulation (EC) No 905/98.⁴⁸

Considering the significant progress received from the economic reforms of Russia and the People's Republic of China, and in order to accommodate these changes, the EC⁴⁹ issued Council Regulation (EC) No 905/98 on 27 April 1998. It deleted the two states from the list of NMEs, and agreed to determine the normal value of their exports with rules applicable to MEs, if the producer(s) under investigation can demonstrate that market conditions prevail by meeting criteria set in the new rules.⁵⁰

c. Council Regulation (EC) No 2238/2000.⁵¹

Due to the similar reasons mentioned above, the EC⁵² revised Council Regulation (EC) No 384/96 again with Regulation (EC) No 2238/2000 on 9 October 2000. The rule acknowledges the process of economic reform in the Ukraine, Vietnam, Kazakhstan and countries which are Members of the World Trade Organisation (WTO) at the date of the initiation of the relevant

⁴⁸ Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community. OJ 1998 L 128/18.

⁴⁹ I use 'EC' here in order to distinguish it from the ECSC

⁵⁰ This issue will be further analyzed in the next section - The development of the EU's anti-dumping rules applicable to the People's Republic of China.

⁵¹ Council Regulation (EC) No 2238/2000 of 9 October 2000 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community. OJ 2000 L257/2.

⁵² I use 'EC' here in order to distinguish it from the ECSC.

anti-dumping investigation⁵³, and grants their exports similar treatment as that which is applicable to the People's Republic of China.

Based on these rules in force, up to now, only Armenia, Azerbaijan, Belarus, North Korea, Tajikistan, Turkmenistan, Uzbekistan are still subject to strict 'analogue country method' to determine the normal value of their exports. Other countries which used to be regarded as NMEs now have the opportunity to be treated as MEs, provided they meet the conditions set in the new Regulation. Regardless of their actual effects, the rules, undoubtedly are more practical and flexible than ever before.

d. Council Regulation (EC) No 1972/2002.⁵⁴

On 5 November 2002, EU enacted Council Regulation (EC) No 1972/2002 amending Regulation (EC) No 384/96. The new legislation brings several significant changes to the old rules relating to NME issues. First, it deletes Russia from the list of countries that are subject to the conditional MET under Council Regulation (EC) No 905/98. Therefore, Russian exporters are entitled to the MET automatically in the EU's anti-dumping proceedings afterwards. Second, it formally enumerates the criteria of individual treatment in the EU Regulation for the first time.

In addition, it explains the concepts of 'related parties' and 'particular market situation' in the context of the old rules, and provides guidelines to the use of data when costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned.

⁵³ Today, Albania, China, Georgia, Kyrgystan and Mongolia have entered into the World Trade Organization.

⁵⁴ Council Regulation (EC) No 1972/2002, OJ 2002 L305/1.

B. The development of the EU's anti-dumping rules applicable to the People's Republic of China.

Trade cooperation between the EC⁵⁵ and the People's Republic of China has increased rapidly since the establishment of official diplomatic relations in 1975.⁵⁶ After twenty years of development, China has become the EU's fourth most important supplier in the world. However, unfortunately, it also is the EU's primary target for its anti-dumping practice at present.

Following the first EU-China trade agreement⁵⁷ signed in 1978, the EU began to initiate anti-dumping investigations against imports from China frequently. From 1979 when the first case was brought against saccharin from China⁵⁸ to March 2001, there have been 91 anti-dumping investigations with regard to imports from China initiated by the EU by far.⁵⁹ This situation results from the EU's special anti-dumping rules with regard to the People's Republic of China.

The development of the EU's anti-dumping rules applicable to China can be divided into two stages:

⁵⁵ I use 'EC' here because the EU was not established until 1993.

⁵⁶ Jianyu Wang, 'A Critique of the application to China of the NME Rules of Antidumping Legislation and Practice of the European Union' (1993) 33(3) J.W.T., 117 at p 117.

⁵⁷ Council Regulation (EEC) No 946/78 of 2 May 1978 concerning the conclusion of the Trade Agreement between the European Economic Community and the People's Republic of China, OJ 1978 L 123/1.

⁵⁸ 80/1116/EEC: Commission Decision of 4 December 1980 accepting undertakings offered by the exporters of saccharin and its salts originating in China and the United States of America and terminating the proceedings concerning imports of saccharin and its salts from China, Japan and the United States of America. OJ 1980 L 331/ 41.

⁵⁹ 'Anti-Dumping Statistics, Ministry of Foreign Trade and Cooperation, PRC' <<http://www.moftec.gov.cn:7777/Detail.wct?RecID=0&SelectID=10&ChannelID=9428&Page=1>> (1 December 2002).

1. China was regarded as an NME.

First of all, as the legal framework of EU anti-dumping legislation, GATT provides the definition of dumping and establishes relevant rules for transactions in the ordinary course of trade, where prices are determined by supply and demand under normal competitive conditions in free and open markets.⁶⁰ So, difficulties arise when determining whether imports from state-trading countries (i.e. NMEs) are dumped or not. In those countries, prices as well as exchange rates are centrally planned by governments regardless of free market and fair competition principles. The methods to determine normal value in anti-dumping investigations and criteria to judge dumping practices are not applicable to those countries. Therefore, it states that the importing parties may find it necessary to take account of the fact that a strict comparison with the domestic price in the exporting country may not always be appropriate.⁶¹

According to this provision, for the first time, the Commission introduced rules to determine the normal value of imports from NMEs in 1979.⁶² However, since the GATT suggests no alternative criteria applicable to state-trading countries, the EU adopted two approaches.

a. The 'analogue country method' in Regulation 384/96.⁶³

In this case, normal values of exports from state-trading countries are determined with the prices of like products from a third ME. As to the concept

⁶⁰ Art. VI (1)(a), GATT.

⁶¹ The second interpretative note to paragraph 1 of Article VI in Annex I to the GATT.

⁶² Regulation 1681/79, OJ 1979 L196/1.

⁶³ Art 2(7), Council Regulation 384/96.

of state trading or NME, Regulation 384/96 did not give a clear definition. Instead, it listed a number of third States outside of the EU as NMEs in Regulation 519/94,⁶⁴ and most of them are Communist and developing countries. They are: Albania, Armenia, Azerbaijan, Belarus, the People's Republic of China, Georgia, Kazakhstan, North Korea, Kyrgystan, Moldavia, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam.

b. One country one duty rule.

It is presumed that in an NME, all production and natural resources are fully controlled by the State, so all imports from the country are considered to emanate from a single producer. For this reason, once dumping practice is confirmed by the EU, in order to prevent circumvention⁶⁵, a single rate is applied on all exports. Based on this theory, the EU generally imposes a uniform anti-dumping duty on exporters originating in the NME.⁶⁶

Following the process of economic reform in these NMEs, which led to the emergence of firms in which market-economy conditions prevail, some proposals were made with regard to the application of the EU's anti-dumping regime. The one of 1997⁶⁷ provides an exception to the one country one duty

⁶⁴ Regulation 519/94, OJ 1994 L67/89.

⁶⁵ i.e. transfer exports through the exporter with the lowest duty rate.

⁶⁶ Article 9(5) of the Regulation (EC) No. 384/96 provides: 'An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except as to imports from those sources from which undertakings under the terms of this Regulation have been accepted. The Regulation imposing the duty shall specify the duty for each supplier or, if that is impracticable, and as a general rule in the cases referred to in Article 2 (7), the supplying country concerned.'

⁶⁷ Proposal to the Council Regulation amending Council Regulation (EC) No. 384/96, COM/97/0677 final - ACC, OJ 1998 C70/15

rule, which allows the Commission to grant ‘individual treatment’⁶⁸ to a company which can demonstrate that it operates independently from the State.⁶⁹ Exporters should meet eight criteria to qualify for individual treatment.⁷⁰

Due to the considerable overlap between the traditional individual treatment criteria and conditional market economy treatment (MET) criteria,⁷¹ only exporting producers that can fulfill the requirements for market economic status can qualify for individual treatment.⁷² Therefore, in order to make the rules more logical and fair, the criteria of

⁶⁸ i.e. the company who can demonstrate that it operates independently from the State will receive individual dumping margin based on its own export prices rather than based on that of third ME.

⁶⁹ This issue will be analyzed in the section IV of chapter three.

⁷⁰ Annex 1 of Proposal to the Council Regulation amending Council Regulation (EC) No. 384/96, COM/97/0677 final - ACC, OJ 1998 C70/15:

- i) The majority of the shares should belong to genuinely private companies and no State officials should appear on the board or in a key management position the fact that the company concerned is controlled by a foreign investor will be considered a relevant indication of independence.
- ii) The land on which the facilities of the company are built should be rented from the State at conditions comparable to those in an ME or purchased (e.g. proper contractual lease).
- iii) The company should have the right to hire and dismiss employees and the right to fix salaries.
- iv) The company should have full control over its supply of raw materials and inputs in general.
- v) The supply of utilities should be guaranteed on the basis of proper contractual terms.
- vi) Proof is given that profit can be exported and capital invested can be repatriated (only in case of foreign investment, e.g. joint ventures).
- vii) The export prices should be determined freely the fact that export sales are made to a related party located outside the country in question will be a decisive factor.
- viii) Freedom to carry out business activities should be guaranteed, in particular in respect of the following:
 - there should be no restrictions on selling on the domestic market
 - the right to do business cannot be withdrawn outside proper contractual terms
 - quantities produced for export should be determined freely by the company in accordance with the traditional demand of its export markets.

⁷¹ Criteria for market economy treatment are provided in Council Regulation (EC) No 905/98.

⁷² Recital 53, Proposal for a Council Regulation amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community /* COM/2000/0363 final - ACC 2000/0160

individual treatment were amended in June 2000 to refocus on those areas having a direct impact on the export activities of the exporting producer.⁷³ In that case, the exporter concerned has less burden of proof than before, and he needs to show that he is free to determine export prices and quantities, as well as their terms and conditions.⁷⁴

However, even after the revision was made, only a few Chinese exporters under EU's anti-dumping investigations were granted individual treatment. This reflects the fact that even the revised Regulation was difficult to apply in practice.

Under such circumstances, imports from China were still subject to the analogue country method and one country one duty rule. So most exports involved in anti-dumping investigations were found dumped and consequently high anti-dumping duties were imposed.

The latest legislation of individual treatment was enacted in November 2002.⁷⁵ For the first time, the EU provides criteria for the treatment in its Council

⁷³ *ibid.*

⁷⁴ Recital 54, *ibid.*, provides new criteria for individual treatment:

i) Exporters are free to repatriate capital and profits (applicable to wholly foreign owned firms or joint ventures).

ii) Export prices and quantities, and conditions and terms of sale are freely determined, and the majority of the shares belong to genuinely private companies. State officials appearing on the board or in key management positions should be in a clear minority. The presumption is that a State-controlled company cannot guarantee its independence from State interference, and the burden rests with the exporter to prove otherwise.

iii) Exchange rate conversions are carried out at the market rate.

iv) State interference is not such as to permit circumvention of measures if exporters are given different rates of duty.

⁷⁵ Council Regulation (EC) No 1972/2002 of 5 November 2002 amending Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Community. OJ 2002 L305/1.

Regulation.⁷⁶ Compared with the old rules, the criteria given in Council Regulation (EC) No 1972/2002 are more specific. In particular, it added an additional requirement relating to a firm's personnel.⁷⁷ However, whether this idea is reasonable and whether there will be more Chinese companies get the individual treatment under the new criteria can be known only after the law is fully implemented.

2. Conditional MET.

The practice that treats China as a complete NME is not consistent with the change in the economic status of China due to her economic reform since 1979. In fact, the reform enables China to transfer itself into a market-oriented economy country. However, the inconsistency not only results in the fact that most Chinese exporters involved in anti-dumping investigations will have high duties imposed on them, but it also impedes further trade cooperation between China and the EU. So, the Chinese government called for revision of the EU's stringent policy. In addition, the fact that more and more developed countries such as Australia and New Zealand treat China as a transitional economy according to the achievements of its economic reform, the EU proposed to amend its anti-dumping rules

⁷⁶ Council Regulation (EC) No 1972/2002 provides five criteria for individual treatment:

- (a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;
- (b) export prices and quantities, and conditions and terms of sale are freely determined;
- (c) the majority of the shares belong to private persons. State officials appearing on the board of Directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from state interference;
- (d) exchange rate conversions are carried out at the market rate; and
- (e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.

⁷⁷ Art. 1 (6), Council Regulation (EC) No 1972/2002.

applicable to China and Russia at the end of 1997.⁷⁸ As a result, Council Regulation (EC) No 905/98⁷⁹ entered into force on 27 April 1998.

The new Regulation, on the one hand, deletes China from the list of NMEs; on the other hand, establishes five conditions to assess whether the Chinese producers operate their business under market economy conditions. To benefit under the rules relating to conditional MET, exporters must demonstrate five criteria.⁸⁰

Only when the exporter meets all of the criteria, will it be treated with provisions applicable to MEs, i.e. use their domestic price as the normal value to compare with its export price.

On paper, the new policy seems to be much more reasonable than the old one. However, in fact it has not been a significant change in the approach taken by the EU. Most Chinese exports treated under the new rule are still found dumped and subsequently high anti-dumping duties are imposed on them. Why? There are two crucial reasons: first, the criteria set in the new

⁷⁸ Lianyin, Chen. 'Changes and Adjustments Made on European Union's Anti-Dumping Policy with regard to China' in Chinese Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters (ed.), *How to Respond to Foreign Countries' Anti-Dumping Practice?* (Beijing, China: Foreign Economy and Trade Publisher, 2001) at p 172.

⁷⁹ Regulation (EC) No 905/98, OJ 1998 L128/18.

⁸⁰ Council Regulation (EC) No 905/98 provides that:

'i. Decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values;

ii. Firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

iii. The production costs and financial situation of firms are not subject to significant distortions carried over from the former NME system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

iv. The firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

v. Exchange rate conversions are carried out at the market rate.'

Regulation are not flexible enough to accommodate the change of China's current transitional economic status. Second, the EU enjoys too broad a discretion when they assess dumping. In that case, both factors easily result in unfair judgements adverse to Chinese exporters. This issue will be further analyzed in the next chapter.

C. History and development of the ECSC anti-dumping rules.

Since coal and steel products were outside the scope of the EC Treaty, they were not supervised by EC anti-dumping Regulations. With regard to products listed in the annex to the ECSC Treaty,⁸¹ they were governed by the Commission Decision on protection against dumped imports from countries not members of the ECSC.

The first anti-dumping duty rule codified by the ECSC is Recommendation 77/329.⁸² It was adopted as part of the 'Davignon Plan' to help the ECSC steel industry cope with economic crisis at that time. The rules were based on the contemporary EC⁸³ anti-dumping Regulation except for a few procedural modifications which were made to accommodate the differences in the institutional structure of the ECSC such as the more active role of the Commission (formerly the High Authority) in the decision-making process compared with the EC Commission.

The first amendment to the Recommendation was made by Recommendation No. 3004/77/ECSC⁸⁴ in December 1977. It introduced some provisions to

⁸¹ Annex 1, ECSC Treaty.

⁸² Recommendation 77/329/ECSC, OJ 1977 L114/6.

⁸³ 'EC' is used in this section in order to be distinguished from the ECSC.

⁸⁴ Commission Recommendation No 3004/77/ECSC, OJ 1977 L352/13.

respond to 'the American trigger price mechanism and laid down the ground-work for the subsequent Community basic price system for iron and steel products.'⁸⁵ The second amendment was made by Recommendation No. 158/79/ECSC⁸⁶, which provided specific rules dealing with dumped imports from state-trading countries.

Following the enactment of Council Regulation (EC) No. 3017/79, the ECSC published its Recommendation No. 3018/79/ECSC⁸⁷. The innovations made mainly concerned subsidies and countervailing duties. This Recommendation was later revised in 1982.⁸⁸ The new rules provided that reviews would be held only one year later after the termination of the proceedings.

Subsequently, Recommendation No. 3025/82/ECSC⁸⁹ was published pursuant to a GATT understanding on basic price systems. In 1984, Commission Decision 2177/84/ECSC⁹⁰ replaced the previous rule in order to strengthen the enforcement of the rules. It provided that anti-dumping and countervailing duties may be imposed by legal instruments such as Decisions,

⁸⁵ Beseler & Williams, *fn* 20 above at p 25.

⁸⁶ Commission Recommendation No 158/79/ECSC of 29 January 1979 amending recommendations 77/329/ECSC on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Coal and Steel Community OJ 1979 L21/14

⁸⁷ Commission Recommendation No 3018/79/ECSC of 21 December 1979 on protection against dumped or subsidized imports from countries not members of the European Coal and Steel Community OJ 1979 L339/15

⁸⁸ Commission Recommendation No 1995/82/ECSC of 22 July 1982 amending Recommendation No 3018/79/ECSC on protection against dumped or subsidized imports from countries not members of the European Coal and Steel Community OJ 1982 L215/28.

⁸⁹ Commission Recommendation No 3025/82/ECSC of 12 November 1982 amending Recommendation No 3018/79/ECSC on protection against dumped or subsidized imports from countries not members of the European Coal and Steel Community OJ 1982 L317/17.

⁹⁰ Commission Decision No 2177/84/ECSC of 27 July 1984 on protection against dumped or subsidized imports from countries not members of the European Coal and Steel Community OJ 1984 L201/17.

which have similar legal effects under the ECSC Treaty as a Regulation has under the EEC Treaty.

Following the publication of Council Regulation 2423/88⁹¹, the ECSC issued its Decision 2424/88/ECSC.⁹² It unified amendments made by the contemporary EC anti-dumping Regulation.

In order to incorporate the rules of the Anti-Dumping Agreement, the EC⁹³ enacted Regulation 384/96 as its consolidated version of anti-dumping legislation. Likewise, the ECSC published Commission Decision No 2277/96/ECSC.⁹⁴

According to the amendments⁹⁵ made by the EU to Article 2 of its anti-dumping Regulation (rules of comparison of normal value and export price and provisions governing dumped imports from NMEs), the ECSC revised its former Decision in May 1999⁹⁶ to accommodate these changes.

Due to the great progress in the economic status in those so called NMEs, the EU once again amended its anti-dumping legislation with Council Regulation (EC) No 2238/2000.⁹⁷ Subsequently, the ECSC also enacted Commission

⁹¹ Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community OJ 1988 L209/1.

⁹² Commission Decision No 2424/88/ECSC of 29 July 1988 on protection against dumped or subsidized imports from countries not members of the European Coal and Steel Community OJ 1988 L209/18 and corrigendum in OJ 1988 L273/19.

⁹³ I use 'EC' here in order to distinguish it from the ECSC.

⁹⁴ Commission Decision No 2277/96/ECSC. OJ 1996 L 308/11.

⁹⁵ Council Regulation (EC) No 905/98 and Regulation (EC) No 2238/2000.

⁹⁶ Commission Decision No 1000/1999/ECSC, OJ 1999 L122/35.

⁹⁷ Council Regulation (EC) No 2238/2000, OJ 2000 L257/2.

Decision No 435/2001/ECSC of 2 March 2001 amending Decision No 2277/96/ECSC.⁹⁸

II. Current EU anti-dumping legislation in force.

After the ECSC Treaty expired on 23 July 2002, Council Regulation (EC) No 384/96⁹⁹ replaces Commission Decision No 2277/96/ECSC¹⁰⁰ and governs products listed in the Annex to the ECSC Treaty.¹⁰¹ Therefore, the EU anti-dumping legislation in force currently is Council Regulation (EC) No 384/96 and its amendments made—Regulation (EC) No 2331/96¹⁰², Regulation (EC) No 905/98¹⁰³, Regulation (EC) No 2238/2000¹⁰⁴ and Council Regulation (EC) No 1972/2002.¹⁰⁵ It governs imports from third countries not Members of the EU.

A. Objectives and Principles of the EU's anti-dumping Regulation.

As a Contracting Party to the GATT, the EC established its anti-dumping legislation under the GATT legal framework.

Pursuant to the objectives of the Anti-Dumping Agreement to restore fair international competition, the EU's anti-dumping Regulation should ensure

⁹⁸ Commission Decision No 435/2001/ECSC, OJ 2001 L63/14. These amendments were made to parallel to the revised anti-dumping Regulation.

⁹⁹ Council Regulation (EC) No 384/96, OJ 1996 L56/1.

¹⁰⁰ Commission Decision No 2277/96/ECSC, OJ 1996 L 308/11.

¹⁰¹ Council Regulation (EC) No 963/2002 of 3 June 2002 laying down transitional provisions concerning anti-dumping and anti-subsidy measures adopted pursuant to Commission Decisions No 2277/96/ECSC and No 1889/98/ECSC as well as pending anti-dumping and anti-subsidy investigations, complaints and applications pursuant to those Decisions. OJ 2002 L 149/3.

¹⁰² Council Regulation (EC) No 2331/96, OJ 1996 L317/1.

¹⁰³ Council Regulation (EC) No 905/98, OJ 1998 L 128/18.

¹⁰⁴ Council Regulation (EC) No 2238/2000, OJ 2000 L257/2.

¹⁰⁵ Council Regulation (EC) No 1972/2002, OJ 2002 L305/1.

‘a level playing field for all producers on EU market’.¹⁰⁶ On the one hand, it restricts or punishes manufacturers outside the EU who undercut their competitors by dumping, which will boost their market share or drive the competition from the market. On the other hand, it provides the norm of anti-dumping, so that anti-dumping measures will not be abused to exclude reasonable imports. In other words, its impact on EU trade should not be exaggerated.

In the EU’s anti-dumping Regulation,¹⁰⁷ Article 1 establishes four principles to be observed when the law is applied. They concern the scope of the Regulation and three basic concepts, i.e. dumping, exporting country and like product.

B. Substantive rules and key concepts.

1. Determination of dumping.

Article 2 provides detailed rules to determine dumping. First of all, it defines two key concepts:

- Normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country.
- Export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the Community.¹⁰⁸

¹⁰⁶ ‘Trade Policy Instrument: on Guard for Unfair Practice’
<<http://trade-info.cec.eu.int/europa/2001newround/pol.htm>> (1 December 2002).

¹⁰⁷ Council Regulation (EC) No 384/96, OJ 1996 L 56/1.

¹⁰⁸ Art. 2(8), Council Regulation (EC) No 384/96.

The rule also provides principles to determine normal value and export price when there is no direct source available. However, these methods to determine normal value are only applicable to MEs. As far as NMEs are concerned, there is another procedure: selection of analogue country, which means the normal value of imports from these countries should be determined by that of a like product in a third ME. As to the selection of such an analogue country, Article 2(7) lays down that:

an appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time limits; where appropriate, a market economy third country which is subject to the same investigation shall be used.

From the rule quoted above, we may find out that the selection of an analogue country is a very complex issue and process. Because, today, there are hardly two different areas which have similar economic development levels as well as the same manufacturing costs. However, the rule simply stipulates that such a selection should be made in 'a not unreasonable manner'. The words here are rather vague and leave extremely broad discretion to relevant EU authorities to make judgement.

Furthermore, Article 2(7) stipulates that:

the parties to the investigation shall be informed shortly after its initiation of the market economy third country envisaged and shall be given 10 days to comment.

This rule seems to be reasonable at first glance. However, most NMEs are developing countries. So, it is hard to imagine that a developing country is

able to collect the necessary information of the third ME and then make comment within such a short period. Even a developed country may find it difficult to achieve. This rule is obviously unfair to the NME.

The inappropriate wording and the time limit provided in the rule are clearly unreasonable. There are further unfair factors in the rules with regard to NMEs, and all of these will be analyzed carefully and logically in the next chapter.

In addition to the provisions analyzed above, Article 2 also specifies procedures to make comparison of normal value and export value and methods to calculate dumping margin.

2. Determination of injury

Article 3 of the EU's anti-dumping Regulation covers rules to assess the injury of dumped imports. Injury should be determined by two factors: the volume of dumped imports and their effects on prices of like products in the EU; the actual impact of those imports on industry of the EU. Meanwhile, the rules emphasize three points:

- a. The existence of dumping: whether there is a significant increase in dumped imports and their price.¹⁰⁹
- b. Examination of the injury: other factors that are injuring the Community industry shall be taken into account separately with dumped imports;¹¹⁰
Determination of the effect of the dumped imports shall be based on solid

¹⁰⁹ Art. 3(3), Council Regulation (EC) No 384/96.

¹¹⁰ Art. 3(7), Council Regulation (EC) No 384/96

facts.¹¹¹

- c. The actual causal relationship between dumped imports and injury on the Community industry.

3. Definition of Community industry.

Article 4 provides a general notion of Community industry, which refers to the EU producers as a whole of the like products or those whose collective output of the products constitutes a major proportion of the total EU production of the like product. The rule also identifies exceptional situations (when producers are related to the allegedly dumped product) and several criteria to examine such relationship.

C. Procedural requirements.

1. Initiation of proceedings and subsequent investigation.

Article 5 identifies the requirement to initiate an anti-dumping investigation, i.e. a written complaint should be submitted on behalf of the Community industry to the European Commission or to a Member State.¹¹² Or, in the absence of any complaint, a Member State that possesses relevant sufficient evidence shall communicate such evidence to the Commission at once.

The Article also sets the basic content of a complaint¹¹³ to determine whether it is made on behalf of the Community industry¹¹⁴. Besides, it stresses that an investigation can be initiated only when there is sufficient evidence of both

¹¹¹ Art. 3(8), Council Regulation (EC) No 384/96

¹¹² Art. 5(1), Council Regulation (EC) No 384/96

¹¹³ Art. 5(2), Council Regulation (EC) No 384/96

¹¹⁴ Art.5(4), Council Regulation (EC) No 384/96

dumping and injury to support the complaint.

Article 6 focuses on the anti-dumping investigation. It specifies time limits for an investigation's duration, rules on notification to interested parties and collection of evidence.

2. Provisional measures.

Article 7 provides prerequisites to adopt anti-dumping provisional measures, the amount of the duty that should be imposed and time limit to take anti-dumping measures.

It is noticeable that the first paragraph of the Article sets five prerequisites before any provisional duty can be imposed. They are:

- 'proceedings have been initiated in accordance with Article 5;
- notice has been given to that effect;
- interested parties have been given adequate opportunities to submit information and make comments in accordance with Article 5 (10);
- a provisional affirmative determination has been made of dumping and consequent injury to the Community industry;
- the Community interest calls for intervention to prevent such injury.¹¹⁵

3. Price undertakings.

Article 8 stipulates that during the course of an anti-dumping investigation, if satisfactory price undertakings are offered by an exporter to revise its prices

¹¹⁵ Art. 7(1), Council Regulation (EC) No 384/96.

or cease exports at the dumped price on a voluntary base, anti-dumping proceedings may be terminated without the imposition of provisional or definitive duties. The rules also set criteria on acceptable price undertakings. In case of breach or withdrawal of undertakings by any exporter, a definitive duty shall be imposed in accordance with Article 9.¹¹⁶

4. Imposition and collection of definitive duties.

Article 9 specifies the conditions to terminate anti-dumping investigations or impose definitive duties. Procedures and time limits to make such decisions are also covered by the rule. Pursuant to the GATT Anti-Dumping Agreement, an anti-dumping duty should be less than the margin of dumping if such a lesser duty is adequate to remove injury of the domestic industry in the importing state¹¹⁷. So, the EU's anti-dumping Regulation emphasizes two points on its imposition and collection of definitive duties.

- A definitive anti-dumping duty can be imposed by the Council only after the fact of dumping and injury caused on EU interest thereby are well established.¹¹⁸
- 'An anti-dumping duty shall be imposed in the appropriate amounts in each case...The Regulation imposing the duty shall specify the duty for each supplier.'¹¹⁹,

However, in accordance with Article 2.7 of the Regulation, Article 9.5 states

¹¹⁶ Art. 8(9), Council Regulation (EC) No 384/96

¹¹⁷ Art. 9(1), GATT Anti-Dumping Agreement.

¹¹⁸ Art. 9(4), Council Regulation (EC) No 384/96.

¹¹⁹ Art. 9(5), Council Regulation (EC) No 384/96.

that the second point (i.e. specific anti-dumping duty for individual supplier) may not be applicable to NMEs. This provides the legal base for one country one duty rule, which significantly guide the EU's anti-dumping practice against dumped imports from China nowadays.

China's effective economic reform has lasted for more than twenty years (since 1979), and it enables most Chinese enterprises to manage their business by themselves with much more rights than ever before. This results in the situation that different enterprises have different market economic development levels, which means that Chinese exporters producing the same product may have different costs and export prices thereby.

From this point of view, the EU's one country one duty rule is neither practical nor fair to be applied to imports from China. This issue will be further analyzed with a few cases in the next chapter.

Article 10 contains rules about the imposition of anti-dumping definitive duties. It mainly provides that the difference shall not be collected if the definitive duty is higher than the provisional duty. While if the former is lower than the latter, the duty shall be recalculated.¹²⁰ Besides, it provides the time limit to impose the definitive duties, i.e. having the prerequisites for their imposition, definitive duties can be imposed retroactively on products imported during a period of up to 90 days before provisional duties enter into force. In no circumstances may they be imposed on products imported before the initiation date.¹²¹

¹²⁰ Art. 10.3, Council Regulation (EC) No 384/96

¹²¹ Art. 10.4, Council Regulation (EC) No 384/96

5. Duration, reviews and refunds.

Article 11 provides for the duration of anti-dumping measures as well as detailed procedures of reviews and refund.

It states that generally speaking, an anti-dumping measure shall expire automatically five years after its imposition. However, if there is any request containing sufficient evidence to show that expiry of the anti-dumping measure will lead to a continuation or reoccurrence of dumping or injury, an expiry review shall be initiated. While such a review is in progress, the anti-dumping measure shall remain in force pending the outcome of the review.¹²²

Before the anti-dumping measures expire automatically, an interim review can be initiated on request if the request contains sufficient evidence to show that the measures are no longer necessary to offset the injury. However, such an interim review can only be accepted after at least one year since the imposition of anti-dumping duties.

Since the position of an exporter who did not export to the EU during the investigation period is problematic,¹²³ a newcomer review shall also be carried out to determine the exporter's individual margins of dumping.¹²⁴ After consultation with the Advisory Committee and comment is made by EU producers, the review shall be initiated and carried out on an accelerated basis.

Any review shall be terminated within one year from the date of its initiation.

¹²² Art. 11.2, Council Regulation (EC) No 384/96

¹²³ Van Bael & Bellis, *fn* 25 above at p 306.

¹²⁴ Art. 11 (4), Council Regulation (EC) No 384/96.

Depending on the conclusion of the review, measures shall be repealed or maintained.

Anti-dumping measures are supposed to raise the prices of dumped imports so to offset the injury to the Community industry. However, circumstances may change over time. Based on this point, Article 11.8 provides a refund procedure, so that an importer may request reimbursement of duties collected if he can prove that the dumping margin on the basis of which duties were paid, has either been eliminated or reduced to a level which is below the level of the duty in force.

6. Anti-absorption review.

Anti-dumping measures are utilized to raise the price of dumped imports in order to offset the injury to the Community industry. However, even after the imposition of anti-dumping duties, effects of such measures may not be reflected properly if exporters sell products to related importers at the same price as that which was clarified before imposition of anti-dumping duties by further reducing their export prices. Such a practice is defined as ‘absorption of duties’.¹²⁵ In that case, anti-dumping measures fail to reach their objective.

To deal with the problem, the EU provides criteria to determine such practice and procedures for an anti-absorption review in Article 12. When the Community industry demonstrates with sufficient information that there is no change in the price of exports which have been charged anti-dumping duty, an investigation will be reopened to examine whether the anti-dumping measures taken are effective enough. If increased dumping is confirmed at the conclusion at the reinvestigation, anti-dumping measures in force shall be

¹²⁵ Van Bael & Bellis, *fn* 25 above at p 315.

amended pursuant to procedures specified in this Article.

7. Circumvention.

Article 13 of the EU's anti-dumping Regulation focuses on circumvention of anti-dumping measures.

First, it defines circumvention as:

A change in pattern of trade between third countries and the Community which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like products and there is evidence of dumping in relation to the normal values previously established for the like or similar products.¹²⁶

Second, it sets criteria to judge whether an assembly operation in the EU or a third country constitutes circumvention against anti-dumping measures.

Third, its third paragraph provides procedures that investigations of circumvention should follow.

With regard to all the rules analyzed above, some of them are not relevant to the central argument of my thesis. They are discussed here for the completeness of the description of the EU anti-dumping legislation, so they will not be dealt further. However, those relating to NMEs and China are the highlights of this thesis, and they will be fully examined in the next chapters.

¹²⁶ Art. 13 (1), Council Regulation (EC) No 384/96.

III. Enforcement of the EU's anti-dumping rules with regard to imports from the People's Republic of China.

A. General situation regarding enforcement.

After the first anti-dumping case (Saccharin) about exports from the People's Republic of China took place in 1979,¹²⁷ more than twenty years passed, and there have been 91 cases in total initiated by the EU against imports from China so far¹²⁸. Since 1988, China has become the country whose exports are subject to most of the EU's anti-dumping investigations.¹²⁹ Considering the fact that those initiated by the EU after 1990 account for 70 percent of the total 91 cases, there is a trend that more and more anti-dumping investigations against exports from China will be carried out by the EU.

Furthermore, most Chinese exports involved in these anti-dumping investigations were found to have been dumped, (up to now, only 20 of the 91 cases have been terminated without imposition of anti-dumping measures¹³⁰), and they were charged with rather high anti-dumping duties by the EU authority. Among 69 of the 91 cases, Chinese exports were found to have been dumped and anti-dumping measures were subsequently taken towards them.¹³¹ Most of the

¹²⁷ 80/1116/EEC: Commission Decision of 4 December 1980 accepting undertakings offered by the exporters of saccharin and its salts originating in China and the United States of America and terminating the proceedings concerning imports of saccharin and its salts from China, Japan and the United States of America. OJ 1980 L 331/41.

¹²⁸ 'Anti-Dumping Reports of July 2001, Ministry of Foreign Trade and Economic Cooperation, PRC'. <<http://www.cacs.gov.cn/text.asp?texttype=1&id=2733&power=>> (1 December 2002).

¹²⁹ Jingqi, Wang, *Anti-Dumping Legislation and Practice*, (Beijing: People's Court Press, 2000) at p 136.

¹³⁰ 'Anti-Dumping Reports of July 2001, Ministry of Foreign Trade and Economic Cooperation, PRC,' *fn* 128 above.

¹³¹ 'WTO Anti-Dumping Statistics' <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm> (1 December 2002); 'EU's Anti-Dumping Statistics' <<http://www.europa.eu.int>> (1 December 2002).

anti-dumping duties imposed in these cases were very high – especially when the one country one duty method was applied.¹³² There are only 8 cases whose rate of duty charged were under 20 percent.¹³³ Consequently, the Chinese exporters will be much less competitive, and some of them have to give up their business in the European market.

From this point of view, the EU's anti-dumping regime constitutes a very serious barrier to Chinese exports to access the European market. It is also very harmful to the development of trade cooperation and sound relationships between the EU and China.

B. Main characters regarding enforcement.

Considering anti-dumping cases initiated by the EU towards imports from the People's Republic of China, there are five characteristics of the enforcement of the rules.

First, the number of anti-dumping cases towards Chinese exports has risen sharply since 1990. As we discussed before, those that took place after 1990 account for 70 percent of the total 91 cases. From January 1999 till July 2001, there were 20 anti-dumping investigations carried out by the EU against imports from China.¹³⁴ If this trend is followed, it is likely that the EU will launch more and more anti-dumping proceedings against Chinese products in future.

Second, there are fewer anti-dumping cases which are terminated with price undertakings. During the first ten years from 1979 to December 1989, 24

¹³² This issue will be examined in chapter three.

¹³³ 'WTO Anti-Dumping Statistics,' *fn* 131 above.

¹³⁴ *Ibid.*

investigations were launched against Chinese exports, among which 8 were terminated with price undertakings. However, from January 1990 till now, price undertakings proposed by Chinese exporters were seldom accepted by the EU. It shows that nowadays, the EU prefers to impose anti-dumping duties rather than accept price undertakings on dumped Chinese imports as anti-dumping measures.

Third, anti-dumping duties imposed in recent years are much higher than ever before. From August 1979¹³⁵ till 1 January 2002, there were 91 anti-dumping proceedings launched by the EU against Chinese exports within that period. In 69 cases, Chinese exports were found to have been dumped.¹³⁶ Subsequently, anti-dumping measures were imposed on these products. In particular, the duties imposed in recent years are much higher than ever before. Among the above proceedings initiated within the period from August 1979 to 1 January 1990, there are 4 cases in which the rates of duties were above 40 percent. While with regard to those launched between 1 January 1990 to 1 January 2002, the number of such cases reaches 11 – almost triples.¹³⁷

Fourthly, the range of Chinese exports involved in the EU's anti-dumping investigations has gradually extended from primary products to finished products. From 1979 to 1988, 70 percent of Chinese imports subject to anti-dumping investigations were mineral and chemical products. While during the following ten years, the ratio decreases to 41.7 percent, and there are more finished products subject to the EU's anti-dumping investigations today¹³⁸.

¹³⁵ The first anti-dumping investigation towards China initiated by the European Community was *Saccharin* (China, Japan and U.S.), OJ 1980 L331/41.

¹³⁶ *Fn* 131 above.

¹³⁷ *Ibid.*

¹³⁸ 'The EU anti-dumping legislation against Imports from the People's Republic of China'

Finally, the EU has amended its anti-dumping rules applicable to Chinese exports several times within recent years. According to the dramatic progress obtained from China's economic reform, the EU began changing its anti-dumping rules applicable to imports from China gradually. Since the Council Regulation (EC) 384/96 entered into force in 1996, the EU has amended it several times to accommodate the new changes occurring in those former NMEs. As a result, China was eliminated from the NME list in December 1997.¹³⁹ The amendment gives the possibility that provisions determining normal value of imports from MEs can be applied to Chinese exporters, if they meet the five conditions set in the new rules.

Though there still are significant inflexible or unreasonable factors in the EU's anti-dumping Regulation with regard to China, the amendment is no doubt a desirable step forward. It not only reflects the objectives of anti-dumping legislation, (i.e. to restore fair competition in international trade rather than restrict due imports,) but also shows the EU's wish to develop a sound commercial relationship with China to a certain extent.

C. Problems arising in the EU anti-dumping legislation with regard to imports from the People's Republic of China.

Examining the statistics of the EU's anti-dumping measures taken since they were first utilized in 1970, we may find the following inconsistencies:

1. The increasing anti-dumping measures taken by the EU do not agree with China's current economic status, which has fundamentally changed after the reform within this decade.

<<http://www.ec3286.com/report/zhengce/002.htm>> (1 December 2002).

¹³⁹ Council Regulation (EC) No 905/98, OJ 1998 L128/18.

The methods that the EU adopts to determine the normal value of products exported from China were based on China's former economic structure and its government policy -- central state control twenty years ago. However, since 1992 when China officially confirmed its current policy to accelerate the transformation of the country into a market-oriented economy, reforms have been designed and implemented to make state-owned enterprises operate as independent economic entities and to be fully responsible for their profits and losses. As a result, dramatic changes in China's economic structures and development took place.¹⁴⁰ Prices of over 90 percent of final goods are now determined by market forces, a factor which has been confirmed by the World Bank.¹⁴¹ According to these significant changes, most countries (such as the United States and Japan) who used to regard China as an NME have changed their anti-dumping policies towards China and granted individual treatment to Chinese state-owned enterprises when the investigation is initiated.¹⁴² This has proved to be more rational and practical in later cases. However, the EU seems to respond less to the fundamental changes resulting from China's economic reform. Though in the new Council Regulation No. 905/98, it deleted China from the list of NMEs and agreed to consider individual investigation to Chinese exporters who meet certain criteria. This is no doubt a big step forward, but things have not changed because the criteria set in the new Regulation are too severe and impractical to meet the need of actual situations (as will be illustrated in the following chapters). As a result, most Chinese companies involved in anti-dumping proceedings are still subject to

¹⁴⁰ China's economic reforms and prospects will be examined in chapter four.

¹⁴¹ 'China: Reform and Development in 1992-1993', World Bank Discussion Paper No. 215, <http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000009265_3970716144524> (1 December 2002).

¹⁴² Alternative anti-dumping approaches of the U.S, Australia, New Zealand and Japan towards China will be fully analyzed in chapter five.

the analogue country method in the calculation of their normal value and one country one duty rule when determining anti-dumping duties. Furthermore, anti-dumping investigations initiated by the EU in 1999 reached 12, which is the highest compared with that of before¹⁴³. The fact shows that the EU's new anti-dumping policy against China does not achieve the objective to accommodate the changes arising from China's economic reform, and this also brings about the following two inconsistencies.

2. Considering the past twenty years, the number of the total EU's anti-dumping cases has gone down, while those against China has risen sharply. From 1979 to 1998, the number of EU's anti-dumping cases against third countries is decreasing. The average cases initiated per year has declined from 42 ten years ago to 33 within the residual ten years, while cases concerning Chinese exports increased from average 2.3 per year in the first ten years to 4.6 in the last ten years, which occupied from 5.5 percent of the total EU's anti-dumping cases for the former period to 13.8 percent for the following ten years.¹⁴⁴

3. The actual effect of the EU's anti-dumping policy against China is not consistent with its objective (i.e. to restore fair competition, offset the injury and limit the sharply increasing quantity of dumped goods rather than exclude them from the EU). But in fact, statistics of imports from China suffering from the effects of EU's anti-dumping measures show that they exceed their original purpose. Due to the unjustified factors discussed above, most Chinese exporters involved in the investigation suffer very high anti-dumping

¹⁴³ 'The EU anti-dumping legislation against Imports from the People's Republic of China', *fn* 138 above.

¹⁴⁴ *Ibid.*

duties so that they are virtually excluded from the European market since then. For example, China exported more than 200 million bicycles to the EU in 1991, but since the anti-dumping duty as high as 30.6 percent was imposed in 1993, it has been excluded from the European market gradually. Similarly, colour televisions from China almost disappear from the European market now after being levied 44.6 percent anti-dumping duty¹⁴⁵. From this point, it is easy to see that the actual effects of the EU's anti-dumping policy obviously deviate from its objectives!

These inconsistencies reflect problems existing in the EU anti-dumping legislation towards China. They will be analyzed and explained in detail in the next chapter.

Conclusion

This chapter elaborates the EU anti-dumping legislation by analysing its evolution, key concepts, substantive and procedural rules. In addition, the main differences between provisions applicable to MEs and those for NMEs are analyzed. In the end, the current situation of the enforcement of the rules applicable to China is introduced. So, it provides a theoretical basis for the EU's anti-dumping rules with regard to China, which enables us to further explore its problems and issues in the next chapters.

The EU applies different provisions to MEs and NMEs when it determines normal value of imports under investigations. It did not give any definition of NME, but provided a relevant list in 1994. Due to the significant progress

¹⁴⁵ 'Anti-Dumping Measures against China Sharply Decrease Chinese Exports Volumes' <<http://www.peopledaily.com.cn/zcxx/2000/08/082110.html>> (1 December 2002).

obtained from these so-called NMEs' economic reforms of this decade, the EU amended its anti-dumping rules in order to accommodate new changes of these countries' economic status. Thus, a number of countries were deleted from the NME list. China is one of these countries. According to the revised provisions, China can be treated as an ME in EU's anti-dumping proceedings if exporters can demonstrate that they operate separately from the government, i.e. they meet the five criteria set in the new rules. This is a desirable step forward. However, since the criteria are applied in an inflexible way in practice, most Chinese exports under the EU's anti-dumping investigations are found to be dumped.

Considering the data of the EU's anti-dumping measures, we find some inconsistency of facts. They reflect that the EU's current anti-dumping rules with regard to the People's Republic of China are problematic. The reasons for this will be analyzed in detail in the next chapter.

Chapter Three

Unreasonable Factors in the Current EU's Anti-Dumping Policy towards the People's Republic of China

Introduction

As discussed in the second chapter, the EU revised its anti-dumping legislation applicable to the People's Republic of China due to the latter's dramatic progress achieved by economic reforms during the past twenty years.¹ These amendments mainly include the adoption of a conditional market economy treatment and the new criteria set to grant individual treatment to Chinese exporters.

One of the most important changes was made towards China's economic status. The EU used to regard China as a non-market economy (NME), hence it used the analogue country method (apply the domestic price of the like product from a third ME to determine the normal value of imports from an NME). Following the enforcement of Council Regulation (EC) 905/98,² if the required conditions are satisfied, producers and exporters from China would be allowed to use their domestic sales prices to calculate the normal value in an anti-dumping investigation.

¹ China's economic reforms and development prospects will be analyzed in chapter four.

² Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community. OJ 1998 L 128/18.

Another kind of amendment was made to individual treatment. It means that an individual dumping margin is calculated for the exporting producer by comparing the normal value from the analogue country with the producer's own export prices. It is granted where an exporting producer in an NME can show that its export activities are not subject to state interference. Individual treatment was first introduced in the Small Screen Televisions (SCTVs)³ case in 1991. The criteria for application of the approach were later revised in 1997,⁴ 2000⁵ and 2002.⁶ The latest legislation was made on 5 November 2002,⁷ which set out five criteria for exporters from NMEs to apply for individual treatment.

Based on these points, there are four separate forms of treatment which are applied against Chinese exporters in the EU's anti-dumping investigations at present:

- I. Traditional non-market economy treatment – analogue country method;
- II. Conditional market economy treatment (conditional MET);
- III. One country one duty rule;

³ Council Regulation (EEC) No 2093/91 of 15 July 1991 imposing a definitive anti-dumping duty on imports of small-screen color television receivers originating in Hong Kong and the People's Republic of China and collecting definitively the provisional duty OJ 1991 L195/1.

⁴ Proposal for a Council Regulation amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community /*COM/97/0677 final – ACC. OJ 1998 C70/15.

⁵ Proposal for a Council Regulation amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community /* COM/2000/0363 final - ACC 2000/0160.

⁶ Council Regulation (EC) No 1972/2002 of 5 November 2002 amending Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Community. OJ 2002 L305/1.

⁷ Proposal for a Council Regulation amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community /*COM/2000/0363 final – ACC 2000/0160.

IV. Individual treatment.

The analogue country method and the one country one duty rule are the forms of treatment traditionally used by the EU in its anti-dumping policy towards China. They have come to be more and more problematic due to China's economic reform during the past twenty years. Under these circumstances, both the conditional MET and individual treatment have been introduced, in order to accommodate the remarkable advances brought about by the economic reform in China. They are presumed to bring more justification in the EU's anti-dumping practice. However, relevant statistics for recent years show the impact of the new approach is rather discouraging. It also makes it clear that the application of these new approaches is problematic, at least from a statistical point of view.

The section below analyzes the four different approaches applied by the EU in its anti-dumping investigations against imports from China in four sections. For each of them, I will at first analyze the rule from both a theoretical and practical basis, then enumerate why each can be considered unreasonable by referring to some typical cases.

In short, this chapter analyzes and comments on the current EU's anti-dumping rules towards China, and therefore constitutes a significant part of the whole thesis.

1. Traditional non-market economy treatment (analogue country method)

The analogue country method is the traditional method to determine the normal value of Chinese exports involved in anti-dumping investigations by the EU. When a Chinese company fails to reach the criteria for conditional MET, such a treatment will be applied automatically.

A. Relevant rules in force.

In the current EU anti-dumping legislation, it was specified in Regulation 384/96⁸ ('basic Regulation' thereafter) in Article 2 (A)(7) as:

In the case of imports from NMEs and, in particular, those to which Council Regulation (EC) No 519/94 (5) applied, normal value shall be determined on the basis of the price or countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin.

An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time limits; where appropriate, a market economy third country which is subject to the same investigation shall be used.

The parties to the investigation shall be informed shortly after its initiation of the market economy third country envisaged and shall be given 10 days to comment.

B. Outcome of application of the analogue country method.

From August 1979 when the first anti-dumping investigation was initiated against Chinese exports by the European Community⁹ till April 1998 when the EU introduced conditional MET for both China, the EU adopted the analogue country method to

⁸ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ 1996 L 56/1.

⁹ Here I use 'European Community' because the investigation was initiated before the EU was established by the Treaty on European Union, which entered into force on 1 November 1993.

determine the normal value of all imports from China. There were 72 anti-dumping proceedings launched by the EU against Chinese exports within that period. In 61 cases, Chinese exports were found to have been dumped.¹⁰ Subsequently, the EU imposed anti-dumping measures in all these cases. In most cases, the anti-dumping duties imposed were very high – especially when one country one duty rule was applied, i.e. a single duty rate was charged. In only 4 cases¹¹ was the rate of duty charged under 20 percent.¹²

C. Theoretical and practical analysis of the rule.

1. The wording of the rule is rather vague.

The rule merely provides that the selection of the reference country shall be made on a reasonable basis. It is too vague to regulate such a complex selection of a third ME. Thus, it leaves great discretionary powers to the EU authorities.

Generally speaking, all so-called non-market economies are developing countries, and market economies are developed countries. Since a certain field or industry cannot flourish isolated from others in a country, so its development level should be parallel to that of the country. From this point of view, it is unscientific to compare an industry from

¹⁰ ‘WTO Anti-Dumping Statistics’ <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm> (1 December 2002);

‘Anti-Dumping Statistics of the EU’ <<http://www.europa.eu.int>> (1 December 2002).

¹¹ Council Regulation (EEC) No 2093/91; Council Regulation (EEC) No 3433/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand and definitively collecting the provisional anti-dumping duty, OJ 1991 L326/1;

Council Regulation (EC) No 3664/93 of 22 December 1993 imposing a definitive anti-dumping duty on imports into the Community of photo albums in bookbound form originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty OJ 1993 L333/67;

Council Regulation (EC) No 5/96 of 22 December 1995 imposing definitive anti-dumping duties on imports of microwave ovens originating in the People's Republic of China, the Republic of Korea, Malaysia and Thailand and collecting definitively the provisional duty imposed OJ 1996 L2/1.

¹² ‘WTO Anti-Dumping Statistics’ and statistics of the EU official website, *fn* 10 above.

a developing country with that of a third developed country. Even if one is able to find an industry of an ME which has similar development level to the corresponding industry in an NME, such selection is very complex.

Furthermore, 'analogue' is a very vague concept, and the EU absolutely has no rule to specify the basis of 'analogue'. As a result, it leaves the following important question without answer: what does it mean in the context of the analogue country method? Is it the development of the countries concerned, or the respective production process, or the comparability of the products, or the comparability of the respective industry?

Without detailed rules to regulate such complex practices, the EU certainly has very broad discretion in the selection. Thus, a conclusion that leads to possible high dumping margin always occurs, and it is rather unfair to Chinese exporters. Before April 1998, in which conditional MET was provided, 72 anti-dumping investigations were launched by the EU against China. 84.7 percent of them concluded that Chinese exports had been dumped. Among them, when a single duty was imposed on all Chinese exports concerned under one country one duty rule, only 4 cases get a relatively low anti-dumping duty, which was under 20 percent.¹³

2. The time limit for non-market economies to comment is over strict.

The EU allows parties to the investigation 10 days to comment on the selection of the ME third country. From the analysis made above, we may understand that the selection of analogue country is very complex. Even the EU authority itself may find it difficult to gather relevant information, so that in many cases, its decision of the selection is significantly affected by the availability of cooperation of the ME. However, it gives Chinese exporters a mere 10 days to comment on the EU's selection of the analogue

¹³ Ibid.

country. It is obviously impossible to collect the necessary information to do so. Therefore, 'this will further curtail the opportunities of exporters to control the process of the selection of the reference country and will increase the discretionary power available to the Community authorities.'¹⁴

3. The analogue country method makes the outcome of the selection unpredictable.

One of the functions of law is to make the outcome of certain practices predictable, so that similar mistakes and the corresponding punishments can be avoided in future business. However, the analogue country in an anti-dumping investigation will be selected by the EU on different bases, which vary from time to time. Therefore, it is never foreseeable to Chinese exporters.

Since the wording of the provisions which regulate the selection of the third market economy (ME) is very vague, the EU authority makes its decision based on variable factors in practice. In most cases, it adopts the suggestions of the complainant in anti-dumping investigations.¹⁵ Though this can be hardly seen from the authority's anti-dumping report, it was found during my interviews¹⁶ that the producers of the analogue country proposed are ready to cooperate with the Commission due to the arrangement made by the complainant in advance. In addition, as discussed above, Chinese exporters can hardly propose any constructive comment on the selection of the analogue country due to the tight time limit. Therefore, without any other substantive suggestion, the Commission will consequently adopt the third ME proposed by the

¹⁴ P.V. Schueren, 'New Anti-Dumping Rules and Practice: Wide Discretion Held on a Tight Leash?' (1996), 33(2) Common Market Law Review, 271 at p 282.

¹⁵ John H. Jackson & Edwin A. Vermulst, *Anti-Dumping Law and Practice: A Comparative Study*. (University of Michigan Press: 1990), 77.

¹⁶ Interviews with experienced anti-dumping lawyers in Brussels, June 2002.

complainant. However, in order to support its own argument that the imports concerned have been dumped, the complainant normally suggests the analogue country which can lead to high dumping margins. In that case, the complainant will definitely never consider whether the proposal is fair and reasonable to Chinese exporters.

In addition to the suggestions of the complainant, the Commission considers the following factors to select analogue countries.¹⁷ They are the cooperation of information in the analogue country concerned is available;¹⁸ the potential analogue is also accused of dumping,¹⁹ the potential analogue is the only other producer of the product;²⁰ the manufacturing process, technical standards and the scale of production are similar²¹ and the potential analogue is the largest or most efficient free market producer.²²

¹⁷ Jianyu Wang, 'A Critique of the Application to China of the Non-Market Economy Rules of Antidumping Legislation and Practice of the European Union.' J.W.T. 1999, 33(3), 117 at p 125.

¹⁸ Council Regulation (EC) No 771/98 of 7 April 1998 imposing a definitive anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China OJ 1998 L111/1; Commission Regulation (EC) No 45/97 of 10 January 1997 imposing a provisional anti-dumping duty on imports of sacks and bags made of polyethylene or polypropylene originating in India, Indonesia and Thailand OJ 1997 L12/8

¹⁹ When anti-dumping investigation involves in both MEs and NMEs, the Commission tends to use one of the MEs as the analogue country. This principle was established in Codeine and its Salts case (83/9/EEC: Council Decision of 17 January 1983 terminating the anti-dumping proceeding concerning imports of codeine and its salts originating in Czechoslovakia, Hungary, Poland and Yugoslavia OJ 1983 L16/30).

²⁰ In Dihydrostreptomycin case (Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China OJ 1991 L187/23), Japan was the only ME outside the European Community to produce the kind of imports concerned. Therefore, Japan was selected as an analogue country.

²¹ In Handbags case (Commission Regulation (EC) No 209/97 of 3 February 1997 imposing a provisional anti-dumping duty on imports of certain handbags originating in the People's Republic of China OJ 1997 L33/11). Indonesia was selected as an analogue country because it has similar characteristics and production process with the Chinese handbags.

²² Silicon metal (Council Regulation (EC) No 2496/97 of 11 December 1997 imposing a definitive anti-dumping duty on imports of silicon metal originating in the People's Republic of China OJ 1997 L345/1). In this case, Norway was selected as the analogue country, because the Commission regarded it as the most important and efficient silicon metal producers in the world and Norway benefits from low energy costs, cheap raw material and good exporting conditions.

From the above analysis, it can be seen that only the last two bases concern the comparative advantages of Chinese exporters. So, they can be regarded to be more reasonable than others to a certain extent. However, neither of the two guidelines is frequently followed by the Commission, because they may be considered only after the Commission fails to find an analogue country with all other methods. Therefore, in most anti-dumping investigations relating to China, the EU authority's practice is likely to maximize the inherent flaws of the analogue country method.

As a result, of the 90 anti-dumping investigations against Chinese exports from August 1979 till 1 January 2002, 29 countries have been selected as analogue countries by the EU authority (See Table 3.1). Therefore, it is impossible for Chinese exporters to predict which country will be used to determine the normal value in a potential anti-dumping dispute. As a result, they will not know how to adopt their pricing structures to avoid dumping in the European market. From this point of view, the analogue country method causes the EU's anti-dumping law to fail to play the important role, i.e. to predict and then avoid unfavourable outcomes.

Table 3.1. Selection of analogue countries for Chinese exports by the Commission: 1979-2001. (Note: GNI per capita (2001) of China is \$890).

Country ²³	U.S.A	Korea	Hong Kong	India	Spain	Yugoslavia
Times	16	6	3	5	1	1
GNI (\$) ²⁴	34,870	9,400	25,920	460	14,860	940

Country	Thailand	Japan	Australia	Sri Lanka	Austria	South Africa
Times	4	3	1	1	1	3
GNI (\$) ²⁴	1,970	35,990	19,770	830	23,940	2,900

Country	Uruguay	Turkey	Singapore	Norway	Taiwan	Philippines
Times	1	2	1	1	2	1
GNI (\$) ²⁴	5,670	2,540	24,740	35,530		1,050

Country	EU	Poland	Malaysia	Hungary	Brazil	Argentina
Times	2	1	2	1	1	1
GNI (\$) ²⁴		4,240	3,640	4,800	3,060	6,960

Country	Mexico	Canada	Indonesia
Times	3	1	1
GNI (\$) ²⁴	5,540	21,340	680

Source: EU Official Journal, various years.

²³ Market Economies selected as analogue countries by the EU in anti-dumping investigations towards imports from China.

²⁴ GNI is gross national income (gross national product, or GNP, per capita (2001), Atlas methodology (US dollars), World Bank Indicator, available from <<http://www.worldbank.org>> (1 December 2002).

These statistics show that the U.S. has become the most common analogue country for China chosen by the European Commission in anti-dumping investigations, although the two countries have the largest difference (except Japan and Norway) with regard to their GNI per capita. With almost 40 times difference of GNI per capita, it is apparent that the selection of analogue countries has not been made on a reasonable basis. This is because under the Commission's guidelines, analogue countries are selected mainly based on the complainant's suggestions and the availability of cooperation from the third ME. However, as discussed above, neither of these two factors can be justified to achieve a fair comparison between the like products of an analogue country and China in anti-dumping investigations. Since Chinese exporter's comparative advantages are not considered in that case, their normal values based on the analogue country method are normally higher than they actually are. This finally leads to an incorrect determination of the existence of dumping.

4. Difficulties may arise in case of non-cooperation of a third ME.

The experience of application of the analogue country method shows that the Commission cannot always get cooperation from the third ME which it considers to be the most appropriate country to determine the normal value of Chinese exports concerned. Unfortunately, unwillingness of such cooperation tends to increase, because data needed by the Commission may be also used as evidence against the third country's own producers and exporters in any future anti-dumping proceedings initiated by the EU. When the Commission encounters such non-cooperation, it can only adopt the information provided by another ME, which will generally result in a higher normal value and dumping margin of exports from the NME concerned. From this point of view, the analogue country method is neither reasonable to be applied by the Commission nor fair enough to determine the normal value of Chinese exports.

5. The analogue country method denies the fact that individual countries have comparative advantages in international trade, and it restrains nonmarket economies from taking such advantages.

It should be well recognized that any individual country, regardless of its development level, has its own comparative advantages compared with others. And that it is its due right to take such advantages in international trade. However, the actual consequence of the application of the analogue country method ignores the fact and the right. This statement can be illustrated by the outcome that most Chinese exports involved in the EU's anti-dumping investigations were found to be dumped and subsequently high anti-dumping duties were imposed. Thus, the import prices increase significantly, and the exporter therefore is unable to take its comparative advantage in international trade.

All of these disadvantages of the analogue country method can be seen in the following case, which is a typical one to show how dumping margins are artificially maximized under that method.

D. Case analysis.

1. Outline of the case.

In November 1993, the Commission received a complaint lodged by the European Chemical Industry Council (Cefic) representing the totality of the EU production. The Commission accordingly announced the initiation of an anti-dumping proceeding concerning imports of persulphates originating in the People's Republic of China. The Commission selected Japan as the third ME to determine the normal value of Chinese exports, and therefore came to the conclusion that persulphates imported from China were dumped, which caused material injury to the EU industry. As a result, a high provisional anti-dumping duty of 83 percent was imposed on imports of

peroxodisulphates (persulphates) originating in China on 17 July 1995.²⁵ Subsequently, a definitive anti-dumping duty of the same rate was imposed on 18 December 1995.²⁶

2. Highlight – selection of the third ME when determining the normal value of Chinese exports.

The Commission officially notified the complainants, the exporters and importers known to be concerned and the representatives of the exporting country of the initiation of the proceeding and gave the parties concerned the opportunity to make their views known in writing and to request a hearing.

When determining the normal value of the Chinese exports, according to the basic Regulation at that time (Article 2 (12) of Regulation (EEC) No 2423/88),²⁷ the Commission began to select an ME as a reference country. The Commission sent questionnaires to known producers of persulphates i.e. in the United States, Taiwan, Turkey, Japan, India and Mexico. However, the producer in the USA and Mexico refused to cooperate with the Commission, and the producer in Taiwan did not submit sufficient information and refused on-the-spot verifications. Producers in Turkey and Japan agreed to cooperate with the Commission. Since the information submitted showed that the total production of persulphates by the sole producer in Turkey was limited, Japan was selected as the reference country. Although the Chinese exporters opposed the choice of Japan as reference country and requested that at least the determination of normal value for Chinese ammonium persulphate be based on data pertaining to Turkey, the

²⁵ Commission Regulation (EC) No 1748/95 of 17 July 1995 imposing a provisional anti-dumping duty on imports of peroxodisulphates (persulphates), originating in the People's Republic of China OJ 1995 L169/15

²⁶ Council Regulation (EC) No 2961/95 of 18 December 1995 imposing a definitive anti-dumping duty on imports of peroxodisulphates (persulphates), originating in the People's Republic of China, OJ 1995 L308/61.

²⁷ Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community OJ 1988 L209/1.

Commission considered the advantages of Japan as a suitable reference country, on balance, still outweighed the arguments presented in favour of Turkey. Consequently, the normal value of persulphate from China was established based on information submitted by the two Japanese companies willing to cooperate with the Commission.

Using the information of the Japanese company to determine the normal value of Chinese products, the Commission easily came to the conclusion that the normal value is much higher than the export price. Therefore, the imports were dumped, and an anti-dumping duty as high as 83 percent was imposed.

3. Problematic points that should be noticed in the above case.

First, the selection of the third ME to determine the normal value of imports from NMEs is likely to deny the latter's comparative advantages in international trade.

It is well known that labour is cheaper in developing countries than developed countries or market economies. This should be regarded as one of the non-market economies' comparative advantages, and it is those countries' due right to benefit from it in international trade. In the persulphate case, if we consider the key factor involved in manufacture, we may find out that the EU's comparison is absolutely unfair.

First of all, persulphate production is labour intensive and is a high energy consuming industry. It means that the cost of labour is the most important element to constitute the overall manufacturing cost of persulphate. In the persulphate case, Japan was the analogue country, which has rather high domestic price of persulphates. Applying it to establish the normal value of imports from China, the Commission simply came to the conclusion that the normal value is much higher than the export price of persulphates from China.

However, there is a huge difference between the cost of labour in China and Japan. According to World Bank statistics,²⁸ the average labour cost per worker in manufacturing in China between 1995-1999 is \$729 per year, while that of Japan is \$31687 per year, which is 43 times higher than the former. So it is ridiculous to select Japan as the third ME in the persulphates case. Nevertheless, the EU did so, and as a result, Chinese products were found to have been dumped with high dumping margin.

From this point, we can see an unscientific element existing in the analogue country method, i.e. the obvious difference between the labour costs from China and Japan results in an unfair judgement. Even if the same industry of the two countries use the same technology and have the same procedure to manufacture persulphates, the cost in Japan is still higher than that of China. In that case, selection of Japan as the analogue country to determine the normal value of the Chinese exports is absolutely unreasonable and unfair. Using that methodology, it is not surprising that the Commission finally imposed an anti-dumping duty as high as 83 percent on Chinese exporters.

Second, selection of a third ME whose relevant industry is the major rival in international trade to that of the NME concerned may be improper to some extent.

Decisions of industries in different countries to cooperate or not with the Commission in anti-dumping investigations are usually made due to some reasons. These reasons should also be taken into account. Especially when one country seems to be eager to cooperate in the anti-dumping investigation, and its industry is the very major competitor of that from the NME in international trade, then the information supplied by the former should really be considered carefully. Data adverse to the NME is likely to be put forward at that time in order to weaken its rival's competition capacity in future.

²⁸ World Bank Statistics of Labour and Employment.

<<http://www.ignkeywords.com/keyword/keyword.aspx?keyword=www.worldbank.orgdatadatabytopicdatabytopic.html>> (1 December 2002).

In the above case, Japan is the second largest persulphate exporter next to China in the world. So, the reason why its companies agreed to cooperate with the Commission in the anti-dumping investigation may be because information submitted by them would obviously result in unfavourable consequences for its biggest rival – Chinese persulphate producers in international trade. From this sense, Japan is not the best choice to be taken to determine the normal value of persulphates from China.

Third, information from the third ME available to the Commission does not always mean it is the best data to establish the normal value and to make a fair comparison with export price of products concerned. In the persulphate case, we may find out that Japan was selected as the analogue country mainly because the Commission did not have any other choice except that, due to others non-cooperation.

Besides, the case also reflects other defects of the rule discussed in I.2 of this chapter. On the one hand, the rule is rather vague considering the selection of the third country without detailed substantive and procedure requirements. On the other hand, due to the over strict time limit, the Chinese exporters concerned cannot put forward significant opinion about the selection of the third ME. Under this circumstance, the EU almost has absolute discretionary power to judge this matter.

According to the above analysis, those unscientific factors of the traditional non-market economy treatment (analogue country method) easily let the EU come to an incorrect conclusion that deviates from the facts, and therefore result in the judgment which is unfavourable and unfair to exporters of non-market economies.

II. Conditional market economy treatment.

A. Relevant rules in force.

In order to meet the need in anti-dumping practice and reward economic reforms taking place in the People's Republic of China and Russia, the EU published Council Regulation (EC) 905/98²⁹ on 27 April 1998. It grants market economy status in anti-dumping investigations to individual enterprises of the two countries. That is to say, when exporters of China meet the five criteria set in the rule, their individual dumping margins could be based on their own domestic sales prices rather than that of a third ME. These five criteria are:

Decisions of firms regarding prices, costs and inputs, including for instance raw materials, costs of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant state interference in this regard, and costs of major inputs substantially reflect market values,

Firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

The production costs and financial situation of firms are not subject to significant distortions carried over from the former NME system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

The firms concerned are subject to bankruptcy and property laws which guarantee

²⁹ Council Regulation (EC) No 905/98, OJ 1998 L 128/18.

legal certainty and stability for the operation of firms, and

Exchange rate conversions are carried out at the market rate.

A determination whether the producer meets the abovementioned criteria shall be made within three months of the initiation of the investigation, after specific consultation of the Advisory Committee and after the EU industry has been given an opportunity to comment. This determination shall remain in force throughout the investigation.³⁰

B. Specific procedures for the new approach.

At the early stage in the EU's anti-dumping investigation, procedures were set to examine whether the conditional MET can be granted to relevant individual exporters. First of all, a special claim to apply for MET must be submitted by a Chinese enterprise. The deadline for requesting the special treatment and providing necessary information at the same time is 21 days after the publication of the Notice which initiates the investigation in the EU's Official Journal.³¹ Within three months after that, the Commission should assess the information submitted by Chinese exporters and decide whether they meet the five criteria for the MET. If the outcome of the assessment is positive, the individual exporter will be granted MET, which gives the exporter specific dumping margin at both the provisional and definitive stages of the investigation. However, if the application is rejected, the exporters will be subject to the analogue country method automatically.

³⁰ Art. 1, Council Regulation (EC) No 905/98.

³¹ Robert M. MacLean, 'Evaluating the Impact of the E.C.'s Conditional Market Economy Principle in Chinese and Russian Anti-Dumping Cases' (2001) 7(3), *Int. T.L.R.* 65 at p 68.

C. Outcome of the application of the conditional market economy approach.

In order to identify and encourage the remarkable advances brought about by economic reform in China, the EU adopts conditional MET to imports from China in anti-dumping investigations. Hence, 'the proposed changes will be a recognition of the efforts made so far by China and Russia to transform their economies.'³² The new approach is no doubt a big step forward. However, the outcome of its application is not so satisfactory when we look at the following statistics and facts:

From April 1998 when the revised legislation entered into force, out of over 45 applications for MET, only five Chinese companies and one Russian enterprise met the criteria of MET according to the EU's assessment, and therefore were allowed to use their domestic price to determine the normal value of exports. The rate of successful application is only around 12 percent. The reason for such a low rate is that the criteria to grant MET have proved to be extremely strict and difficult for Chinese exporters to satisfy in practice.³³

The conditional MET was supposed to reflect the actual normal value and dumping margin of imports from China. However, on the contrary, the number of fresh anti-dumping investigations initiated against China in particular has increased significantly compared to the period preceding the change in policy. That is to say, only one anti-dumping case was initiated against imports from China in 1998, while it jumped to 12 new cases in the following year. In 2000, 6 new investigations were launched. In other words, 18 new cases have been opened against imports from China in the two-year

³² Proposal to the Council Regulation amending Council Regulation (EC) No. 384/96, COM/97/0677 final - ACC, OJ 1998 C70/15, pp. 1-2.

³³ R. M. MacLean, *fn* 31 above at p 65.

period immediately following the new approach of conditional MET.³⁴

Based on these facts, we can conclude that the EU's new anti-dumping policy (conditional MET) towards China is not capable of achieving its goal, i.e. to accommodate the dramatic changes of the economy in China, and to be more reasonable to apply. Furthermore, instead of encouraging China's economic reform, the current situation actually has had a negative impact on it.

D. Unreasonable factors in the application of the conditional MET

As we have seen, the EU's new approach of conditional MET does not function as well as it is supposed to. The following points constitute the major reasons for this.

1. Very tight time limit for the MET application.

The Commission requires applicants for conditional MET to provide all information needed within very tight time limits. Generally speaking, foreign parties in anti-dumping investigations have to submit necessary documents 40 days after they receive the questionnaires.³⁵ However, with regard to Chinese exporters who apply for MET, the deadline for lodging the application and providing necessary information is only 21 days after the publication of notice of initiation of the investigation in the Official Journal³⁶. Thus, the burden for those exporters to bear is extremely tough.

³⁴ 'Summary of the European Union's Anti-Dumping Investigation against Chinese Exports from 1979', <<http://www.cacs.gov.cn/infor/lssl/lssl11.htm>> (1 December 2002).

³⁵ Art. 6 (2), Council Regulation (EC) No 384/96.

³⁶ *fn* 31 above.

2. The Commission's assessment on whether applicants for conditional MET meet the criteria set out in the Regulation is too strict to be reasonable.

The Commission requires applicants for conditional MET to meet all criteria set in the Regulation completely. With regard to the five criteria, if there is any deficiency or flaw in documents given by a Chinese exporter, he will be given an absolute objection to MET. In that case, the rate for successful application of MET is as low as 12 percent since the new approach took effect. It is unfair to those exporters whose requests are refused to some extent, because the assessment to grant MET should be made according to the goal of the new approach. That is to say, if a Chinese exporter is able to meet most of the criteria stipulated in the Regulation, and he can show that the overall management of the business is independent of state control, he should then be granted MET.

3. Use-out Domestic Data Methodology.³⁷

In practice, even if a Chinese company is granted MET in an anti-dumping investigation, its domestic price cannot be used as the normal value of the same product from other companies whose application for MET is rejected. This is called Use-out Domestic Data Methodology. An anti-dumping proceeding concerning imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China was initiated on 17 May 2000.³⁸ Ten Chinese exporters applied for MET, and two of them³⁹ were granted the new approach by the Commission. One of the exporting producers has

³⁷ This issue is further analyzed in chapter six.

³⁸ Council Regulation (EC) No 1470/2001 of 16 July 2001 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China. OJ 2001 L195/8. Commission Regulation (EC) No 255/2001 of 7 February 2001 imposing a provisional anti-dumping duty on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China. OJ 2001 L38/8.

³⁹ Lisheng Electronic & Lighting (Xiamen) Co. Ltd, Xiamen and Philips & Yaming Lighting Co. Ltd, Shanghai.

sufficient domestic sales volume,⁴⁰ so its normal value was established on the basis of the domestic sales prices in accordance with Article 2(1) of the basic Regulation. However, as to other Chinese exporters whose application for MET was rejected, they were still subject to the analogue country method. In this case, the normal values of their products was determined by relevant information from Mexico rather than the domestic prices of the Chinese company which was granted the MET.

With regard to this practice, the Commission argued that it is consistent with Article 2(7)(a) of the basic Regulation, which prefers to select a third ME. However, making use of the price information of the Chinese company who gets the MET to establish normal values for other Chinese producers has two advantages in anti-dumping investigations. First, the normal values thus established are more accurate than those determined by the price information from a third ME, because they operate under the same economic conditions. Second, it enables the Commission to be free of the troublesome process to gain cooperation and information from a third ME. Therefore, the Commission's argument cannot be easily justified.

4. Inappropriate adjustment made towards the domestic sales prices of Chinese companies which already get the MET.

In a few cases, even if a Chinese company was granted MET, and it had sufficient domestic sales volume, its domestic sale prices were not adopted directly to establish the normal values of the imports.

⁴⁰ Art. 2(2) of the basic Regulation requires that the domestic sales prices can be adopted to establish normal value of the imports concerned only when the sales represented 5 percent or more of the sales volume of the product concerned exported to the Community.

In the Zinc Oxide case of September 2001,⁴¹ five Chinese exporters applied for MET. After verification, the Commission granted three exporters MET because they have fulfilled all the criteria. In addition, all of them have sufficient domestic sales volumes in accordance with Article 2(2) of the basic Regulation. Therefore, their domestic sales prices should be directly adopted to establish the normal value of the exports. However, the Commission argued that the purchase prices of the basic zinc raw materials for the production of zinc oxide appeared to be below market prices by comparing actual prices paid by the three companies and zinc quotations on the London Metal Exchange (LME).⁴² For that reason, it made adjustments towards the domestic sales prices of the three Chinese companies before using them to establish normal values. As a result, all of them were found to have dumped their exports.

However, the conclusion of the anti-dumping investigation might have been different if no adjustment was made. Here the question is: whether or not the adjustment should be made towards the domestic sales prices in accordance with international price reference such as the LME? In my opinion, the reference of the LME should not be taken into account in this case. Otherwise, there is no sense for the Commission to assess whether a Chinese exporter fulfils the criteria of the MET.⁴³ In other words, once a Chinese exporter gets the MET, it is a fact that it operates under free market conditions. So, no adjustment

⁴¹ Council Regulation (EC) No 408/2002 of 28 February 2002 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain zinc oxides originating in the People's Republic of China. OJ 2002 L 62/7. Commission Regulation (EC) No 1827/2001 of 17 September 2001 imposing a provisional anti-dumping duty on imports of certain zinc oxides originating in the People's Republic of China. OJ 2001 L248/17.

⁴² LME provides reference prices for the world-wide pricing of activities relating to non-ferrous metals, in this case zinc materials and related zinc products.

⁴³ One of the MET criteria is:

Decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant state interference in this regard, and costs of major inputs substantially reflect market values.

should be made to establish the normal values of the Chinese products.

5. Chinese exporters cannot apply for MET during the sunset review.

With regard to imports from China, the Commission refuses to introduce the methodology of the conditional MET in sunset reviews carried out after the new legislation came into force. In the Magnetic Disks cases in 2002,⁴⁴ the Commission refused to consider Chinese exporter's application for the MET during the sunset review, and continued to adopt the analogue country method. It indicated that during a sunset review, pursuant to Article 11.2 of the basic Regulation, measures must either be maintained or repealed, but not modified.⁴⁵ In the meantime, it suggested that the exporters could ask for other methods to establish the normal values only during interim review under Article 11.3. However, the criteria to initiate an interim review are very stringent. Under Article 11.3, such proceedings can be carried out only if the Commission finds 'the circumstances with regard to dumping and injury have changed significantly', or the 'existing measures are achieving the intended results in removing the injury previously established'. Therefore, it is very difficult for Chinese exporters to persuade the Commission to initiate an interim review.

This puts the Chinese companies into a dilemma, where they normally cannot apply for the new approach of the MET in proceedings with regard to the existing anti-dumping measures. It is particularly unfair to these exporters, because like others companies, most of them have obtained great progress from China's economic reforms. Therefore, they should have the same right to apply for the conditional MET, and if they are able to meet the five criteria of the treatment, the Commission should use their domestic sales prices to

⁴⁴ Council Regulation (EC) No 312/2002 of 18 February 2002 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5 microdisks) originating in Japan and the People's Republic of China and terminating the proceeding in respect of imports of 3,5 microdisks originating in Taiwan. OJ 2002 L 50/24.

⁴⁵ Para. 19, Ibid.

establish the normal values.⁴⁶

Based on the above point, in order to ensure that all Chinese exporters have the same right to apply for the MET, the Commission should provide more flexible criteria to initiate interim reviews for those whose exports are currently subject to anti-dumping measures.

In summary, the proposal for conditional MET is a favourable step forward as to the EU's anti-dumping policy against imports from the People's Republic of China. However, how the new approach and the basic criteria are applied by the Commission is crucial to the actual outcome of the policy. Based on this idea and the analysis made above, the new policy is being implemented in a way that effectively excludes the large majority of MET applicants from being successful.

III. One country one duty rule.

A. Relevant rules in force.

Article 9.5 of the EU's basic anti-dumping Regulation⁴⁷ stipulates that

An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except as to imports from those sources from which undertakings under the terms of this Regulation have been accepted. The Regulation imposing the duty shall specify the duty for each supplier or, if that is impracticable, and as a general rule in the cases referred to in Article 2(7), the supplying country concerned.

In practice since the early 1990s, the Commission has stressed repeatedly that in

⁴⁶ Proposal relating to this issue is suggested in the Conclusions of the thesis.

⁴⁷ Council Regulation (EC) No 384/96.

anti-dumping proceedings with regard to imports from NMEs, it will generally impose a single anti-dumping duty on all exports from such countries on a country-by-country basis.⁴⁸

B. Concept and rationale for one country one duty rule.

Generally speaking, imports from non-market economies are subject to two disadvantages in the EU's anti-dumping investigation. One of them is the analogue country method, another is 'one country one duty rule'. In the case of market economies, individual duties are determined for each exporter automatically, however, a single average rate of duty is established on all imports from an NME in anti-dumping investigations. With regard to imports from the People's Republic of China, 'save in exceptional cases, all such exports will be subject to the same general rate of anti-dumping duty.'⁴⁹

The rationale for the policy is that all imports from non-market economies are centrally controlled by the state, so there is the possibility for them to channel exports through the exporter with the lowest duty rate. Therefore, a single rate is applied in order to avoid such circumvention of anti-dumping duties.

C. Unreasonable factors existing in the one country one duty rule.

Unreasonable factors existing in the one country one duty rule can be analyzed from two aspects.

First, it is extremely unfair to exporters of non-market economies, since most of them

⁴⁸ Jianyu Wang, *fn* 17 above at p 124.

⁴⁹ Sebastian Farr, 'Individual Treatment for Exporters in Anti-Dumping Cases: the China Syndrome'. (1997) 3(3) *Int. T.L.R.*, 105-107.

have undergone economic reforms and restructuring during the last decade. As a result of such reforms, producers and exporters from these countries have the decisive right to manage their business rather than being subject to strict state control. Therefore, they decide their own export price according to their individual operation situation. However, the one country one duty rule means that the EU Commission will impose the same anti-dumping duty on an NME exporter as others though it does not practise dumping at all. So, such a practice at the present stage is unfair and out of date, especially to countries like the People's Republic of China, whose favourable outcomes of economic reform including enterprise self-management reform is well recognized in the world.

Besides, the worry of one country one duty (i.e. circumvention of the duties after different anti-dumping duties were determined according to different exporters from an NME) can be eliminated by detecting import volumes of the individual companies before and after the EU's anti-dumping investigation. If imports from the company which was imposed with a low duty increased sharply without due reasons after the anti-dumping proceeding was terminated, circumvention can be found. In that case, individual treatment can be withdrawn or necessary punitive measures can be taken towards specific exporters.

IV. Individual treatment.

A. Rules in force.

Originally, there are eight separate criteria to grant individual treatment. However, due to the recognition of unreasonable factors existing in the one country one duty rule as we analyzed above, reviewing the outcome of the application of individual treatment after 1997 (when the old provision was issued),⁵⁰ the latest legislation was updated in Council

⁵⁰ Proposal for a Council Regulation amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community /*COM/97/0677 final – ACC. OJ 1998 C70/15.

Regulation (EC) No 1972/2002.⁵¹ It sets five criteria for the conditional individual treatment:

- (a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;
- (b) export prices and quantities, and conditions and terms of sale are freely determined;
- (c) the majority of the shares belong to private persons. State officials appearing on the board of Directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from state interference;
- (d) exchange rate conversions are carried out at the market rate; and
- (e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.⁵²

B. Problems of substance in the practical application of the regime

According to the EU's anti-dumping rules in force, individual treatment means that:

For companies in NMEs who can prove that their exporting activities are determined by market forces and not affected by state influence (based on criteria set by the Commission), an individual dumping margin is calculated for them based on a comparison of their own export prices with the normal value from the analogue country.⁵³

⁵¹ Council Regulation (EC) No 1972/2002

⁵² Art. 1(6), Council Regulation (EC) No 1972/2002.

⁵³ Recital 8 of Proposal for a Council Regulation amending Regulation (EC) No 384/96 on protection

That is to say, with regard to exporters from non-market economies (especially from China) in an anti-dumping investigation, when their application for the conditional MET is rejected by the Commission, they still have chance to be granted individual treatment. If they meet the five criteria to show that its export activities are not subject to state interference, anti-dumping duties will be determined on an individual basis according to their export prices.

However, even the Commission itself has to admit the overlap in the criteria for individual treatment has resulted in the fact that only those exporters that can fulfil the requirements for full MET are able to qualify for individual treatment.⁵⁴

C. Main reasons for the problem.

Like the situation of conditional MET, there are mainly two reasons for the problem of individual treatment when it is applied by the Commission.

On the one hand, the criteria to grant individual treatment are not reasonable enough to be applied to Chinese exporters. For example, the first criteria to apply for the treatment is only applicable to wholly foreign owned firms or joint ventures. That is to say, all state owned firms are excluded from enjoying the approach. Also, in practice, state owned firms usually are subject to the highest anti-dumping duties by the Commission. This is a discriminatory policy, and it is very harmful to Chinese exporters considering the significant ratio of state owned enterprises in all Chinese companies. However, we should make it clear that in China, a state-owned firm is not necessarily a state-controlled firm. The former has self-management rights, but the latter has not and its operation is

against dumped imports from countries not members of the European Community /*COM/2000.0363 final – ACC 2000/0160.

⁵⁴ Recital 53, Proposal for a Council Regulation amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community /* COM/2000/0363 final - ACC 2000/0160.

substantially interfered by the government. The existence of state-owned enterprises in China is mainly due to China's special historical and political reasons. However, the reform and reconstruction of such enterprise is a key area in China's economic reform from last decade till now. It was carried out:

through privatisation, closures and mergers, shedding of excess labour, improvements in the financial situation of state-owned enterprises and the financial sector through debt write off, the setting up of Asset management companies and the banking sector being instructed to make lending decisions on the basis of market forces and not policy considerations.⁵⁵

All of these actually emphasize that local government and institutions cannot interfere in the management of the firms; management rights have been transferred to the enterprise itself. In addition, the firms are not entitled to any privileges granted by the Chinese government. As a result of the reform, like wholly foreign owned firms and joint ventures, today, most state-owned enterprises manage their business, take responsibilities as an individual legal person and compete with others fairly in market-economy oriented environment. From this point of view, Chinese state-owned firms which have sound management and performance should also be given the opportunity to apply for individual treatment.

On the other hand, another reason that results in problems of the application of the regime is that it is applied over strictly by the Commission. Anti-dumping investigations in Small Screen Televisions (SCTVs)⁵⁶ and Bicycles⁵⁷ are generally regarded as the foundation of

⁵⁵ Recital 15 of Proposal for a Council Regulation amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community /*COM/2000.0363 final – ACC 2000/0160.

⁵⁶ Council Regulation (EEC) No 2093/91.

⁵⁷ Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty OJ 1993 L228/1.

the EU policy on individual treatment for NME exporters. In the case of SCTVs, the Commission set up relevant rules to grant eligible Chinese exporters individual treatment. As a result, two China-Japanese joint ventures were granted individual treatment on the ground that:

In so far as the other two Chinese exporters are concerned (i.e. the two China-Japanese joint-ventures) the Commission was able to establish to its satisfaction that these companies, even if they did not operate fully on a market economy basis, enjoyed a high degree of independence in their operations, basically because they were able to import components and export finished products without control from the Chamber or from any other body. Furthermore, the fact that these companies were able to transfer their profits subject to certain administrative requirements, out of the People's Republic of China, ensured that these profit-oriented companies enjoyed a sufficient degree of independence which justifies their individual treatment.⁵⁸

This approach was later strengthened in the Video Tapes⁵⁹ and Certain Polyester Yarns⁶⁰ cases. However, individual treatment was refined and tightened up in the EU's

⁵⁸ Ibid, Recital 20, pp. 5-6.

⁵⁹ Commission Regulation (EEC) No. 1034/91 of 23 April 1991 imposing a provisional anti-dumping duty on imports of video tapes in cassettes originating in the P.E. of China, O.J. L106, 26 April 1991, p.15.

Commission Regulation (EEC) No. 3091/91 of 21 October 1991 imposing a definitive anti-dumping duty on imports of video tapes in cassettes originating in the P.E. of China and definitively collecting the provisional duty, O.J.L293, 24 October 1991, p.4.

⁶⁰ Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibers) originating in Taiwan, Indonesia, India, the People' s Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of these yarns originating in the Republic of Korea OJ 1991 L318/48.

Council Regulation (EEC) No 830/92 of 30 March 1992 imposing a definitive anti- dumping duty on imports of certain polyester yarns (man-made staple fibers) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and collecting definitively the provisional duty OJ 1992 L88/1.

anti-dumping investigation of Bicycles from the People's Republic of China.⁶¹ Application for individual treatment from Chinese companies has been systematically refused since then. In the bicycle case, the Commission refused to grant individual treatment to Chinese companies including foreign joint ventures. It gave the following reasons:

First, it reiterated its fear of circumvention of the duties, i.e. if individual treatment was granted, exports could be channelled by the state authorities through whichever exporter has the lowest anti-dumping duty. However, as we have discussed before, such circumvention can be avoided and detected by examining the export volumes of a Chinese company before and after the anti-dumping investigation is terminated.

Second, the Commission stressed that individual treatment is not required by the basic dumping Regulation. This argument is not reasonable enough because the basic dumping Regulation also does not have any provision to prohibit the EU to determine individual export prices, individual dumping and injury margins for suppliers in NMEs. So, whether to grant individual treatment to a Chinese exporter should be determined from a more fair and reasonable point of view.

Third, the Commission concluded that none of the companies involved had been able to demonstrate that it was enjoying and will go on enjoying the necessary degree of commercial autonomy. Since it holds that the power of the state or a representative of the state to block certain key decisions of the company prevents it from acting in a truly autonomous manner,⁶² so it cannot be granted individual treatment. However, as early as

⁶¹ Council Regulation (EEC) No 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty OJ 1993 L228/1.

⁶² Commission Regulation (EEC) No 550/93 of 5 March 1993 imposing a provisional anti-dumping duty on imports of bicycles originating in the People's Republic of China. OJ 1993 L58/12. paragraph 34.

the 1980's, Chinese foreign joint venture law stipulated that the company has the right to manage its own business without any outer interference from the state. The rule provides that according to the contract establishing the joint venture, the board of directors will make decisions on crucial issues such as development strategy, income and expenditure budget, profit distribution and personnel recruitment. Under such provisions, the EU should not conclude that the State exercises a dominant influence on foreign joint ventures like those in the bicycle case.

Based on the above points, the strict substantive and procedural criteria to grant individual treatment to exporters from NMEs and the too broad discretion enjoyed by the EU institution make it very difficult for Chinese companies to satisfy the requirements. Consequently, very few of them can be granted individual treatment. Therefore, the treatment is the exception to one country one duty rule rather than a dominant rule in practice.

Conclusion

This chapter examines four separate forms of treatment which are applied against Chinese exporters in the EU's anti-dumping investigation at present:

- I. Traditional non-market economy treatment (analogue country method);
- II. Conditional MET.
- III. One country one duty rule.
- IV. Individual treatment;

The first two treatments are applied to determine the normal value of imports from NMEs in the EU's anti-dumping investigation. While the one country one duty rule and individual treatment are methods to impose anti-dumping measures.

Both conditional economy treatment and individual treatment have been introduced to accommodate the remarkable advances brought about by the economic reform in China. They are presumed to bring more justification in the EU's anti-dumping practice. However, relevant statistics for recent years shows the impact of the new approaches is rather discouraging:

Among over 45 applications for MET, only five Chinese companies and one Russian enterprise have managed to successfully pass through the Commission's assessment for the status. This means that the success rate is about 12 percent. With regard to individual dumping margins awarded to applicant enterprises that have successfully established their eligibility for MET, there is no significant decline in individual dumping margins than would otherwise have been the case. However, over the same period since the new approaches were introduced, the number of new anti-dumping investigations against Chinese exporters has increased sharply, from only one anti-dumping case in 1998 to 18 new cases in 1999-2000. The facts show that the changes of the EU's anti-dumping policy towards China actually have had a negative impact rather than any tangible reward to its favourable outcome of economic reform. It also makes it clear that the application of these new approaches is problematic, at least from the statistical point of view.

The main reasons for the problems of the new approaches mainly include two points. First, the criteria for both conditional MET and individual treatment are not reasonable enough for Chinese exporters to meet in anti-dumping investigations. The change of the rules was structured to allow the Commission to interpret the law as it saw fit on a

case-by-case basis.⁶³ In this way, the amended policy ensures that the Commission would have ample discretion to determine the existence of dumping in anti-dumping proceedings against imports from NMEs. Second, the policy is implemented over strictly by the European Commission so that it actually excludes the large majority of applicants from being successful. ‘Commission officials admit that the formal rule change was more in name than in substance, and they had no intention of administering the more beneficial rules to Chinese and Russian firms.’⁶⁴

Therefore, it is no surprise that as a result in practice, the conditional MET and individual treatment seem to be exceptions to the traditional rules towards imports from China in the EU’s anti-dumping investigations rather than the main principle to accommodate favourable changes obtained in China’s economic reform.

In summary, this chapter analyzes and comments on the current EU’s anti-dumping rules towards China, and therefore constitutes a significant part of the whole thesis. In the next chapter, I will analyze the actual impacts of China’s economic reform for the past twenty years, so that we can make corresponding suggestions to remedy the defects of the current EU’s anti-dumping policy towards China.

⁶³ Cynthia M. Horne, ‘Belief Stasis as an Impediment to Policy Implementation: Non-Market Economies and Western Trade Laws’ (University of Washington, prepared for: American Political Science Association Conference San Francisco, CA, August 30 – September 2, 2001). p 24.

⁶⁴ Ibid.

Chapter Four

An Analysis of China's Economic Reform

Introduction

This chapter is an analysis of China's economic reform. As discussed in the last chapter, there are many unreasonable factors in the current EU's anti-dumping policy with regard to the People's Republic of China,¹ and the very reason which brings out these problems and makes the rules unfair enough to be applied is the progress achieved in China's economic reform and the changes in its economic status. China has become a transitional economy and is quite close to an ME in many fields, but the EU still applies traditional NME treatment to Chinese exports in most cases, the proportion of Chinese exports subject to the EU's anti-dumping measures are extremely high. Based on this point, I will demonstrate the fundamental progress achieved in China's economy by analysing the development in four important sections, which include reform in foreign trade, enterprise, pricing and financial fields.

Since foreign trade, enterprise, pricing and financial systems are the key areas in China's economic reforms, I will discuss their development respectively. For each of them, first, I give a brief introduction to their pre-reform conditions. Second, I enumerate progress made after the reform. Third, I abstract and explain relevant Chinese national legislation. This is not only because these laws embody the favourable outcomes of the reforms and support them in turn, but also because they relate to the requirements of EU's conditional MET. There, the basic consistency between the Chinese legislation and the criteria to get

¹ The EU's anti-dumping policy against imports China are mainly traditional non-market economy treatment (analogue country method), one country one duty rule and occasionally use of market economy treatment and individual treatment. They are examined in more detail in chapter three.

MET is emphasized in order to propose some practical suggestions to the EU in the end. Four, I analyze commitments made on China's accession to the World Trade Organization (WTO), which ensures that further reform will be carried out towards a market economy direction in future.

After the above issues have been examined, the illegal and unreasonable aspects of the EU's anti-dumping practice towards China are analyzed. Based on the above study, suggestions for the EU are proposed at the end of this chapter.

The analysis in this chapter is based on a variety of sources. It deals with the legislative changes that have taken place since China embarked on its period of economic transformation in the 1980s. These legislative changes are discussed in the context of the economic analyzes that have been conducted by the World Bank, the WTO and the International Monetary Fund (IMF) in relation to each stage of economic reform wherever such reports are available.

Of crucial importance in this respect is the Report of the Working Party on China's Accession to the WTO.² This report provides the analysis – economic and legal – which corroborates the central argument of this thesis that the EU, by failing to take into account the very real changes that have occurred in China's economy, is acting unreasonably in its application of its anti-dumping regime. In many respects, the Report of the Working Party can be said to be a definitive statement of the true position of China's economy at the time of accession to the WTO in late 2001. Its conclusions formed the basis of China's accession and, as such, clearly should be seriously considered by EU policy makers in determining its trade arrangements with China.

² 'Report of the Working Party on the Accession of China', 1 October 2001. WTO document code: WT/ACC/CHN/49. Available by searching through <http://docsonline.wto.org/gen_search.asp> (1 December 2002).

I. China's foreign trade regime.

China's foreign trade regime has undergone fundamental changes through continuous reform since 1979, when trade development was dominated through monopolies controlled by the Chinese central government. As the outcome of the reform, the foreign trade system has seen great progress in both the import and export sectors, so that it was able to meet the commitments when China entered the WTO in November 2001.

A. A brief introduction to the pre-reform foreign trade regime in China.

China's foreign trade system before economic reform was completely controlled by the Chinese government. It was dominated by less than 17 foreign trade corporations with monopoly trading rights.³ Ignoring the important role played by the market, planners determined both import and export volumes by projected demand and supply for particular goods. At that time, the old regime had three characteristics. On the one hand, conventional policy instruments including tariffs, quotas and licences were seldom applied. Instead, there were a series of complicated procedures and formalities to manage the foreign trade system. On the other hand, the government regulated foreign trade activities mainly with administrative measures which lacked transparency and therefore were unpredictable. Furthermore, there was no institution to monitor the planners' work. Under such circumstances, the foreign trade regime was inefficient, thus China lost its advantages in international trade.

B. Process and progress of the reform of China's foreign trade regime.

In order to bring new energy to the old regime, China took four significant strategies in

³ Elena Ianchovichina & Will Martin, 'Trade Liberalization in China's Accession to World Trade Organization' at p 3. World Bank Policy Research Working Paper, No: WPS 2623, 2001/06/30. <http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000094946_01071704024384> (1 December 2002).

the reform, including: enlarging foreign trade rights, reforming trade policy, reforming the exchange system and reforming prices to let market prices guide resource allocation.

1. Enlarged foreign trade rights.

Since 1979, China has granted a large number of enterprises foreign trade rights rather than restrict such rights to the limited monopoly of foreign trade corporations as was done in the past. As a result, external trade is now conducted through more than 200,000 importers and exporters in China.⁴

From 1 January 1999, if private companies can prove that they can meet certain basic requirements provided by law, they will obtain foreign trading rights for their own products. At a later stage, big manufacturing firms can also get direct foreign trade rights for their products automatically without ratification from the state once they meet the legal requirements. That is to say, today, not only state trading enterprises, but also private companies and joint ventures are entitled to participate in foreign trade transactions. In addition, they enjoy the same level of rights and obligations before the law.

Besides, all these enterprises have been granted more rights to decision-making and self-management than ever before.⁵ Since 1984, they have been legally independent economic entities.⁶ Especially state owned enterprises which were completely under government control before, operate mainly along commercial lines now.⁷ Based on this

⁴ Deepak Bhattasali & Masahiro Kawai, 'Implications of China's Accession to the World Trade Organization', <<http://www.worldbank.org.cn/English/content/wto-implications.pdf>> (1 December 2002).

⁵ Except for a few commodities which the number of firms entitled to engage in trade is tightly restricted by state, such as crude oil, cotton, rubber, timber, steel etc.

E. IanchoviChina & W. Martin, *fn* 3 above at p 5.

⁶ Deepak Bhattasali & Masahiro Kawai, *fn* 4 above at p 4.

⁷ Rozelle, S., Park, A., Huang, Jikun and Hehui, Jin. 'Bureacrat to Entrepreneur: the Changing Role of the State in China's Transitional Commodity Economy' (Stanford University: Mimeo, 1996).

point, an individual enterprise can take its advantages in foreign trade business according to its development level and competition capability.⁸

All of these represent a relatively open foreign trade regime compared with before. Since the number of the enterprises and the trade rights that they enjoyed were largely expanded, import and export volumes greatly increased. Consequently, China's trade (imports and exports) as a share of GDP rose from 13 percent in 1980 to 44 percent in 1999.⁹

2. Reform of trade policy.

At the beginning of the reform, China's foreign trade system developed the conventional policy instruments including tariff and non-tariff barriers on imports. However, since 1990, in order to be consistent with the global trade principle, (i.e. eliminate tariff and non-tariff barriers to restore fair competition in international trade) and integrate with the world trade system, China made great efforts to reduce tariffs and remove non-tariff barriers. The average weighted tariff rate for the economy was estimated to be 16.4 percent in 2000¹⁰ from 40.6 percent in 1992 (See Table 4.1). Several significant tariff reforms from October 1997 to 2001 further reduced tariffs on a wide range of commodities. As to non-tariff barriers, these are estimated to have fallen to a tariff-equivalent level of 9.3 percent in the mid-1990s,¹¹ and the number of products subject to quotas and licences fell from 1247 tariff lines in 1992 to 261 in 1999.¹²

⁸ Hang Lin, 'China's Foreign Trade System towards Its Accession to the WTO' (Chinese) <http://www.Chinareform.org.cn/cgi-bin/BBS_Read.asp?Topic_ID=620> (1 December 2002).

⁹ D Bhattasali, *fn* 4 above at p 2.

¹⁰ Para 89, Report of the Working Party on the Accession of China.

¹¹ World Bank 1997b. *China Engaged: Integration with the World Economy*. Washington D.C.: World Bank.

¹² E IanchoviChina, *fn* 3 above at p 6.

Table 4.1. Average tariff rates in China from 1992 to 1998. (Percent)¹³

Year	Sample	Weighted
1992	42.9	40.6
1993	39.9	38.4
1994	36.3	35.5
1996	23.6	22.6
1997	17.6	18.2
1998	17.5	18.7

Source: World Bank 1999. World Development Indicator.

All of these reforms of the old trade regime have greatly stimulated the development of China's foreign trade. As a result, China's foreign trade volume (exports and imports) as a share of GDP (Gross Domestic Product) rose from 13 percent in 1980 to 44 percent in 1999.¹⁴ Also, China has become the second largest country with on-shore foreign currency deposits in the world after the United Kingdom.¹⁵ Thus, it wins more and more shares in international trade transactions.

C. Relevant laws which support the reform;

China provides a series of laws regulating its foreign trade system, in order to ensure that it operates under legal and market economy principles. On the one hand, it encourages normal trade activities, supporting and defending the outcome of the reform. From this

¹³ World Bank 1999. World Development Indicators. World Bank, Washington DC. Available from the World Bank website: <<http://www.worldbank.org>> (1 December 2002).

¹⁴ D Bhattasali, *fn* 4 above at p 2.

¹⁵ 'With on-shore foreign currency deposits of US\$128 billion, the second largest in the world after the United Kingdom, China's economy is more open than generally believed.'

D Bhattasali, *fn* 4 above at p 2.

point, relevant laws include the Foreign Trade Law¹⁶ and Current Policy & Conditions for the Qualification of Foreign Trade Management.¹⁷ On the other hand, to maintain a fair foreign trade order, it punishes any behaviour which is destructive to the system. For example, with regard to the issue of dumping, China enacted its Interim Regulation for the Punishment of Enterprises which Export Products with Low Prices¹⁸ on 20 March 1996. From this point of view, laws of different purpose perform together to keep a better foreign trade order in China. These different regulatory approaches should be analyzed to help us understand to what extent they ensure the system operates towards the market economy direction.

1. Foreign Trade Law of the People's Republic of China.

This law was enacted on 1 July 1994. It provides: a. the basic principles and orders that foreign trade operators should observe, b. a list of a small range of goods which it is prohibited to import, c. export and legal responsibilities for operators.

First of all, Article 4 provides: The State adopts a unified foreign trade regime and exercises a fair and free trade order. The State shall encourage every effort in trade development, help to bring the initiative of the localities into play, and safeguard the autonomy of trade operators in trade operation.

Article 11 stipulates that foreign trade operators shall operate independently according to law and be responsible for their own profits or losses.

¹⁶ Chinese Foreign Trade Law was promulgated by the State President on 12 May 1994. It was enacted to govern foreign trade dealer, goods imports and exports, technology imports and exports, international service trade, foreign trade order, and promotion of foreign trade. The Law went into effect on July 1, 1994.

¹⁷ This Regulation was issued by the Foreign Trade Department, MOFTEC. It has binding effects on all types of enterprises conducting foreign trade in China. Available from <http://www.moftec.gov.cn/article/200207/20020700032855_1.xml> (1 December 2002).

¹⁸ It was enacted on 20 March 1996 by MOFTEC.

In this way, the law confirms its objective to develop a sound foreign trade regime towards market economy orientation. In the meantime, it ensures the rights of operators in trade, so that they are able to make decisions for themselves according to market supply and demand.

2. Current Policy & Conditions for the Qualification of Foreign Trade Companies in the People's Republic of China.

This was promulgated by the Foreign Trade Department of the Ministry of Foreign Trade and Economic Cooperation, PRC (MOFTEC) in June 2001. It specifies basic conditions and application procedures for enterprises which are potentially entitled to trade in China.

The preface of the rule reiterates three points. First of all, the law was published to increase and improve transparency of China's foreign trade regime. In addition, the limit for the company's economic status permitted to do foreign trade business in China has been completely eliminated, i.e. non-public ownership (non-state-control) enterprises have the same rights with state trading companies at this point. In addition, the range of goods to be transacted under the regime is getting broader and broader.

3. Interim Regulation for the Punishment of Enterprises which Export Products with Low Prices.¹⁹

It was enacted on 20 March 1996 by MOFTEC. It indicates that the Ministry is the body to implement this Regulation,²⁰ and identifies the concept of export at low price,²¹ i.e.

¹⁹ This regulation is applicable to all foreign trade enterprises in China. Available (in Chinese) from: <<http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/1/1-2-39.html>> (1 December 2002).

²⁰ Art. 3, Interim Regulation for the Punishment of Enterprises which Export Products with Low Prices.

²¹ Art. 5, Interim Regulation for the Punishment of Enterprises which Export Products with Low Prices.

when the export price is lower than the price that should be paid.²² In order to prevent Chinese exporters competing with each other unfairly by decreasing the prices of their exports, the Ministry encourages individuals and units to report such practices to the authority. Within 30 days of the report being received, the Ministry will decide whether to launch an investigation or not.²³ As to the enterprises which export at low price, they will receive an economic or administrative punishment.²⁴ In this way, unfair competition in the foreign trade system is curbed by the government to some extent.

From the above analysis, it can be seen that China has realized the significance of market economy principles in international trade. So, today, it is making efforts to build a free and fair environment for its foreign trade development within a legal framework.

D. Commitments made on China's accession to the WTO and prospects for the future.

1. Commitments made on China's accession to the WTO.

According to the principles of international trade given in the GATT, the Chinese government made the following commitments in the foreign trade field on its accession to the WTO.

a. Commitment on enterprise's qualification of foreign trade.

Within a three years' transition period, China will liberalize the scope and availability of

²² 'Price that should be paid' comprises: production cost, transportation cost, insurance cost, management cost and reasonable profit of an export.

²³ Art. 8, Interim Regulation for the Punishment of Enterprises which Export Products with Low Prices.

²⁴ Art. 6 & 12, Interim Regulation for the Punishment of Enterprises which Export Products with Low Prices (20 March 1996).

foreign trading rights. It undertook that.²⁵

With regard to wholly Chinese-invested enterprises, it would reduce the minimum registered capital requirement to obtain trading rights to RMB²⁶ 5,000,000 (around US Dollar \$604,000) for year one, RMB 3,000,000 (around US Dollar \$362,400) for year two, RMB 1,000,000 (around US Dollar \$120,800) for year three and would eliminate the examination and approval system at the end of the phase-in period for trading rights. As to foreign-invested enterprises, it would liberalize the scope and availability of trading rights gradually.

Beginning one year after accession, joint-venture enterprises with minority share foreign-investment would be granted full rights to trade and beginning two years after accession majority share foreign-invested joint-ventures would be granted full rights to trade.²⁷

Within three years after accession, all enterprises in China would be granted the right to trade automatically. As a result, all enterprises in China, foreign enterprises and individuals would be allowed to export and import throughout the customs territory of China.²⁸

b. Commitment on designated trading.²⁹

The Chinese government undertook to phase out the limitation on the grant of trading rights for goods specified in Annex 2B of its Draft Protocol within three years after

²⁵ Para. 83 & 84, Report of the Working Party on the Accession of China.

²⁶ RMB is 'Renminbi' for short, Chinese currency.

²⁷ Para. 83 (c), Report of the Working Party on the Accession of China.

²⁸ Except for the share of products listed in Annex 2A to the Draft Protocol reserved for importation and exportation by state trading enterprises.

²⁹ Para. 86, Report of the Working Party on the Accession of China.

accession. It would liberalize the right to trade in such goods by increasing the number of imports progressively during the transition period. All Chinese and foreign enterprises and individuals would be permitted to import and export such goods throughout the customs territory of China in the end.

c. Commitment on tariff reduction.

China has made substantial tariff reductions in many sections within the past few years, a fact which is acknowledged by other WTO members.³⁰ After it entered into the WTO, China has made further commitments on this issue. For example, China signed the Information Technology Agreement on its accession to the WTO, so it would eliminate tariffs and charges on all information technology products as set out in the schedule.³¹ Besides, China has agreed to reduce the average tariffs for all imports. Tariffs on agricultural products will be reduced from 20 percent in 1998 to 17 percent by 2004, and the average tariffs on all manufactures will fall from 18.5 percent in 1998 to 9.4 percent by 2005. (See Table 4.2)³²

³⁰ Para. 87, Report of the Working Party on the Accession of China.

³¹ Para. 92, Report of the Working Party on the Accession of China.

³² Deepak Bhattasali & Masahiro Kawai, *fn* 4 above at p 4.

Table 4.2: Summary of Important Features of the China-US Agreement.³³

Sector	Agreements
Agriculture	<p>Average tariffs reduced from 20 percent to 17 percent by January 2004.</p> <p>A tariff-rate quota (TRQ) system established for bulk commodities, with quota quantities increasing over time, and subject to tariffs between 1-3 percent. Export subsidies on cotton and rice eliminated.</p> <p>Foreign exporters given the right to sell and distribute their products directly to consumers.</p>
Manufacturing	<p>Average tariffs reduced from 18.5 percent in 1998 to 9.4 percent by 2005, phased in linearly, with large cuts for automobiles, high tech products, wood, and paper.</p> <p>Quotas and non-tariff restrictions eliminated within 5 years (and most in 2002-2003). Foreign firms given full trading and distribution rights for imported goods.</p>
Textiles and Clothing	<p>Import quotas on China's textiles and clothing exports eliminated by end-2005, subject to anti-surge provisions through 2008.</p>

Source: International Monetary Fund.

d. Commitments on elimination of non-tariff trade barriers (quotas and licences).

China established a tariff-rate quota (TRQ) system on its accession to the WTO. China undertakes that the system will be transparent, predictable, uniform, fair and non-discriminatory with clearly specified timeframes, administrative procedures and requirements, which reflects consumer preferences and end-user demand. China will apply TRQs according to WTO principles and the provisions set out in China's Schedule

³³ WTO most-favored-nation (MFN) treatment enables the commitments made in China-US Agreement available to all other members.

'Summary of U.S.- China Bilateral WTO Agreement',
<http://www.usChina.org/public/991115a.html> (1 December 1, 2002).

of Concessions and Commitments on Goods.³⁴

As to the TRQ provisions applied to state-trading enterprises. China ensures that it would implement consistent allocation and reallocation policies. Besides, all these decisions will be made by a single, central authority according to consumer preferences and end-user demand of the commercial market.³⁵

In addition, China has submitted a list of goods with non-tariff measures to phase out contained in Annex 3 of the Draft Protocol.³⁶ China will eliminate the measures according to the schedule provided in the Annex. China confirmed that the application and administration of those measures, i.e. quotas and import licences, would be consistent with the WTO Agreement. The quotas will be allocated and the licence will be issued through simple and transparent procedures. As long as the products are within the relevant quota category, the quota holder has absolute rights to dispose of them, including to decide their specifications, pricing and packaging.³⁷ All of these policies are targeted to meet potential need in the market and minimize the adverse effect of non-tariff measures on trade.

Based on these principles, all quotas and non-tariff trade barriers will be eliminated within 5 years after China's accession to the WTO.³⁸

2. Prospects for China's foreign trade in future.

China's entry into the WTO had significant impact on its economic status in the world

³⁴ Para. 116, Report of the Working Party on the Accession of China.

³⁵ Para. 119, Report of the Working Party on the Accession of China.

³⁶ 'The Draft Protocol of the Report of the Working Party on the Accession of China', Report of the Working Party on the Accession of China at p 73.

³⁷ Para. 131, Report of the Working Party on the Accession of China.

³⁸ Deepak Bhattachali & Masahiro Kawai, *fn 4* above at p 5.

economy. With the implementation of the accession offer, its share of world export markets are estimated to rise from 3.7 percent in 1995 to 6.8 percent in 2005, and from 3.4 percent in 1995 to 6.6 percent in 2005 of world import markets. With regard to its impact on developed regions, Western Europe can benefit most due to China's accession to the WTO. Its exports to China will increase from \$28,571 Million in 1995 to \$50,182 Million in 2005, while those from North America will grow from \$19,019 Million to \$28,638 Million during the same period of time.³⁹ China is likely to be the second largest trading partner only after the US twenty years later, rather than the 10th largest partner of today.⁴⁰

Considering these facts and analysis, it is safe to say that after years of reform, China's foreign trade system operates mainly under market economic conditions today. Following China's accession to the WTO, it will make further progress at this point through continuous reform. Therefore, both the outcome and prospects of the reform should be taken into account when determining China's economic status in international trade issues such as anti-dumping.

II. Chinese enterprise reform.

Chinese enterprises can be divided into four categories according to their ownership: state-owned enterprises, collective-owned enterprises, individual-owned enterprises, and 'other' ownership forms. Among them, collective-owned enterprises include urban collectives, township enterprises, village enterprises, and cooperatives. Individual-owned firms, which account for about 80 percent of the more than 7 million enterprises in China, are privately owned firms that employ no more than seven workers. 'Other' ownership

³⁹ Deepak Bhattasali & Masahiro Kawai, *fn* 4 above at p 18.

⁴⁰ Yukon Huang, 'Realizing China's Potential', <<http://www.worldbank.org.cn/english/content/529z6146591.shtml>> (1 December 2002).

firms include domestic joint ventures, privately owned enterprises, foreign-funded joint ventures, overseas-funded joint ventures, foreign-funded wholly owned firms, overseas-funded wholly owned firms, foreign-funded cooperatives, overseas-funded cooperatives, and share-holding enterprises.⁴¹ Fundamental changes took place in Chinese enterprises due to China's economic reform, especially the self-management rights enjoyed by enterprises of different ownerships. These changes are examined below.

A. Brief introduction to Chinese enterprise before reform.

Before China's economic reform, the Chinese government fully controlled China's economy by dominating the country's enterprises. The large majority of investment funds and resources were allocated by the state from state resources.⁴² There was hardly any other ownership except state-owned and collective-owned enterprises. For example, in 1980, China had only 400 'other' ownership firms, but 83,400 state-owned and 293,300 collective-owned enterprises, which accounts for 99.89 percent of the total at that time.⁴³

B. Process and Progress of the Chinese enterprise reform.

Following China's economic reform in 1978, several key strategies were taken by the government, and tremendous changes took place in Chinese enterprises.

First, non-state-ownership was introduced and increasingly expanded. The overall number of enterprises in China rose from 377,000 in 1980 to nearly 8 million in 1999. (Table 4.3) Among them, State-owned enterprises decreased from 83,400 in 1980 to

⁴¹ Gary H. Jefferson & Thomas G. Rawski, 'Ownership Change in Chinese Industry' in Gary H. Jefferson and Inderjit Singh (eds.), *Enterprise reform in China, Ownership, Transition, and Performance*. (Oxford University Press: 1999) at p 23.

⁴² Gary H. Jefferson, Albert G. Z. Hu, and Inderjit Singh, 'Industrial Investment, Finance, and Enterprise Performance in Chinese Industry', in Gary H. Jefferson and Inderjit Singh (eds.), *Enterprise reform in China, Ownership, Transition, and Performance*. (Oxford University Press: 1999), 223.

⁴³ Gary H. Jefferson & Thomas G. Rawski, *fn* 41 above at p 25.

61,300 in 1999. The number of collective-owned enterprises increased from 293,500 in 1980 to 1,659,200 in 1999, with most of the growth coming from village or joint township-village enterprises. The most extraordinary growth existed in individual-owned enterprises, which rose sharply from 3,347,800 in 1985 to 6,126,800 in 1999. All of the changes, especially the rapid expansion of non-state-owned firms, reflect the relatively free market environment in China compared with before.⁴⁴

Table 4.3. Number of enterprises (thousand), selected years (1980-99).

Type of enterprise	1980	1985	1990	1995	1998	1999
State-owned	83.4	93.7	104.4	118.0	64.7	61.3
Collective-owned	293.5	367.8	1,668.5	1,475.0	1,797.8	1,659.2
Individual-owned	--	3,347.8	6,176.0	5,688.2	6,033.8	6,126.8
Other	0.4	1.7	8.8	60.3	85.7	91.8
Total	377.3	3,811.0	7,957.8	7,341.5	7,974.6	7,929.9

Note: -- Not available.

Source: China State Statistical Bureau 2000.⁴⁵

Second, at the beginning, the reform was carried out by decentralizing public ownership through devolution of the control of state industry to provincial and local governments. This decentralization of control was reinforced by the policy that the state increasingly leaves the disposition of all except the largest enterprises to provincial and local levels of government. It had a strong impact on the large number of state-owned enterprises at that time. Although public ownership still dominates Chinese industry, the state could no longer monopolize production and pricing, except in certain natural resource and defense sectors. As a result, these enterprises gained more flexibility in their individual

⁴⁴ Ibid.

⁴⁵ From China State Statistical Bureau official website:
<<http://www.stats.gov.cn/sjjw/ndsj/zgnj/2000/M01c.htm>> (26 March 2002).

development, and became more competitive than before.⁴⁶

Another approach to Chinese enterprise reform is corporate restructuring. A rapidly growing number of Chinese state owned enterprises have been corporatized, generally as joint ventures or joint stock companies in which the state remains the majority shareholder. The incentive to the conversion is the low productivity of state-owned enterprises, which declined at an annual rate of 3.42 percent between 1988 and 1992.⁴⁷

An important reason for the frequently poor performance of these enterprises, and of difficulties experienced by foreign partners investing in or with them, has been their lack of a corporate structure. Due to this reason, by the end of 1997, more than 400 of China's larger state enterprises had been converted into joint stock companies and listed on public exchanges. Labour productivity in these enterprises was highly improved in this way. (See table 4.4). In 2000, 2800 bankruptcy and merger proposals were approved, among which 1504 were carried out, with a total writing-off of RMB81 billion (around US Dollar \$9.79 billion). By the end of 2000, more than 81 percent of the 63,490 small-sized state-owned enterprises existed at end-1996 had been reformed (mainly through sales).⁴⁸ As a result of corporate restructuring, these enterprises enjoy a substantial expansion of property rights and decision-making rights, which bring out much higher productivity and stronger competitive capability compared with before.

⁴⁶ Gary H. Jefferson and Thomas G. Rawski, *fn* 41 above at p 29.

⁴⁷ Gary H. Jefferson, Inderjit Singh, XingJunling, and Zhang Shouqing. 'China's Industrial Performance: A Review of Recent Findings' in Gary H. Jefferson and Inderjit Singh (eds.), *Enterprise reform in China, Ownership, Transition, and Performance*. (Oxford: Oxford University Press 1999), 147.

⁴⁸ 'World Bank Report on China's Economic Management,' September 2001, <<http://www.worldbank.org.cn/english/Knowledge/update9-2001.pdf>> (1 December 2002).

Table 4.4 Labour productivity by ownership, selected years, 1985-96. (Chinese Yuan RMB per worker; 1 U.S Dollar is roughly equivalent to 8.28 RMB in December 2002)⁴⁹

Year	1980	1988	1990	1993	1996
Type of enterprise					
State enterprise	15309	24477	29933	50522	66295
Collective enterprise	5042	8721	11444	22581	42234
Other enterprises	32636	63018	76297	120888	223176

Source: China State Statistical Bureau.

In short, Chinese enterprise reform has been carried out towards market orientation since 1978. It results in less and less interference from the state or local government in these enterprises' operations. It brings them (especially state owned enterprises) many more rights to manage themselves than ever before, so that today they can make crucial decisions according to their individual advantages and market demand. On the other hand, the state applies a unified set of rules to regulate companies with different ownerships and treats them without discrimination. Under such circumstances, all types of enterprises are able to compete fairly under market principles.

C. Main laws regulating Chinese enterprises.

China has enacted a number of laws to ensure that the Chinese enterprise reform is carried out towards market orientation. They include General Principles of the Civil Law of the People's Republic of China,⁵⁰ Company law,⁵¹ Enterprise Bankruptcy

⁴⁹ Source: China State Statistical Bureau 1986, 1989, 1991, 1994, 1997; *China Labour Statistics Yearbook 1993* (pp. 193, 349, 413); *China Industrial Economy Statistical Yearbook 1988* at p. 27; China State Statistical Bureau enterprise data set.

⁵⁰ General Principles of the Civil Law of the People's Republic of China was Promulgated by the State President on April 12, 1986.

⁵¹ The translation of the law is available from <<http://www.qis.net/Chinalaw/lawtran1.htm>> (1 December 2002).

Law,⁵² Laws for enterprises of different ownerships.

1. General Principles of the Civil Law of the People's Republic of China

This is a very important statute which identifies the basic legal status of Chinese enterprises. Coming effect on January 1, 1987, it provides general rights and obligations of a legal person in China.

According to the law, a legal person shall be an organization that has capacity for civil rights and capacity for civil conduct and independently enjoys civil rights and assumes civil obligations.⁵³ An enterprise as a legal person shall bear civil liability for the operational activities of its legal representatives and other personnel.⁵⁴ A state-owned enterprise (enterprise owned by the whole people), collective enterprise, China-foreign equity joint venture, China-foreign contractual joint venture or foreign-capital enterprise as a legal person shall bear civil liability with the property it owns, except as stipulated otherwise by law.⁵⁵

2. Chinese Company Law.

Chinese Company law was enacted on 29 December 1993 for the first time and revised on 25 December 1999. Compared with the provisions in the General Principles of the Civil Law of PRC, it is more specific, governing a company's foundation, structure, rights and obligations, functioning, stock issue, dissolution and so on. However, for the purpose of this section,⁵⁶ here we may just examine the provisions with regard to a company's

⁵² It was promulgated by the State President on 2 December 1986 and took effect on 1 October 1988.

⁵³ Art. 36, General Principles of the Civil Law of the People's Republic of China.

⁵⁴ Art. 43, General Principles of the Civil Law of the People's Republic of China.

⁵⁵ Art. 48, General Principles of the Civil Law of the People's Republic of China.

⁵⁶ This section aims to prove that Chinese enterprises of today enjoy broad self-management rights, so that they are able to operate and compete with each other under fair market conditions.

self-management rights, obligations and responsibilities that it bears for its decisions.

a. Liabilities of a company.

According to the Law, 'company' refers to a limited liability company or a company limited by shares established within the Chinese territory.⁵⁷ Both types of companies are enterprise legal persons.

In the case of a limited liability company, a shareholder is liable to the company to the extent of the amount of the shareholder's capital contribution. A limited liability company is liable for the debts of the company with all its assets. In the case of a company limited by shares, its entire capital is divided into shares of equal value and shareholders shall be liable to the company to the extent of the shares held by them. A company limited by shares is liable for the debts of the company with all its assets.⁵⁸

The above provisions stress that companies of different types are responsible for their debts with their assets. They are very important because they are the prerequisite to provide a company's self-management rights subsequently in this law.

b. Basic rights and general principles of self-management.

The shareholders of a company, as capital contributors, have the right to enjoy the benefits of the assets of the company, make major decisions, choose managers etc. in accordance with the amount of capital they have invested in the company. A company enjoys all legal person property rights constituted by the shareholders' investment, enjoys civil rights and assumes civil liabilities in accordance with the law.⁵⁹

⁵⁷ Art. 2, Company Law of the People's Republic of China.

⁵⁸ Art. 3, Company Law of the People's Republic of China.

⁵⁹ Art. 4, Company Law of the People's Republic of China.

With respect to all its corporate property, a company conducts its business autonomously in accordance with the law and is responsible for its own profits and losses. Under the state's macro regulation and control adjustment, a company organizes its production and operations autonomously according to market demand with the objectives of raising economic efficiency and labour productivity and preserving and increasing the value of assets.⁶⁰ A company implements an internal management structure with a clear division of rights and responsibilities, scientific management and combined incentives and restrictions.⁶¹

The above rules ensure a company's self-management rights without state interference with regard to decision-making, profit and loss, and production. All of these are consistent with the first criterion of the EU's conditional MET.⁶²

The law also provides that a state owned enterprise which is being reorganized as a company shall replace its system of operation, gradually and systematically take inventory of its assets and verify its capital, determine property rights, clear creditors' rights and indebtedness, value assets and set up a standardized internal management structure in accordance with the law and conditions and requirements of administrative regulations.⁶³

This rule is basically the same as the third criterion of the EU's conditional MET, which

⁶⁰ Art. 5, Company Law of the People's Republic of China.

⁶¹ Art. 6, Company Law of the People's Republic of China.

⁶² 'Decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values', Art. 2(7)(c) of Council Regulation (EC) No 905/98, OJ 1998 L 128/18.

The five criteria of the conditional MET are analyzed in more detail in chapter three and section V of this chapter.

⁶³ Art. 7, Company Law of the People's Republic of China.

requires that 'the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts'.

c. Management rights of a limited liability company.

China's Company Law strengthens a limited liability company's self-management rights by specifying the powers exercised by its shareholder's meeting, board of directors, manager and board of supervisors.

Under the Law, a shareholder's meeting of a limited liability company will be made up of all shareholders.⁶⁴ It is the company's authoritative organization, and exercises the powers to decide on the company's operational policies and investment plans; to elect and replace directors and decide on matters relating to the remuneration of directors; to elect and replace the supervisors who are representatives of the shareholders, and decide on matters relating to the remuneration of supervisors; to examine and approve reports of the board of directors; to examine and approve reports of the board of supervisors or any supervisor(s); to examine and approve the company's proposed annual financial budget and final accounts; to examine and approve the company's plans for profit distribution and recovery of losses; to decide on increases in or reductions of the company's registered capital; to decide on the issue of bonds by the company; to decide on transfers of capital contribution by shareholders to a person other than a shareholder; to decide on issues such as merger, division, change in corporate form or dissolution and liquidation of the company; and to amend the company's articles of association.⁶⁵

The board of directors is set up with 3-13 members of the company, and has one chairman

⁶⁴ Art. 37, Company Law of the People's Republic of China.

⁶⁵ Art. 38, Company Law of the People's Republic of China.

and may have one or two vice-chairmen who are elected according to the articles of association. The chairman of the board of directors is the legal representative of the company.⁶⁶ The board of directors is responsible to the shareholders' meetings and exercises the powers to be responsible for convening shareholders' meetings and is accountable to the shareholders' meeting; to implement the resolutions of the shareholders' meeting; to decide on the operational plans and investment plan of the company; to formulate the company's proposed annual financial budget and final accounts; to formulate plans for profit distribution and recovery of losses; to formulate plans for increases in or reductions of the company's registered capital; to prepare plans for merger, division, change in corporate form and dissolution of the company; to decide on the set up of the company's internal management structure; to appoint or dismiss the company's manager (general manager) (the 'manager') and pursuant to the manager's nominations to appoint or dismiss the deputy manager and the financial officers of the company and decide upon their remuneration; and to formulate the company's basic management system.⁶⁷

A limited liability company has a manager who is appointed or dismissed by the board of directors. The manager is responsible to the board of directors and exercises the powers to be in charge of the company's production, operations and management and organize the implementation of the resolutions of the board of directors; to organize the implementation of the company's annual business plan and investment plan; to propose plans for the putting in place of the company's internal management structure; to propose the company's basic management system; to formulate specific rules and regulations for the company; to propose the appointment or dismissal of the company's deputy manager(s) and financial officers; to appoint or dismiss management officers other than

⁶⁶ Art. 45, Company Law of the People's Republic of China.

⁶⁷ Art. 46, Company Law of the People's Republic of China.

those required to be appointed or dismissed by the board of directors; and other powers conferred by the company's articles of association and the board of directors. The manager is present at meetings of the board of directors.⁶⁸

The board of supervisors is made up of representatives of shareholders and a reasonable proportion of representatives from the company's staff and workers according to the Company's Articles of Association. The directors, manager and financial officers of the company shall not act concurrently as supervisors.⁶⁹ The board of supervisors as supervisor (s) exercises the powers to inspect the company's financial situation; to exercise supervision over the acts of the directors and manager carried out while performing their corporate functions which violate laws, regulations or the company's articles of association; to demand remedies from a director or manager when the acts of such director or manager are harmful to the company's interests; to propose the convening of an interim shareholders' meeting; and other powers specified in the company's articles of association. The supervisors are present at meetings of the board of directors.⁷⁰

Other provisions about a company's decision-making right include: when considering and deciding on major issues relating to the company's production and operations and formulating important rules and regulations, the company shall solicit and consider the opinions and proposals of the company's trade union and staff and workers.⁷¹ In addition, state civil servants shall not act concurrently as a company's director, supervisor or manager.⁷²

⁶⁸ Art. 50, Company Law of the People's Republic of China.

⁶⁹ Art. 52, Company Law of the People's Republic of China.

⁷⁰ Art. 54, Company Law of the People's Republic of China.

⁷¹ Art. 56, Company Law of the People's Republic of China.

⁷² Art. 58, Company Law of the People's Republic of China.

d. Management rights of a company limited by shares.

Based on the provisions of Chinese Company Law, a company limited by shares enjoys similar broad management rights as a limited liability company. Like the latter, a shareholder's general meeting,⁷³ board of directors⁷⁴ and board of supervisors⁷⁵ will be made up, and a board chairman and a manager⁷⁶ will be appointed according to the Company's Articles of Association. Besides, in case of consulting and making decisions on crucial issues relating to the company's production and operation, also when formulating important rules and regulations, the company is required to solicit and consider the opinions or proposals of the company's trade union and the staff and workers.⁷⁷

All of the above detailed provisions of the Company Law ensure a company's self-management rights with regard to its operation and development. Therefore, it is safe to say that under these rules, there is no significant state interference towards most of the companies today.

e. Financial Affairs and Accounting.

Chinese Company Law requires every company to have its financial and accounting systems according to the laws, administrative regulations and the regulations of the responsible finance department of the State Council.⁷⁸

At the end of each fiscal year, the company shall prepare a financial statement which shall

⁷³ Art. 102 & 103, Company Law of the People's Republic of China.

⁷⁴ Art. 112, Company Law of the People's Republic of China.

⁷⁵ Art. 124, 126, Company Law of the People's Republic of China.

⁷⁶ Art. 119, Company Law of the People's Republic of China.

⁷⁷ Art. 122, Company Law of the People's Republic of China.

⁷⁸ Art. 174, Company Law of the People's Republic of China

be examined and verified as provided by law. The company's financial statements shall include the following accounting statements and schedules: balance sheet, profit and loss statement, statement of financial changes, explanation of financial condition, and profit distribution statement.⁷⁹

Together with other laws regulating enterprises' accounting and financial system which will be illustrated later, these provisions are in line with the second criterion of the EU's conditional MET, which requires that 'firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes'.

f. Insolvency, dissolution and liquidation of a company.

In the case of a company legally declared bankrupt because it is unable to repay debts due, the People's Court shall, in accordance with the provisions of relevant laws, organize the shareholders, relevant organizations and relevant professional personnel to establish a liquidation group to carry out bankruptcy liquidation procedures with respect to the company.⁸⁰

A company may dissolve in any of the following situations: (1) Pursuant to the provisions of the company's articles of association, the term of the company has expired or one of the other events which are grounds for dissolution has occurred; (2) A resolution for dissolution is passed by a shareholders' meeting; (3) Dissolution is necessary due to a merger or division of the company.⁸¹

After putting the company's property in order and preparing a balance sheet and an

⁷⁹ Art. 175, Company Law of the People's Republic of China.

⁸⁰ Art. 189, Company Law of the People's Republic of China.

⁸¹ Art. 190, Company Law of the People's Republic of China.

inventory of property in connection with liquidation of the company resulting from dissolution, if the liquidation group discovers that the company's assets are insufficient to repay the company's debts, the liquidation group shall immediately apply to the People's Court for a bankruptcy declaration.⁸²

The rules of insolvency, dissolution and liquidation of a company are consistent with the fourth criterion of the EU's conditional MET, which requires that the firms concerned be 'subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms'.

3. Laws for enterprises of different forms of ownerships.

They mainly include: State-Owned Enterprise Law;⁸³ Law on Urban Collective-owned Enterprise;⁸⁴ Law on Township/Village-owned Enterprise;⁸⁵ Individual-owned Enterprise Law;⁸⁶ Law on Chinese-Foreign Equity Joint Venture;⁸⁷ Foreign-Capital Enterprise Law;⁸⁸ Law on Chinese-Foreign Contractual Joint Venture.⁸⁹

⁸² Art. 196, Company Law of the People's Republic of China.

⁸³ It went into effect on 1 August 1988, providing s state-owned enterprise's establishment, rights and obligations, management, legal responsibilities.

⁸⁴ It took effect on 1 January 1992.

⁸⁵ It went to effect on 1 January 1997.

⁸⁶ It governs the establishment, basic rights and obligations, dissolution, liquidation and legal responsibilities of Individual-Owned Enterprises. It took effect on 1 January 2000.

⁸⁷ It governs the establishment, organization form, financial and accounting affairs of Chinese-Foreign Equity Joint Ventures. The Law went into effect on July 1, 1979 with amendments on April 4, 1990 and March 15, 2001.

⁸⁸ It is enacted to encourage the establishment of foreign-capital enterprises in China by foreign investors and protect the lawful rights and interests of foreign-capital enterprises. The Law went into effect on April 12, 1986, and was amended on October 31, 2000.

⁸⁹ It is enacted to expand China-foreign economic co-operation and technical exchange and to promote foreign enterprises and other economic organizations or individuals to establish China-foreign contractual joint ventures. The Law went into effect on April 13, 1988, and was amended on October 31, 2000.

Though they are laws governing enterprises with different forms of ownerships, all of them insist on the same basic principle that all enterprises should observe laws and be responsible for their own profits and losses. The legislation ensures that different types of Chinese enterprises today enjoy broad freedom and operate under legal and market conditions.

4. Laws regulating enterprises' accounting and financial system.

They are mainly Accounting Law, Enterprise Accounting Standards and General Principles on Financial Affairs of Enterprises.

a. Accounting Law.⁹⁰

Accounting Law of China regulates accounting behaviours, ensures accounting information to be truthful and complete, strengthens economic management and financial management, and improves economic benefits. The law covers general provisions, accounting calculation, special provisions on accounting calculation of companies and enterprises, accounting supervision, accounting organs and accounting personnel, legal liability and supplemental provisions. The law entered into force on July 1, 2000.

b. Enterprise Accounting Standards.⁹¹

They govern the common principles, assets, liabilities, equities of the owner, revenue, expenses, profits, and accounting statements of enterprises. The standards went into effect on July 1, 1993.

⁹⁰Chinese Accounting Law was firstly promulgated by the State President on January 21, 1985. It was amended in 1993 and most recently on October 31, 1999.

⁹¹ It was enacted by the Ministry of Finance, People's Republic of China on 30 November 30, 1992, and went into effect on July 1, 1993.

c. General Principles on Financial Affairs of Enterprises.⁹²

It regulates financing, working capital, fixed, intangible and deferred assets, investment, costs and expenses, business income, profits and their distribution, foreign currency operations, enterprise liquidation, and financial statements and evaluation. The principles went into effect on July 1, 1993.

The three laws operate together governing the accounting and financial system of Chinese enterprises. According to the detailed provisions of the laws, basic accounting principles observed by Chinese enterprises are the same as international accounting standards in nature.⁹³ This is consistent with the second criteria for MET in the current EU's anti-dumping policy applicable to China.⁹⁴

5. *Chinese Enterprise Bankruptcy Law.*

It was enacted on 2 December 1986 and took effect on 1 October 1988. It regulates bankruptcy of state-owned enterprises. When such an enterprise is unable to repay debts due because of the failure of management, it will be legally declared to be bankrupt pursuant to this law. It provides detailed procedures on bankruptcy liquidation and allocation of residual assets of the enterprise concerned.

According to the law, state-owned enterprises will be declared bankrupt as a result of

⁹² It was promulgated by the Ministry of Finance, People's Republic of China on November 30, 1992, and went into effect on July 1, 1993.

⁹³ Lei Wang, 'The Twenty Years of EU's Anti-Dumping Practice with regard to the People's Republic of China' in Chinese Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters (ed.), *How to Respond to Foreign Countries' Anti-Dumping Practice?* (Beijing, China: Foreign Economy and Trade Publisher, 2001).

⁹⁴ 'firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,' Art 2(7)(c), Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community. OJ 1998 L 128/18.

failure in market competition, unless they are essential to the national economy and unless the livelihood of people is threatened, then they may be supported by government. That is to say, considering the conditions governing bankruptcy, state-owned enterprises do not have privileges compared with those of other ownerships. All of them compete with each other fairly under market economy conditions according to laws and regulations.

From the above analysis of laws, we can see the favourable outcomes of the reform of Chinese enterprises and companies. First, the reform realizes the separation of government's administrative rights and company/enterprise's decision-making rights.⁹⁵ Second, enterprises enjoy many more self-management rights compared with before. Third, enterprises with different forms of ownership enjoy the same level of rights and obligations and compete fairly under market principles.

D. Commitments about Chinese enterprise made on China's accession to the WTO.

As we have discussed above, China has made remarkable progress on its enterprise reform. The reform will go even deeper now that China has entered into the WTO. This can be ensured by the commitments made on its accession to the WTO. According to the 'Report of the WTO working party on the accession of China',⁹⁶ emphasis is put on issues of state ownership, where enterprise decision-making process is most likely to be interfered with by the state. The commitments ensure the maximum decision-making rights of state-owned enterprises and the minimum possible interference from Chinese central government.

⁹⁵ Art. 58. State civil servants shall not act concurrently as a company's director, supervisor or manager. Chinese Company Law.

⁹⁶ Report of the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 2001. Available from: <http://www.wto.org>

1. China states that Chinese state-owned enterprises operate under rules of market economy without direct government interference in the human, finance and operational activities such as production, supply, and marketing. Production resources are allocated by the market, and the price of products from the enterprises are determined by the enterprises themselves based on market demand. The state-owned banks had been commercialized, and their transactions with state-owned enterprises are carried out exclusively under market conditions.⁹⁷

2. China ensures that all state-owned and state-invested enterprises' decisions will be made based solely on commercial considerations without government influence. Enterprises of other WTO members have equivalent opportunities to compete for sales and purchases from these state enterprises on non-discriminatory terms and conditions.⁹⁸

Based on the above point, it is easy to deduce that as the result of continuous reform, with the commitments that China has made as a member of the WTO, Chinese enterprises of different ownerships will operate more freely and compete more fairly under market economy principles in the future.

III. Price reform.

According to economic theory, prices are essential to establish the correct signals for resource allocation. Especially when combined with reforms that give enterprises autonomy and the incentive to respond to price signals, they ensure that allocative efficiency will be improved. From this point of view, the most critical and basic requirement in any reforming planned economy (RPE) is the establishment of market-based relative prices for commodities and factors of production. Due to this

⁹⁷ Report of the Working Party on the Accession of China, para 43.

⁹⁸ Report of the Working Party on the Accession of China, para 46.

reason, China has regarded price reform as a key area in its economic reform since 1979.

A. A brief introduction to the pricing system in China before reform.

Prior to the reform, China's economy was dominated by mandatory planning, so prices were set by the central government. According to a World Bank report, in 1978, 97 percent of retail prices, 94.4 percent of farm prices and 99.7 percent of raw material prices were state controlled in China.⁹⁹ Even in the early 1980s, 110 agricultural commodities were subject to state price.¹⁰⁰ In that case, they reflect neither the value of commodities, nor supply and demand of the market.

B. Outcome of price reform in China.

China has carried out reform of its price system gradually since 1979. The price reform aims to reduce the scope of state controlled price and apply both floating prices and market prices to goods circulating in the market. The reform has lasted for more than twenty years so far, and it has received favourable outcomes.

By the early 1990s, the reform had reached a fairly advanced stage. Nearly 70 percent of all consumer goods, in terms of sales value, had been deregulated and price controls had been relieved except on 111 intermediary goods. At the end of 1991, only 17 agricultural commodities remained subject to state price controls.¹⁰¹ Reform by that time had enabled the most important economic factors such as resource allocation to be increasingly subject to market prices. It also accelerated the growth of productivity in industrial

⁹⁹ Page 7, Council Regulation amending Council Regulation (EC) No. 384/96, COM/97/0677 final - ACC, OJ 1998 C70/15.

¹⁰⁰ 'China: the Achievement and Challenge of Price Reform'. (World Bank Report No: 11772,. March 1993),
vii.
<http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000178830_9810191119204> (1 December 2002).

¹⁰¹ Ibid.

sectors.

After achieving primary macroeconomic stability, China began another round of price adjustments in the late 1980. These adjustments covered transport tariffs, and the prices of industrial raw materials, agricultural commodities and grain. By 1992, 'They have successfully exploited the opportunities provided by a relatively benign macro environment, in substantially reducing relative price distortions in critical sectors and brought Chinese prices close to international ones.'¹⁰² Crude oil and steel prices were liberalized in 1993.

In the past few years, price reform in China has been further deepened. According to the World Bank, in 1996, 90 percent of retail prices and 80 percent of prices for agriculture and raw materials were determined by the market.¹⁰³ In 2001, the number of products with regulated prices has dropped to 13, as against 144 in 1992.¹⁰⁴

By October 2001 when China successfully entered into the WTO, data¹⁰⁵ shows that in respect of social retailing products, the share of government prices was about 4 per cent, that of government guidance prices 1.2 per cent, and that of market-regulated prices 94.7 per cent. For agricultural products, the share of government prices was 9.1 per cent, government guidance prices 7.1 per cent, and market-regulated 83.3 per cent. For production inputs, the share of government prices was 9.6 per cent, that of government guidance prices 4.4 per cent, and market-regulated prices 86 per cent. Above is the fundamental progress made in the price reform of China so far.

¹⁰² Ibid.

¹⁰³ Proposal to the Council Regulation amending Council Regulation (EC) No. 384/96, COM/97/0677 final - ACC, OJ 1998 C70/15.

¹⁰⁴ 'Country update, Economic Management of China', World Bank Report. September 27, 2001. Page 2. <<http://www.worldbank.org.cn/english/Knowledge/update9-2001.pdf>> (1 December 2002).

¹⁰⁵ Para 55, Report of the Working Party on the Accession of China.

Based on these facts, we can say that the share of direct government-controlled prices has been largely reduced so far, and China's price system has become increasingly rationalized. Today, the majority of prices in China are determined by the market, and state-controlled prices have been eliminated in all areas except a few relating to the national economy and livelihood of people, such as gas, water and electricity for civil use.¹⁰⁶

C. Chinese Price Law.¹⁰⁷

China promulgated its Price Law on May 1, 1998. It is enacted to regulate price behaviours, stabilize the general level of market price, and protect legitimate rights and interests of consumers and operators. It governs pricing by operators, pricing by government, price supervision, inspection and legal liabilities. The law protects business operator's basic pricing rights on the one hand. On the other hand, it prohibits undue pricing behaviours. These can be shown by examining specific provisions of the Price Law.

- General Principles.¹⁰⁸

The State shall introduce and gradually improve the mechanism of regulation of prices mainly through market forces and under a kind of macroeconomic control. Under such a mechanism, pricing should be made to accord with the value law with most of the merchandise and services to adopt market -regulated prices¹⁰⁹ while only a few of them

¹⁰⁶ Proposal to the Council Regulation amending Council Regulation (EC) No. 384/96, COM/97/0677 final - ACC, OJ 1998 C70/15.

¹⁰⁷ It was promulgated by the State President on December 29, 1997 and went into effect on May 1, 1998.

¹⁰⁸ Art. 3 & 4. Price Law of the People's Republic of China.

¹⁰⁹ Market-regulated prices refer to prices fixed independently by business operators through market competition.

are to be put under government-set¹¹⁰ or guided prices.¹¹¹

- Pricing rights of business operators.

According to the law, prices of merchandise and services shall be subject to market regulation to be fixed by business operators independently.¹¹² Under fair, lawful, honest and trustworthy principles, business operators should fix their prices based on the cost of production or operation, market supply and demand.¹¹³

- Prohibited pricing behaviour.¹¹⁴

On the one hand, the law protects business operator's basic pricing rights. On the other hand, it prohibits undue pricing behaviours, which include:

1. Working collaboratively with others to control market prices to the detriment of the lawful rights and interests of other business operators or consumers;
2. Engaging in dumping sales (except the cases of sales of fresh and live merchandise, seasonal merchandise and stockpiled merchandise at discount) at below cost prices in order to attain an upper hand over rivals or dominate the market and disrupt the normal production and operation order to the great detriment to the interests of the State or the lawful rights and interests of other business operators;

¹¹⁰ Government-set prices are fixed by the government department in charge of prices or related departments within their term of reference according to the provisions of this law.

¹¹¹ Government-guided prices refer to prices as fixed by business operators according to benchmark prices and range of the prices as set by the government department in charge of price or other related departments within their term of reference.

¹¹² Art. 6. Price Law of the People's Republic of China.

¹¹³ Art. 6 & 7. Price Law of the People's Republic of China.

¹¹⁴ Art. 14. Price Law of the People's Republic of China.

3. Fabricating and spreading price rise information to push up prices to excessively high levels;
 4. Resorting to deceitful or misleading means in terms of prices to entice consumers or other business operators into trading in terms of prices;
 5. Discriminating in terms of prices as between the same kinds of merchandise or services offered by certain business operators under the same trading conditions;
 6. Disguisedly raising or lowering prices at irrational ranges by artificially raising or lowering grades of merchandise or services;
 7. Seeking exorbitant profits in violation of laws and regulations; and
 8. Affecting other illicit price behaviours that are forbidden by law or administrative decrees.
- Government pricing behaviour.

The law limits government pricing behaviours to a few areas based on the price catalogues, which are issued by the central and local governments following strict administrative procedures.¹¹⁵ The government shall issue government-set or guided prices for the following merchandise and services:¹¹⁶

1. The few merchandise that are of great importance to development of the national economy and the people's livelihood;
2. The few merchandise that are in shortage of resources;
3. Merchandise of monopoly in nature;

¹¹⁵ Art. 19. Price Law of the People's Republic of China.

¹¹⁶ Art. 18. Price Law of the People's Republic of China.

4. Important public utilities;
5. Important services of public welfare in nature.

In fixing government-set and guided prices, price departments and other related departments should carry out investigations into prices and costs and collect views from consumers, business operators and other quarters.¹¹⁷ After the government-set and guided prices are determined, they shall be made public by the price departments.¹¹⁸ The scope and level of the government-set and guided prices shall properly be adjusted in the light of the operation of the national economy and recommendations from consumers and business operators.¹¹⁹

- Monitoring and checking of prices

In order to keep the price system in good order, the Price Departments of the People's Governments at and above the county level exercise monitoring and checking over pricing activities according to law and mete out administrative punishments on acts that violate the law.¹²⁰ Business operators or government departments concerned in that case will take legal responsibilities for their behaviours.¹²¹

In this way, the Price Law of the People's Republic of China substantially defends the favourable outcomes of the reform, and ensures the ongoing reform is deepened towards the market economy direction.

¹¹⁷ Art. 22. Price Law of the People's Republic of China.

¹¹⁸ Art. 24. Price Law of the People's Republic of China.

¹¹⁹ Art. 25. Price Law of the People's Republic of China.

¹²⁰ Art. 33. Price Law of the People's Republic of China.

¹²¹ Chapter 6. Price Law of the People's Republic of China.

D. Commitments and prospects after China's accession to the WTO.

Price reform will be carried out in more areas and at a deeper level towards the market economy direction after China's entry into the WTO. This can be confirmed in the 'Report of the WTO working party on the accession of China'.¹²² According to the document, China has made the following commitments that aim to limit government power to interfere in pricing decisions.

*1. Range of products subject to government pricing.*¹²³

China currently adopts a mechanism of market-based pricing under macro-economic adjustment, and national treatment is observed in the areas of government pricing for all imported goods. Only a few products and services are subject to government pricing.¹²⁴ They are those having a direct bearing on the national economy and the basic needs of the people's livelihood, including those products that were scarce in China.¹²⁵ As the result of the continued reform of China's price system, the share of government prices is decreasing, and that of market-regulated prices will go on increasing.

2. Factors taken into account in case of government pricing.

All the enterprises and individuals enjoyed the same treatment in terms of participating in the process of setting government prices and government guidance prices.¹²⁶ While formulating government prices and government guidance prices, crucial pricing factors should be taken into account. They include normal production costs, supply and demand

¹²² Report of the Working Party on the Accession of China.

¹²³ Annex 4 of the Draft Protocol contained a comprehensive listing of all products and services presently subject to government guidance pricing and government pricing.

¹²⁴ i.e. government-set or guided prices explained in China's Price Law. They have the same meaning as the terms 'government prices and government guidance prices'.

¹²⁵ Para 52, Report of the Working Party on the Accession of China.

¹²⁶ Para 53, Report of the Working Party on the Accession of China.

situation, relevant government policies and prices of related products.¹²⁷

3. Transparency of the pricing policies.

China will publish the list of goods and services subject to state pricing and changes, together with price-setting mechanisms and policies in an official journal.¹²⁸ It is 'Pricing Monthly of the People's Republic of China', a monthly magazine listing all products and services priced by the State.

4. Other Commitments.

China assures that it will continue to deepen its price reform, adjusting the catalogue subject to state pricing and further liberalizing its pricing policies.¹²⁹ It confirms that price controls will not be used for purposes of affording protection to domestic industries or services providers,¹³⁰ and they will not limit or impair China's market-access commitments in goods and services. In addition, after China's entry into the WTO, it will take account of the interests of exporting WTO Members as provided for in paragraph 9 of Article III of the GATT 1994.¹³¹

IV. Reform of the financial system.

Both economic theory and practical experience suggest that financial liberalization can stimulate economic development. So since 1978 when China commenced its economic reform, great efforts have been made in the financial sector. After more than twenty years'

¹²⁷ Para 55, Report of the Working Party on the Accession of China.

¹²⁸ Para 60, 61, Report of the Working Party on the Accession of China.

¹²⁹ Para 61, Report of the Working Party on the Accession of China.

¹³⁰ Para 63, Report of the Working Party on the Accession of China.

¹³¹ Para 64, Report of the Working Party on the Accession of China.

reconstruction, fundamental changes took place – various types of government control in this area have been abolished gradually. As a result, today China's financial market has been greatly liberalized compared with before. For the purpose of this chapter, I will focus on foreign exchange issue in China's financial reform.

A. Brief introduction to China's pre-reform financial system.

Like most developing countries, extensive government intervention was the norm in their financial markets before reform. In that case, 'ceilings were imposed on bank interest rates; credit was allocated by administrative decision rather than market criteria; and inflows of foreign capital were strictly controlled.'¹³²

As a substantial part of financial operation, foreign exchange always has close relationships with a country's international trade volume. So, before we examine China's pre-reform financial system, it is important to examine the foreign trade regime in operation at that time. As stated earlier in this chapter, before China's open economy policy, all foreign trade transactions in the country were conducted strictly in accordance with government plans. In determining these import and export plans, the authority sought to achieve a balance in foreign exchange requirements. As the result of such heavy reliance on mandatory plans, the foreign exchange rate had very little influence on the level and the pattern of foreign trade. In other words, it was essentially an accounting device used in the formulation of foreign trade plans. Consequently, before financial reform, the exchange rate played no direct role as a price signal in either foreign trade or in the allocation of resources in China.¹³³

¹³² Huw Pill & Mahmood Pradhan, 'Financial Indicators and Financial Change in Africa and Asia,' IMF Working Paper No. 95/123 (Washington: IMF, November 1995) <<http://www.worldbank.org/fandd/english/0697/articles/0110697.htm#author>> (1 December 2002).

¹³³ YC Richard Wong and ML Sonia Wong (University of Hong Kong), 'Removing Regulatory Barriers in China: Changing the Foreign Exchange Regime.' Paper Prepared for the Conference of China as a Global Economic Power: Market Reforms in the New Millennium, Shanghai, June 15-18, 1997. <<http://www.cato.org/events/China/papers/wong.html>> (1 December 2002).

B. Process and outcomes of China's financial reform.

Reform in the financial sector should follow the track of the industrial sector in China. Since 1978, China has allowed the non-state sector to compete with state-owned enterprises (SOEs). It decentralized foreign trade authority to localities and enterprises, and the role of the exchange rate began to change in the meantime.

When foreign trade corporations were given increasing freedom to conduct foreign trade, the exchange rate began to act as a signal to motivate importing and exporting decisions. Because the domestic currency was overvalued at that time, foreign trade corporations had little incentive to expand exports. To recover the incentive effects of the exchange rate on exports, China began to modify its foreign exchange policy shortly after its foreign trade decentralization.

The modifications were made in several steps. First, the official exchange rates were steadily devalued so as to compensate for the rising costs of exports. Second, the foreign exchange retention scheme was launched, which allows exporting enterprises and local governments to retain a certain portion of their foreign exchange earnings to finance their own imports. Third, foreign exchange swap markets were established in 1988, where exporters could convert their retained foreign exchange earnings at more favourable exchange rates. As the results of the retention scheme and the swap markets, they not only provided incentives to exporters, but also helped to increase the convertibility of China's domestic currency.

On January 1, 1994, official RMB exchange rates were unified with the market rates. The banking exchange system was adopted and a nationwide unified inter-bank forex market was established, with conditional convertibility of the RMB on current accounts.¹³⁴ The

¹³⁴ Para 28, Report of the Working Party on the Accession of China.

1994 reform was a significant step towards current account convertibility. Afterwards, exports, tourism, and foreign direct investment grew briskly, at rates of 31.9 percent, 56.4 percent, and 22.7 percent, respectively. Foreign exchange reserves increased by 114.5 percent in 1994 and 42.6 percent in 1995.¹³⁵ In 1996, China introduced full convertibility for current restrictions on current account transactions, forgoing the right ever to reimpose any currency restrictions on current account activities without the approval of the International Monetary Fund.¹³⁶ Before China's accession to the WTO, 'it was confirmed by the IMF in its Staff Report on Article IV Consultations with China in 2000 that China had no existing forex restrictions for current account transactions.'¹³⁷

C. Relevant laws in force.

China has enacted a number of laws to regulate foreign exchange operations in its process of reform. The most important laws specifically for forex are the 'Regulations on Foreign Exchange Control of the People's Republic of China',¹³⁸ 'Regulations on the Control of Banking Operations of Foreign Exchange',¹³⁹ 'Regulations on the Control of Settlement, Sale and Payment of Exchange'.¹⁴⁰ In addition, legislation governing the allocation of forex earned by joint ventures is provided in the China-Foreign Equity Joint Venture Law¹⁴¹ and China-Foreign Contractual Joint

¹³⁵ YC Richard Wong and ML Sonia, *fn* 133 above.

¹³⁶ Proposal to the Council Regulation amending Council Regulation (EC) No. 384/96, COM/97/0677 final - ACC, OJ 1998 C70/15.

¹³⁷ Para 28, Report of the Working Party on the Accession of China.

¹³⁸ The law was first promulgated by the State Council on December 18, 1980, and was re-promulgated by Decree No 211 of the State Council on January 14, 1997.

¹³⁹ It was issued by the State Administration of Foreign Exchange on September 27, 1997. It entered into force on January 1, 1998.

¹⁴⁰ The Regulations went into effect on July 1, 1996. The Provisional Regulations on the Control of Foreign Exchange Settlement, Sale and Payment promulgated on March 26, 1994 were annulled on the same date.

¹⁴¹ The Law was promulgated by the State President. It went into effect on July 1, 1979 with amendments on April 4, 1990 and March 15, 2001.

Venture Law¹⁴² of the People's Republic of China. We can find out how these laws keep foreign exchange operations in order under market economy conditions by examining them respectively.

1. Regulations on Foreign Exchange Control of the PRC.

It governs foreign exchange on current account and on capital account, RMB exchange rate and foreign exchange market. According to the regulation, a unitary and well-managed floating exchange rate system based on market supply and demand is implemented for the exchange rates of RMB. The People's Bank of China shall publish the exchange rates of RMB against major foreign currencies according to the prices fixed at inter- bank foreign exchange swap centers.¹⁴³ Transactions at foreign exchange swap centers shall be governed by the principle of being open, fair, impartial, and honest.¹⁴⁴

2. Regulations on the Control of Banking Operations of Foreign Exchange.

The law was adopted in accordance with the Law on Commercial Banks and the Regulation on the Control of Foreign Exchange. It was formulated to enhance the control of banking operations of foreign exchange, to ensure the healthy development of foreign exchange business and to maintain the stability of the financial order.

3. Regulations on the Control of Settlement, Sale and Payment of Exchange.

The Regulations are enacted to standardize the acts in foreign exchange settlement, sale and payment, and realize the convertibility of RMB under current account. They govern these transactions under capital account; supervision and control of foreign exchange

¹⁴² The Law was promulgated by the State president on April 13, 1988. It was later amended on October 31, 2000.

¹⁴³ Art. 33, Regulations on Foreign Exchange Control of the PRC.

¹⁴⁴ Art. 34, Regulations on Foreign Exchange Control of the PRC.

settlement, sale and payment.

4. Provisions governing the allocation of forex earned by joint ventures.

China-Foreign Equity Joint Venture Law ¹⁴⁵ and China-Foreign Contractual Joint Venture Law of the People's Republic of China ¹⁴⁶ contain some provisions relevant to foreign exchange.

The net profit which a foreign joint venture receives as its share after performing its obligations under the laws, and the agreements or the contract, the funds it receives upon the expiration of the venture' term of operation or its early termination, and its other funds may be remitted abroad in accordance with foreign exchange control regulations and in the currency or currencies specified in the contract concerning the equity joint venture. ¹⁴⁷

The wages, salaries or other legitimate income earned by a foreign worker or staff member of an equity joint venture, after payment of the individual income tax under the tax laws of the People's Republic of China, may be remitted abroad in accordance with foreign exchange control regulations. ¹⁴⁸

From the above analysis of the laws, it can be seen that China's foreign exchange regulation has been liberalized. Compared with before, there are less government restrictions on the use and allocation of forex. Today, all legal forex transactions are encouraged to be carried out under market economy conditions.

¹⁴⁵ The Law was promulgated by the State President. It went into effect on July 1, 1979 with amendments on April 4, 1990 and March 15, 2001.

¹⁴⁶ The Law was promulgated by the State president on April 13, 1988. It was later amended on October 31, 2000.

¹⁴⁷ Art. 11, China-Foreign Equity Joint Venture Law of the People's Republic of China.

¹⁴⁸ Art. 12, China-Foreign Equity Joint Venture Law of the People's Republic of China.

D. Commitments and prospects for foreign exchange after China's accession to the WTO.

Since foreign exchange plays a very important role in a country's economic development and its international trade, China has made commitments in this field on its accession to the WTO. They can be summarized into the following points.

1. Purpose of the reform.

It indicates that the purpose of China's forex reform is to reduce administrative intervention and increase the role of market forces. It assures that further reform will be carried out towards the market economy direction.¹⁴⁹

2. Enterprises' rights to purchase and debit forex.

With regard to forex payments under current accounts, domestic entities (including foreign investment enterprises) could purchase forex at market exchange rates from designated banks or debit their forex accounts directly upon presentation of valid documents.¹⁵⁰

3. Exchange rate regime.

Since the unification of exchange rates on 1 January 1994, China has adopted a single and managed floating exchange rate regime based on supply and demand.¹⁵¹ Designated forex banks are the major participants in forex transactions, and they deal on the inter-bank market according to the turnover position limit on banking exchange stipulated by State Administration of Foreign Exchange (SAFE) and covered the position

¹⁴⁹ Para 28, Report of the Working Party on the Accession of China.

¹⁵⁰ Para 30, Report of the Working Party on the Accession of China.

¹⁵¹ Para 31, Report of the Working Party on the Accession of China.

on the market.¹⁵²

4. Rights that foreign investment enterprises enjoy with regard to foreign exchange transaction.

In order to encourage foreign direct investment, China has granted national treatment to foreign investment enterprises (FIEs) in exchange administration. Since 1 July 1996, forex dealing of the FIEs has been carried out through the banking exchange system.

FIEs are allowed to open and hold forex settlement accounts to retain receipts under current accounts, up to a maximum amount stipulated by the SAFE. No restrictions are maintained on the payment and transfer of current transactions by FIEs, and FIEs could purchase forex from designated forex banks or debit their forex accounts for any payment under current transactions, upon the presentation of valid documents to the designated forex banks or SAFE for the bona fide test. FIEs could also open forex accounts to hold foreign-invested capital, and they could sell from these accounts upon the approval of SAFE. FIEs could also borrow forex directly from domestic and overseas banks, but were required to register with SAFE afterwards, and obtain approval by SAFE for debt repayment and services. FIEs could make payments from their forex accounts or in forex purchased from designated forex banks after liquidation, upon approval by SAFE according to law.¹⁵³

5. Commitments made with regard to the International Monetary Fund (IMF).

China has accepted Article VIII of the IMF's Articles of Agreement, which provides that 'no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions'. According to these

¹⁵² Para 32, Report of the Working Party on the Accession of China.

¹⁵³ Para 33, Report of the Working Party on the Accession of China.

obligations, China would not resort to any laws or other measures to restrict the availability to any individual or enterprise of forex for current international transactions within its customs territory to an amount related to the forex inflows attributable to that individual or enterprise, unless otherwise provided for in the IMF's Articles of Agreement.¹⁵⁴

From the above commitments made on China's accession to the WTO, we can see the significant progress made in the foreign exchange section of China's financial reform so far. With regard to the future development, the commitments and relevant laws in force will operate together to ensure that further reform can be carried out towards a more liberalized market economy direction.

V. Findings of the economic analysis.

From this analysis of China's economic reform, we can derive two important findings which shake the basis of the current EU's anti-dumping policy against imports from the People's Republic of China.

A. The illegal aspect of the EU's anti-dumping practice against China.

China is no longer an NME or state-control country after more than twenty years of economic reform. Plus the fact that China has entered into the WTO, the EU's anti-dumping practice against China can be regarded as illegal.

Based on the dramatic progress obtained from China's economic reform and the solid legislation which defends the outcomes, it is safe to say that fundamental changes have taken place in China's economic status, i.e. it is not an NME or state-trading country any more. This fact is widely accepted and has been further confirmed by China's accession

¹⁵⁴ Para 35, Report of the Working Party on the Accession of China.

to the WTO. Since the WTO was established on fair competition and free market principles, considering China's huge size and influence on the world economy, it would not be accepted as a member of the organization if it were an NME. Based on this point, China is a transitional ME, and is quite close to market economies in many areas of its economy which are highly developed.

According to the GATT, during an anti-dumping investigation, if there is a sufficient volume of sales of the like product in the domestic market of the exporting country,¹⁵⁵ the normal value of the import concerned is normally based on its domestic price except when the import comes 'from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State.'¹⁵⁶

Referring to recent statistics, the EU adopts the traditional NME treatment¹⁵⁷ when determining the normal value of imports from China in most cases. As a member of the WTO, the legal basis of the EU's practice is the GATT provision analyzed above. However, due to the change of China's economic status, the provision is no longer applicable in that case. Furthermore, the EU's practice can be regarded as illegal and could be challenged by China under the GATT because China is now a member of the WTO.

¹⁵⁵ Art. 2 (2), WTO Anti-Dumping Agreement.

¹⁵⁶ Para. 1 of Art. VI in Annex I to the GATT 1994 states: 'It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the state, special difficulties may exist in determining prices comparability for the purposes of Paragraph 1, and in such case importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.'

¹⁵⁷ i.e. analogue country method.

B. Unfair aspects underlying the EU's anti-dumping practice towards China.

According to the analysis of China's economic reform of foreign trade, enterprise, pricing and forex systems, the criteria for Chinese exporters to apply for EU's MET when deciding their exports' normal values are very unfair.

In Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community, the following criteria are provided for Chinese exporters to apply for MET:

Decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant state interference in this regard, and costs of major inputs substantially reflect market values;

Firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

The production costs and financial situation of firms are not subject to significant distortions carried over from the former NME system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts.

The firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

Exchange rate conversions are carried out at the market rate.¹⁵⁸

As we discussed before, the new method to determine the normal value of imports in anti-dumping proceedings is proposed to match the fundamental change of China's economic status. Unfortunately, within two years after the new method was proposed, it was granted to three Chinese companies, only accounting for about 10 percent of the total applicants.¹⁵⁹ The reason is that it is too strict and unfair to be applied in practice, because applicants have to bear very heavy burden of proof within extremely tight time limit. Now, I will examine the unreasonable factors in the criteria.

1. Criterion one requires that firm's decisions are made by itself based on market principles. State does not interfere in the firm's operations such as pricing, production costs and inputs.

From the analysis of legislation of Chinese enterprises and companies, it is clear that it is a firm's right to make decisions and organize its production autonomously according to market demand.¹⁶⁰ Even state-owned enterprises have this self-management right. In the Report of the WTO working party on the accession of China, it is recognized that

State-owned enterprises of China basically operated in accordance with rules of market economy. The government would no longer directly administer the human, finance and material resources, and operational activities such as production, supply and marketing. The prices of commodities produced by state-owned enterprises were decided by the market and resources in operational areas were fundamentally allocated by the

¹⁵⁸ OJ 1998 L128/18.

¹⁵⁹ Proposal for a Council Regulation amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community /*COM/2000/0363 final – ACC 2000/0160.

¹⁶⁰ Art. 5, Company Law of the People's Republic of China.

market.¹⁶¹

With regard to production costs including labour cost and input cost etc, the government does not interfere in their prices in general. Today, the majority of prices in China are determined by the market, and state-controlled prices have been eliminated in all areas except a few relating to the national economy and the livelihood of the people, such as gas, water and electricity for civil use.¹⁶²

Most Chinese firms actually meet this criterion. However, considering the heavy burden of proof that applicants bear, only a few are able to prove it within the very tight time limit.

2. The second criterion emphasizes that applicants should have a set of accounting records, which is in accordance with international accounting standards.

In fact, this is exactly the same requirement that China puts on its enterprises and companies. It can be seen from the relevant accounting laws that detailed rules and basic accounting principles observed by Chinese enterprises comply with international accounting standards in nature.

3. Criterion three is that the firm is liable for its own debts, and its production costs and financial situation not be subject to significant distortions carried over from the former NME system. In fact, Article 7 of Chinese Company Law puts the similar requirement on companies which are being reorganized from state-owned

¹⁶¹ Para 43, Report of the Working Party on the Accession of China.

¹⁶² Proposal to the Council Regulation amending Council Regulation (EC) No. 384/96, COM/97/0677 final - ACC, OJ 1998 C70/15.

enterprises.¹⁶³

4. Criterion four is that Companies should be subject to bankruptcy and property law.

Both the Company Law and the Enterprise Bankruptcy Law of the People's Republic of China have detailed provisions on this point. Chinese Company Law states clearly that various types of companies are all responsible for their own debts, and they will be legally declared bankrupt when they are unable to repay debts due. Likewise, the Chinese Enterprise Bankruptcy Law provides that state-owned enterprises will be declared bankrupt as a result of failure in the market, except those essential to the national economy and the livelihood of people, these may be supported by the government. In this situation, China has a similar policy to most developed countries.

5. The last criterion is about exchange rate conversions, which should be carried out at market rate.

As to this criterion, China's current foreign exchange regime is consistent with the EU's requirements. It is confirmed in the 'Report of the WTO working party on the accession of China' that 'since the unification of exchange rates on 1 January 1994, China had adopted a single and managed floating exchange rate regime based on supply and demand. PBC published the reference rates of RMB against the US dollar, the HK dollar and Japanese yen based on the weighted average prices of forex transactions at the interbank forex market during the previous day's trading... Designated forex banks could deal with their clients at an agreed rate... The exchange rates for other foreign currencies were

¹⁶³ It provides that a state owned enterprise which is being reorganized as a company shall replace its system of operation, gradually and systematically take inventory of its assets and verify its capital, determine property rights, clear creditors' rights and indebtedness, value assets and set up a standardized internal management structure in accordance with the law and conditions and requirements of administrative regulations.

based on the rates of RMB against the US dollar and cross-exchange rates of other foreign currency on the international market. The permitted margin between the buying and selling rate could not exceed 0.5 per cent.¹⁶⁴

VI. Proposals based on the economic analysis of China.

We can therefore conclude that most Chinese firms actually operate under free market principles and therefore should be granted the conditional MET by the EU. This argument is based not only on the existence of an extensive legal regime in China, but also because the economic analysis supports it. Assessments made by authorized international organisations such as the WTO and the World Bank demonstrate that China's economic reforms have not been just a paper exercise. Nevertheless, the European Commission has refused to grant conditional MET to most Chinese exporters on a case-by-case basis by insisting that they do not operate under ME conditions.

This thesis will not explore whether the EU's argument is true or not. However, it is noticeable that the 'Commission officials admit that the formal rule change was more in name than in substance, and that they had no intention of administering the more beneficial rules to Chinese and Russian firms.'¹⁶⁵ This probably is the most explicit answer to the puzzle that within three years after the EU anti-dumping legislation was amended, only around 12 percent of applications for conditional MET were successful.¹⁶⁶

Based on the economic and legal analysis made in this chapter, one way to make the EU's

¹⁶⁴ Para 31, Report of the Working Party on the Accession of China.

¹⁶⁵ Cynthia M. Horne, 'Belief Stasis as an Impediment to Policy Implementation: Non-Market Economies and Western Trade Laws' (University of Washington, prepared for: American Political Science Association Conference San Francisco, CA, August 30 – September 2, 2001). p 24.

¹⁶⁶ R. M. MacLean. 'International Trade Evaluating the Impact of the E.C's Conditional Market Economy Principle in Chinese and Russian Anti-Dumping Cases', 65.

new method to be fair to implement is to reduce the exporter's burden of proof when they apply for the conditional MET. Since all of the five criteria are basically consistent with Chinese laws, practice required for the MET is governed and has been ensured by the national legislation to a large extent. Therefore, the Commission should adopt a more flexible and less stringent approach. In other words, a Chinese exporter's application for the MET should not be rejected simply because it cannot meet one of the five criteria.

As a possible result of this suggestion, a reasonable number of Chinese companies will successfully get conditional MET, and their domestic sales prices will be adopted to determine the normal values of their exports. Therefore, the purpose of the EU's new approach can be fulfilled, and the outcomes of its anti-dumping investigations will be fair enough to Chinese exporters as well.

Conclusion

This chapter enumerates the achievements made through China's economic reform in foreign trade, enterprise, pricing and financial sections, and analyzes the country's economic prospect in future based on existing legislation and commitments made on China's accession to the World Trade Organisation.

Though it only provides a theoretical analysis from the economic point of view for the purpose of the thesis, it brings out more significant issues to us. It can be seen that China has made dramatic progress in its economic reform so far, and this is well acknowledged by the WTO. However, considering the EU's anti-dumping policy against imports from China and its outcomes, there arise several questions:

1. Since China no longer can be regarded as an NME, what is the legal basis for the EU's anti-dumping policy, especially its use of traditional NME treatment, which is applied to Chinese exports in most cases?

2. Is the EU's current practise still legal since China has already become a member of WTO?
3. Based on the analysis in the chapter from the economic point of view, state related enterprises or transactions do not necessarily mean governmental interference in China. Then shall the EU also consider the application for MET for Chinese state related enterprises?
4. To what extent should the EU's policy be revised to be fair enough to meet the actual situations?

With regard to the above issues, all of them will be discussed in the last chapter, which will propose possible resolutions to the EU for its anti-dumping policy applicable to China.

Chapter Five

Alternative Approaches to Anti-Dumping Legislation Applicable to the People's Republic of China

Introduction

This chapter analyzes the anti-dumping legislation of the United States (U.S.), Australia, New Zealand and Japan. It focuses on the differences between the EU and these countries' anti-dumping legislation towards China, especially the different methodologies adopted to determine the normal values of Chinese exports in anti-dumping investigations.

For the purpose of the thesis, these four developed countries are selected for analysis because of two reasons. First, most of them (except Japan) are the main and traditional users of anti-dumping measures among the developed countries of the world. (See Table 5.2-5.4 on pages 230-232) Second, all of them have adjusted their anti-dumping legislation applicable to China as a transitional economy, and their approaches accommodate the changes of China's economic status better than the EU in practice. In other words, their legislation is more flexible and specific, under which anti-dumping authorities can assess the normal value of the imports from China impartially without wide discretion. This can be seen from case studies later in this chapter.

The EU, U.S, Australia, New Zealand and Japan are all Members of the World Trade Organization (WTO). So, their anti-dumping legislation is established under the General Agreement on Tariffs and Trade (GATT) legal framework, i.e. Article VI of the GATT

and the Uruguay Round Anti-Dumping Code.¹ Under the GATT, each Member codifies its anti-dumping legislation to interpret and implement the guidelines.² All of these countries delegate anti-dumping investigations to special authorized bodies, though the extent to which these units are isolated from political pressure and independent of Executive authority varies.³ Under such circumstances, they have the freedom to develop a set of anti-dumping rules specific to non-market economies (NMEs), but they normally apply different methods rather than use domestic sales price to determine the product's normal value.

According to China's economic reform and its well-acknowledged progress obtained,⁴ most WTO Members have adjusted their anti-dumping policies to accommodate the changes. However, compared with the EU, the updated anti-dumping rules towards China adopted by the other four countries are more reasonable and practical considering their implementation in practice.

Here, 'reasonable' means that the rules enable the anti-dumping authority to assess the normal values of imports concerned impartially based on facts and subsequently impose anti-dumping measures on dumped goods proportionately according to their dumping margins. In practice, an accurate assessment of dumping facts needs three principles. First, the investigation authority should grant market economy treatment (MET)⁵ to an exporter who has a sound management record and operates independently in a transitional economy. Second, due to the discrepancy in the level of economic development of different exporters, individual treatment should be applied automatically. That is to say, dumping margins of

¹ i.e. Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994.

² GATT anti-dumping legislation is analyzed in chapter one.

³ Bruce A. Blonigen & Thomas J. Prusa, 'Anti-Dumping' at p 7, <<http://www.nber.org/papers/w8398>> (1 December 2002).

⁴ This issue has been illustrated in chapter four.

⁵ i.e. use the domestic sales prices to determine the normal values of the products.

the dumped imports and rates of anti-dumping duties for different exporters should be determined on an individual basis. Third, in a few cases where the analogue country method is applied due to complete state control in the industry of the export country concerned, a third country should be selected properly. In other words, the side effects of the analogue country method should be minimised. In that case, the selected third economy should have similarities with the export country in three aspects. 1) They have similar comparative advantages in the same industry concerned. 2) They have similar procedures and methods to produce the same products. 3) They have similar costs of key production factors, such as labour costs and raw material costs. Only if the above three principles are observed, can an accurate judgement be made in anti-dumping investigations towards imports from transitional economies.

A sound legislation not only should be reasonable, but also should be practical enough to be applied in practice. With regard to anti-dumping rules towards transitional economies, the authority assesses the economic status of foreign exporters before granting them conditional MET. State control is the main reason to reject the application for MET. So, the way that the authority distinguishes state control from state-related behaviour can lead to quite different outcomes of assessment about an exporter's economic status. In that case, practical rules lead to the conclusion of state control only when state interference has substantial and significant effect on the enterprise's decision-making proceedings. In short, practical rules grant the authority less discretion and ask for more consideration of facts in anti-dumping investigations.

Based on the above points, differences of anti-dumping legislation between the EU and the U.S., Australia, New Zealand and Japan will be examined in this chapter. They will help us understand the most appropriate approaches to determine normal values and anti-dumping duties for Chinese exports in anti-dumping investigations.

The above issue will be analyzed through four parts of this chapter. Part one briefly introduces the anti-dumping legislation of the four countries. Alternative methods to identify NME in the context of anti-dumping legislation will be examined in part two. Though the EU eliminated China from its list of NME in 1998,⁶ it still treats China as an NME in most of its anti-dumping proceedings. Focusing on this issue, part three will identify different NME treatments under the GATT anti-dumping legal framework. Due to the fundamental changes arising in China's economy because of its reforms since 1979, EU and the four countries amended their anti-dumping legislation to try to accommodate these changes. These new approaches adopted to determine the normal values of Chinese exports will be illustrated in part four. Finally, part five will analyze different methodologies to determine anti-dumping duty rates for imports from China.

1. Brief introduction to the anti-dumping legislation of other developed countries.

A. The U.S.

The US anti-dumping law aims to protect American industries from supposedly unfair import competition.⁷ The first legislation passed by the Congress was the Anti-Dumping Act of 1916, which provides for damages through the Federal court against parties who dumped foreign goods in the U.S. In 1921, an Anti-Dumping Act was adopted, which forms the basis of the current US legislation.⁸ Following the Anti-Dumping Agreement reached in the Tokyo Round of trade negotiations, the Trade Agreement Act of 1979

⁶ Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community. OJ 1998 L 128/18.

⁷ Brink Lindsay, 'The U.S. Anti-Dumping Law Rhetoric versus Reality' at p 1 <<http://www.freetrade.org/pubs/pas/tpa-007.pdf>> (1 December 2002).

⁸ Holmes, Peter; Kempton, Jeremy; Stevenson, Cliff, 'The Globalisation of Anti-Dumping and the EU,' at p 2. <<http://www2.cid.harvard.edu/cidtrade/Issues/holmes.pdf>> (1 December 2002).

repealed the Anti-Dumping Act of 1921 with Title I and added a new Title VII to the Tariff Act of 1930. Today, the U.S anti-dumping law in force is the Uruguay Round Agreement Act (URAA), which implemented changes required by the 1994 Anti-Dumping Agreement.⁹

The U.S. anti-dumping institution is quite different from that of the EU. First, it has different administrative authorities that make key decisions. The U.S. authorizes one agency to handle dumping determination, and another to handle injury determination. The Department of Commerce (Commerce) and the International Trade Commission (ITC) have the joint responsibility of administering U.S. anti-dumping law.¹⁰ According to Title 19 of the Code of Federal Regulations (CFR), after a company or a coalition of companies files a dumping petition, Commerce makes a preliminary decision as to whether the product is being sold at less than a normal value in the U.S., and calculates an ad valorem dumping margin equal to the percentage difference between the price it is being sold at in the U.S. and the normal value.¹¹ After that, the ITC makes a preliminary decision as to whether the relevant U.S. domestic industry has been materially injured or is threatened with injury due to the imports under investigation.¹² If both agencies make an affirmative final decision of dumping, then Commerce will issue a permanent anti-dumping order, under which a duty equal to the estimated dumping margin is levied on imports of the product from the subject countries.

Second, compared with the EU, the U.S. adopts different approaches to identify NMEs and to calculate normal values for their exports. In order to accommodate the progress

⁹ *Anti-Dumping and Countervailing duty Handbook*, U.S. International Trade Commission. Washington, DC 20436. November 1997, available from: <ftp://ftp.usitc.gov/pub/reports/studies/PUB3121.PDF> (1 December 2002).

¹⁰ *Anti-Dumping and countervailing duty handbook*, *ibid.*

¹¹ The Commerce regulations are set at Section 353 of the Code of Federal Regulations (CFR).

¹² The ITC regulations are contained in Section 207 of the CFR.

obtained from economic reforms of former NMEs such as China, it also provides a set of criteria to grant conditional MET to its exporters, which is also different from that of the EU. All of these will be analyzed later in this chapter.

B. Australia

The Customs Act 1901 and the Customs Tariff (Anti-Dumping) Act 1975 are the principal legislative instruments of Australian Anti-Dumping Law. The current legislation was the implementation of the GATT, the Anti-Dumping Code (the Agreement on Implementation of Article VI of GATT) and the Agreement on Interpretation and Application of Article VI, XVI and XXIII (the Code on Subsidies and Countervailing Duties).¹³ It was achieved by way of wholesale amendment and addition to Part XVB of the Customs Act, plus some minor changes to other legislation. They include the Customs Legislation Bill (World Trade Organisation Amendments) and the Customs Tariff Bill (Anti-Dumping)(WTO Amendments). They were passed by the Australian Parliament on 6 December 1994, and came into force on 1 January 1995.¹⁴

The Australian Customs Service (Customs) is the key body administering anti-dumping and countervailing measures. After an anti-dumping application is lodged, Customs will investigate it and make preliminary determinations on provisional measures. If dumping is concluded as the determination, Customs will submit the essential facts and recommendations on final measures to the Minister for Justice and Customs, who is empowered to impose anti-dumping duties.

The anti-dumping institutions of Australia and the EU have many similarities. First, both

¹³ John Carroll, 'Australian Anti-Dumping and Countervailing Measures,' for the Lex Mundi Asian Pacific Conference on Saturday, May 20, 2000, 1.
<<http://www.lexmundi.org/committees/confmaterial/carroll.pdf>> (1 December 2002).

¹⁴ Daniel Moulis, Freehill Hollingdale & Page, Canaberra, 'Australia' in Keith Steele (ed.), *Anti-Dumping under the WTO: A Comparative Review*. (London: Kluwer Law International and International Bar Association, 1996), 35.

of them have a single agency to make decisions on injury and dumping. Second, they allow only investigation authorities to have access to all pertinent information. Third, both of them use more price undertakings than the U.S. In addition, both of them require that the anti-dumping duty be lower than the dumping margin if lesser duties would be sufficient to remove the injury caused by the dumping.¹⁵

Despite these similarities, Australian anti-dumping law is quite different from that of the EU. The differences can be summarized in three points: methods to identify NMEs, rules to determine normal values of imports from NMEs, and most important of all, provisions for Economies in Transition (EIT). This will be further analyzed in the following sections.

C. New Zealand

New Zealand was one of the first countries to adopt anti-dumping legislation. As early as 1905, the Agricultural Implement Manufacture, Importation and Sale Act¹⁶ was passed as the first anti-dumping legislation of New Zealand. According to its obligations as a WTO Member, under the GATT 1994 Anti-Dumping Code, the current New Zealand laws are the Dumping and Countervailing Duties Act 1988 (Dumping Act) and the Temporary Safeguard Authorities Act 1987.¹⁷

Compared with the EU, the most significant difference of the New Zealand's current anti-dumping legislation is the removal of the special approach towards NMEs and EIT.

¹⁵ Blonigen & Prusa, *fn* 3 above at p 8.

¹⁶ 'In 1905 domestic and British manufacturers of agricultural implements complained about the efforts of an American harvester trust to monopolise the New Zealand market by systematic price-cutting to New Zealand purchasers.' Under that circumstance, the Act applied a special duty to the unfairly trade imports. 'Anti-Dumping Law and Practice in New Zealand.' <http://www.med.govt.nz/buslt/trade_rem/otherdoc/adlpinz.html> (1 December 2002).

¹⁷ Russell McVeagh McKenzie, Bartleet & Community, Auckland. 'New Zealand', in Keith Steele (ed.), *Anti-Dumping under the WTO: A Comparative Review*. (London: Kluwer Law International and International Bar Association, 1996), 185.

That is to say, its authority normally adopts the domestic sales prices of Chinese products to determine their normal values. Price and cost information from analogue countries only will be used as an exception rather than the rule.¹⁸ This brings out a completely different outcome in its anti-dumping investigations about imports from China – no dumping has been found since January 1994.¹⁹

D. Japan

As a Member of the WTO, Japan's current anti-dumping legislation is compiled under the GATT anti-dumping framework, and it consists of the following laws:

1. Article 8 of the basic Customs Tariff Act (ex Article 9), amended in 1994 in accordance with the WTO Anti-Dumping Agreement.
2. Cabinet Order Relating to Anti-Dumping Duty (the Cabinet Order), adopted in 1980 to implement the Law. It was completely amended in accordance with the amendments to the Customs Tariff Act.
3. 'Guidelines for Procedures Relating to Countervailing and Anti-Dumping Duty' of 24 December 1986 (the Guidelines), issued by the Ministry of Finance as well as the Ministry of International Trade and Industry (MITI), the Ministry of Health and Welfare, the Ministry of Agriculture, Forestry and Fisheries and the Ministry of Transport, to clarify anti-dumping procedures and strengthen the implementation of the above rules.²⁰

Like the EU, the Japanese anti-dumping legislation provides special methods to determine the normal values of imports from NMEs. According to Article 1(2) of the

¹⁸ 'Anti-Dumping Law and Practice in New Zealand', see *fn* 16 above.

¹⁹ 'WTO Anti-Dumping Statistics',
<http://www.wto.org/english/tratop_e/adp_e/adp_stattab2_e.htm> (1 December 2002).

²⁰ Shintaro Hagiwara, 'Japan' in Keith Steele (ed.), *Anti-Dumping under the WTO: A Comparative Review*. (London: Kluwer Law International and International Bar Association, 1996) at p 121.

Cabinet Order, the Japanese authority may determine normal values of imports from NMEs based on price information of the like products in a third market economy (ME). The economic development stage of the selected country should be the closest comparable to that of the NME concerned.

However, the authorities of the two countries interpret and apply the rule in different ways in practice. First, unlike the EU, Japan does not frequently apply its anti-dumping instrument as a protectionist measure for its domestic industry against imports from NMEs. Though Japan compiled its anti-dumping law a long time ago, it seldom uses it. Up to 1 June 2001, only six anti-dumping petitions had been filed against foreign products, and three of them were finally withdrawn.²¹ Second, the Japanese authority in practice adopts fairly flexible methods to assess normal values of imports from transitional economies like the People's Republic of China.

Both of the two facts bring out quite different outcomes of the legislation of Japan and the EU with regard to their anti-dumping measures taken towards transitional economies. This will be illustrated through a case study later.

II. Different methods to Identify non-market economy (NME).

Generally speaking, NME refers to the country where goods and resources are allocated by government planning agencies rather than by prices freely set in a market.²² The classification of NME and ME is not scientific nor reasonable in the reality of today, because there is no purely free market nor totally centrally controlled economy.²³ Further and worse, since the GATT did not provide any definition of MEs and NMEs nor any

²¹ 'WTO Anti-Dumping Statistics', *fn* 19 above.

²² J.H.Jackson (co-editor), *Legal Problems of International Economic Relations* 3rd edn.. (New York: West Publishing, 1995), 1139.

²³ This issue is analyzed in more detail in section IV of chapter one.

- 3) The extent to which joint ventures or other investments by firms of other foreign countries are permitted;
- 4) The extent of government ownership or control over the means of production;
- 5) The extent of government control over the price and output decisions of enterprises;
- 6) The degree of centralized government control over the allocation of resources or inputs.³⁰

No single criterion can conclusively indicate a market or an NME. In considering criterion 1 and 3, the Department of Commerce has stated that both currency convertibility and degree of foreign investment are macroeconomic indicators and have little effect on internal market forces. Therefore, it is acknowledged that such indicators cannot serve as definitive tests of ME status. However, compared with the EU, such identification will benefit transitional economies to be reclassified as market economies,³¹ since it is more reasonable and practical in application.

B. Australia.

Unlike the EU, Australian legislation provided two criteria to define a country as an NME:

- 1) 'The government has a monopoly, or substantial monopoly of the trade of the country; and

³⁰ Petroleum Wax Candles from the People's Republic of China: Anti-Dumping Final Determination of Sales at Less Than Fair Value and Suspension of Liquidation, 51 Fed. Reg. 25085, July 10, 1986.

³¹ Cynthia Horne, 'The Politics Behind the Application of Anti-Dumping Laws to Nonmarket Economies: Distrust and Informal Constraints' (paper prepared for graduate student retreat for comparative research, Society for Comparative Research, UCLA), pp 32 & 34. <<http://www.sscnet.ucla.edu/soc/groups/scr/horne.pdf>> (1 December 2002).

2) The government determines or substantially influences the domestic price of goods in that country.³²

Before China was reclassified as a transitional economy in 1999, Australia regarded it as an NME, under which traditional NME Treatment was applied to Chinese exports in anti-dumping investigations.³³

C. Japan

Japan has no definition of NME in its anti-dumping legislation. However, in accordance with the second interpretative note to paragraph 1 of Article VI in Annex I to the GATT 1994, Japan provides a set of special rules³⁴ to determine the normal value of imports from 'a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State'.³⁵ Therefore, whether a country is an NME and whether to apply the special rules to the exporters under investigation will be determined on a case-by-case basis.

D. New Zealand.

New Zealand has no classification of NMEs any more since it has removed specific provisions determining normal values of imports from NMEs and EIT.³⁶ Recognizing the dramatic progress gained in economic reforms of these countries in the past decades, New Zealand consider it difficult to meet the conditions provided in the Interpretative

³² 'Australia's Anti-Dumping and Countervailing Administration' at p 6
<<http://www.customs.gov.au/resources/files/antidumping.pdf>> (1 December 2002).

³³ 'Ministerial Price Control Guidelines – Economies in Transition',
<http://www.customs.gov.au/site/index.cfm?area_id=5&nav_id=296> (1 December 2002).

³⁴ Art. 2, Cabinet Order Relating to Anti-Dumping Duty.

³⁵ Para. 1 of Art. VI in Annex I to the GATT 1994.

³⁶ 'Anti-Dumping Law and Practice in New Zealand', *fn* 16 above.

Note 2³⁷ to paragraph 1 of Article VI of GATT 1994. Therefore, in case of domestic prices or factor costs of the products concerned might not be based on market considerations, standard provisions of the Dumping Act will be applied case by case. Its current legislation applicable to EIT will be analyzed with case later in this chapter.

III. Different NME Treatments under the GATT anti-dumping legislative framework

Under the GATT anti-dumping legislative framework, WTO Members are allowed to adopt price factors from an ME rather than domestic prices to determine the normal values of imports from an NME. This is the NME Treatment. Today, exporters from NMEs who fail to get conditional MET in anti-dumping investigations are still subject to the traditional NME Treatment. In that case, the anti-dumping authority will adopt different methods to determine the normal value of imports from an NME with the price factors from an ME. It may be analogue country method and constructed value method. Such practice has the following significant disadvantages in making accurate judgements in anti-dumping investigations.

- 1) It will inflate the actual normal value of the imports from an NME;
- 2) In most cases, the NME concerned has certain comparative advantages for its exports in international trade, while the selected ME does not have;
- 3) The choice of an analogue producer is very unpredictable and often depends on practical considerations which have little to do with the purpose of anti-dumping

³⁷ GATT Ad Art. VI Paragraph 1.2 provides: 'It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate'

investigations, i.e. accurate judgements of dumping determination. An example of such considerations is finding a producer who is willing to cooperate.

Though there are unreasonable factors in the traditional NME Treatment as analyzed above, the specific institutions that the U.S. applies (constructed value method) will lead to more accurate judgements than that of the EU (analogue country method) in anti-dumping investigations for imports from NMEs. As to other countries such as Australia, though it also contains the traditional NME Treatment for NMEs in its anti-dumping legislation, it provides more specific guidelines for such practice. All of these will be examined country by country through the following analysis.

A. The EU's analogue country method.

According to the current EU anti-dumping legislation, the normal value of imports from NMEs shall be determined on the basis of:

The price or constructed value in an ME third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product.³⁸

In that case, the selection of the third country is crucial to the outcome of an anti-dumping investigation. However, the selection process undertaken by the EU authority is essentially empirical. The law only stipulates that

An appropriate ME third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time limits; where appropriate, a market economy third

³⁸ Art. 2.7 of Council Regulation (EC) No 384/96.

country which is subject to the same investigation shall be used.³⁹

Under the rule, the authority should select an ME, in which the like product is produced with the same manufacturing processes and technical standards as in the NME concerned. However, in fact, many other factors determine the selection.

In most cases, the analogue country is selected by common arrangement between the parties, most often expressed on a tacit basis, for instance, where suggestions made by the complainant or the Commission are not objected to by the other side.⁴⁰

In some cases, the selection of an analogue country is affected by the attitude of the producers in the third country under consideration; if they refuse to cooperate, another country will have to be used;

In cases involving both MEs and NMEs, the Commission often tends to use one of the MEs concerned as an analogue in order to reduce its workload;

A mere perusal of the list of market economy countries selected as analogues shows that the relative level of economic development or GNP per capita plays virtually no role in an EEC anti-dumping proceeding. Countries at all levels of economic development have been chosen as analogues for any particular non-market economy country.⁴¹

Due to the randomness of the selection by the EU, the dumping determinations can reach a peak of artificiality. On the other hand, it is virtually impossible for exporters in NMEs to determine how to avoid dumping.

³⁹ Ibid.

⁴⁰ John H. Jackson & Edwin A. Vermulst, *Anti-Dumping Law and Practice: A Comparative Study*. (University of Michigan Press: 1990), 77.

⁴¹ Ibid.

B. The U.S.: constructed value method + surrogate country method

Unlike the EU, the U.S. mainly adopts the constructed value method for NME exporters who fail to meet the criteria of conditional MET in anti-dumping investigations. Only in exceptional cases when there is not sufficient information available for constructed value method, surrogate country method (which is similar to the EU's analogue country method)⁴² will be applied.

1. Constructed value method or factor test.

As early as 1988, in Section 1316 of its Omnibus Trade and Competitiveness Act, the U.S. made an effort to alleviate the unfairness inherent in surrogate country method by adopting the Constructed Value or Factor Test as the preferred method of calculating normal value of imports from NMEs.⁴³ Under the factor test, the Department of Commerce must use the value of the factors of production used in producing the merchandise in the NME. So the Factor Test is a two-step approach. At first, it needs to identify and qualify the factors of production used in the NME in producing the products under investigation. Then, it will evaluate these factors in an appropriate ME.

In the current U.S. anti-dumping legislation, the rule is provided in Section 1677b (c) (1), Title 19 of the U.S. Code. It stipulates that:

The administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. Except as provided in

⁴² Both methods use the third country price proxies for NMEs. However, the U.S. authority tends to stress the importance of having surrogates at similar levels of developing while the EU authority does not consider it at all. This will be further examined in the next part. Factors that the EU considers when it selects analogue countries have been analyzed in the previous section.

⁴³ John H. Jackson & Edwin A. Vermulst, *fn 40 at p 450*.

paragraph (2), the valuation of the factors of production shall be based on the best available information regarding the values of such factors in an ME or MEs considered to be appropriate by the administering authority.⁴⁴

The factors of production utilized in producing merchandise include:

- a. hours of labor required,
- b. quantities of raw materials employed,
- c. amounts of energy and other utilities consumed, and
- d. representative capital cost, including depreciation.⁴⁵

The administering authority, in valuing factors of production shall utilize, to the extent possible, the prices or costs of factors of production in one or more MEs that are:

- a. at a level of economic development comparable to that of the nonmarket economy country, and
- b. significant producers of comparable merchandise.⁴⁶

For purposes of valuing the factors⁴⁷ with the constructed value method, the U.S. authority observes the following rules:⁴⁸

⁴⁴ Section 1677b (c) (1), Title 19 of the U.S. Code.

⁴⁵ Section 1677b (c) (3), Title 19 of the U.S. Code.

⁴⁶ Section 1677b (c) (4), Title 19 of the U.S. Code.

⁴⁷ They include factors of production, general expenses, profit, and the cost of containers, coverings, and other expenses.

⁴⁸ Section 351.408(c)(4), 19 CFR. Document No: G/ADP/N/1/USA/1/Suppl.2, <http://docsonline.wto.org/gen_search.asp> (1 December 2002).

a. Information used to value factors.

If a factor or a portion of the factor is purchased from an ME supplier and the remainder from an NME supplier, the authority normally will value the factor using the price paid to the ME supplier.

b. Valuation in a single country.

Except for labour which is provided in the next paragraph, the authority normally will value all factors in a single surrogate country.

c. Labour.

For labour, the authority uses regression-based wage rates – essentially an average of the wage rates in MEs viewed as being economically comparable to the NME. It used to utilize the wage and gross domestic product (GDP) data of at least 45 market economies collected from publicly available sources such as the International Labour Organization and the World Bank/International Monetary Fund. However, beginning with May 2000, it chose to use per capita gross national product (GNP) instead of GDP.⁴⁹ The data is available to the public via the Import Administration's (IA) website⁵⁰ and also at IA's Central Records Unit.

d. Manufacturing overhead, general expenses, and profit.

⁴⁹ 'Expected Wages of Selected Non-Market Economy Countries', <<http://ia.ita.doc.gov/wages>> (1 December 2002).

⁵⁰ 'Expected Wages of Selected Non-Market Economy Countries 1998 Income Data Revised May 2000', <<http://ia.ita.doc.gov/wages/98wages/gdp00web.htm>> (1 December 2002).

For manufacturing overhead, general expenses, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.⁵¹

In short, the major difference between the U.S. constructed value method and the EU analogue country method is that after selecting a third ME, the U.S. values the factor inputs individually while the EU utilizes the actual price of the like product in the analogue as a price proxy for the NME under investigation. In particular, the U.S. takes the GNP and labour costs of the third ME(s) into account. As a result of this methodology, the comparative advantages of developing countries in international trade will be considered in anti-dumping investigations. It undoubtedly increases the fairness and accuracy of the authority's anti-dumping practice.

2. Surrogate country method

Surrogate country method uses the price proxies in a third ME to calculate the normal values of imports from an NME, which is similar to the EU's analogue country method. However, the U.S. authority applies the methodology less frequently than the EU, and it follows different criteria to select the third country.

With regard to imports from NMEs, only when there is not adequate information available to adopt the constructed value method, the U.S. authority will determine their normal values on the basis of the domestic prices of the like products of a third ME.

In that case, the merchandise whose price will be referred is required to be comparable to the subject merchandise. Besides, it should be produced in one or more ME countries that are at a level of economic development comparable to that of the NME, and it is sold in

⁵¹ Section 351.408(c)(4), 19 CFR.

other countries, including the United States.⁵²

In determining whether a country is at a level of economic development comparable to the NME, the U.S. places primary emphasis on *per capita* GDP⁵³ as the measure of economic comparability. The International Trade Administration (ITA) in the Commerce⁵⁴ implements the surrogate country method, and it has five criteria to govern such practice: per capita GNP, growth rate of per capita GNP, significance as a producer of a like product, and the distribution of labor between the agricultural and non-agricultural sectors.⁵⁵

The above analysis shows that the U.S. evaluates the individual factor inputs rather than the actual price of the like product in third MEs, and it tends to stress the importance of having surrogates at similar levels of development in anti-dumping investigations against NMEs. The overall level of economic development is the key consideration for the selection of the surrogate. This is helpful to get a better evaluation of labour cost, which is an important comparative advantage of developing countries such as China in international trade. As a result, the U.S. methodologies not only increase the fairness and accuracy of determination of the existence of dumping in anti-dumping investigations, but also provide a more predictable standard for exporters from NMEs to avoid dumping. From this point, such methodologies towards NMEs are more scientific and flexible than the EU's analogue country method, which is mainly based on the availability of information and cooperation, similarities of manufacturing process and technical

⁵² Section 1677b (c) (2), Title 19 of the U.S. Code.

⁵³ From May 2000, the U.S. authority chose to use per capita gross national product (GNP) instead of GDP.

⁵⁴ i.e. U.S. Department of Commerce.

⁵⁵ 56 FR 60969. 1991. 'Final Results of Anti-Dumping Duty Administrative Review: Shop Towels of Cotton from the People's Republic of China.' United States Federal Register November 29.

standards.⁵⁶ Therefore, the U.S. anti-dumping practice towards NMEs is a step forward in the right direction.

C. Australia: domestic selling prices or constructed prices.

According to Australian anti-dumping legislation, if a country is regarded as an NME, the normal value of its exports will be determined by reference to domestic selling prices or to constructed prices based on cost of production or third country sales.⁵⁷ However, compared with the EU, Australia has more specific guidelines of the selection of the third country.

Under the law, the normal value from an NME is decided according to whichever is the most appropriate of the following methods.

A value of like goods sold in another (or analogue) country in the ordinary course of trade and at arms length;

A value of like goods sold by the analogue country to another country in the ordinary course of trade and at arms length;

A value equal to the cost to make and sell like goods in the analogue country, including any determined profit rate; or

A value of like goods produced and sold in Australia in the ordinary course of trade and at arms length.⁵⁸

As to the selection of an analogue country, Customs provides the following guidelines:

⁵⁶ EU's guidelines to select analogue countries are analyzed in more detail in chapter three.

⁵⁷ Moulis, Hollingdale & Canaberra, *fn* 14 above at p 54.

⁵⁸ 'Australia's Anti-Dumping and Countervailing Administration', *fn* 32 above at p 6.

When selecting a third country, it should have a similar costing structure and, if possible, be at a similar stage of economic development to the country concerned, particularly in regard to the industry under inquiry. In making a comparison, factors such as gross national product, infrastructure development, manufacturing processes, technical standards and scales of production may be taken into account.

Where there is a selection of market and NMEs already included in the complaint, the Australian Customs Service (ACS) may consider using one of the market economy countries already involved.⁵⁹

D. Japan: surrogate country method.

According to Article 2.2 of the Cabinet Order, the Japanese authority may determine normal values of imports from NMEs based on price information of the like products in a third ME. Like the U.S., Japan stresses that the economic development stage of the selected country should be the closest comparable to that of the NME under investigation.

IV. Legislative amendments made or new approach adopted due to China's economic reform.

A. The EU: stringent approach to the conditional MET.

In order to match the progress obtained from economic reforms of the former NMEs, the EU, the U.S., Australia, New Zealand and Japan have adopted new anti-dumping approaches – conditional MET. However, compared with the EU, the criteria provided by these countries for conditional MET in anti-dumping investigations are less stringent. Furthermore, their new approaches have been applied in a more flexible way by the authorities in anti-dumping investigations.

⁵⁹ Moulis, Hollingdale & Canaberra, *fn* 14 above at p 55.

According to the depth of economic reform, the EU gradually eliminated the following countries from its NME list: China, Russia,⁶⁰ Ukraine, Vietnam, Kazakhstan and countries currently classed as NMEs for anti-dumping purposes but who are Members of the WTO. Exporters from these countries will be granted conditional MET, i.e. domestic prices of their exports can be used to determine their normal value if they are able to meet the five criteria provided in Council Regulation (EC) No 905/98.

B. The U.S: the Market Oriented Industry (MOI) Test.

Compared with the EU, the similar regime in the U.S. is more positive and practical. Both the U.S. Department of Commerce and the U.S. Congress acknowledge the possibility that certain sectors or regions in a transitional economy will face market prices or begin to operate under hard budget constraints more quickly than others: ‘attempts by traditional NMEs to evolve towards market-oriented economies may result in a situation in which a sector of an NME may be sufficiently free of NME distortions so that the actual prices and/or costs incurred in the NME could be used in dumping calculations and render meaningful results.’⁶¹ Therefore, in order to make more accurate and fair judgement in anti-dumping investigations, the sectors could potentially be treated differently from other exporters in the country.

Based on this reason, in 1988, the U.S. Congress amended the anti-dumping law with section 773(c)(1)(b) permitting standard ME methodologies in NME cases under limited circumstances, and the Congress began to consider the situation of a ‘bubble of capitalism’ within an NME. In that case, if an industry in an NME is able to prove that its inputs and pricing structures are completely market determined, it would be subject to

⁶⁰ Russia was recognized as an ME for the purpose of anti-dumping by Council Regulation (EC) No 1972/2002 of 5 November 2002 amending Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Community. OJ 2002 L305/1.

⁶¹ ‘Final Negative Countervailing Duty Determination: Oscillating Ceiling Fans from the People's Republic of China’, 57 Fed. Reg. 24018, June 5, 1992.

anti-dumping procedures similar to those for market economies. In the case of Sparklers from the People's Republic of China⁶² and Oscillating Fans From the People's Republic of China,⁶³ the U.S. Department of Commerce clarified its position on bubbles of capitalism.⁶⁴

In 1992, ITA announced certain criteria to determine whether an industry in an NME is sufficiently market-oriented. They include:⁶⁵

1. The virtual absence of government involvement in setting prices or production levels;
2. The industry is characterised by private or collective ownership; and
3. The industry pays market prices for all significant input.

Under the MOI test, industries in a transitional economy like China could have more fair and predictable treatment in anti-dumping investigations. The enterprise which passes the test will be allowed to use the domestic price to determine the normal value of its exports. As a result of the MOI test method, the number of positive final determinations of dumping against NME industries has decreased.⁶⁶ Therefore, the comparative advantages of the industry/enterprise are affirmed in international trade.

C. Australia: Special rules for Economies in Transition (EIT).

This is the most significant difference between Australian and the EU anti-dumping legislation towards China and other EIT. Australia has added and amended relevant rules

⁶² 56 Fed. Reg. 20588, May 6, 1991.

⁶³ 56 Fed. Reg. 55274, October 25, 1991.

⁶⁴ Cynthia Horne, *fn* 31 above at p 24.

⁶⁵ Jianyu Wang, 'A Critique of the Application to China of the Non-Market Economy Rules of Antidumping Legislation and Practice of the EU.' (1999) 33(3) J.W.T., 117 at p 139.

⁶⁶ Cynthia Horne, *fn* 31 above at p 25.

according to the changes of economic status in China's and other EIT since 1998. As we will find out from a recent case later in this chapter, the current legislation matches these changes very well. Compared with the corresponding rules of the EU, it is not only more specific, but also more reasonable and realistic in practice.

1. The Customs Tariff (Anti-Dumping) Act 1975 as amended by the Customs (Anti-dumping Amendments) Act 1998.

The Customs Tariff (Anti-Dumping) Act 1975 as amended by the Customs (Anti-dumping Amendments) Act 1998 introduced an alternative approach to determine normal values of allegedly dumped goods for countries in the process of a transition from a centrally controlled economy to an ME.

Australia's legislation provides for normal values to be assessed through a hierarchy of methodologies with Customs working progressively through each until a point is reached where the normal value can be determined.⁶⁷

The revised law is more flexible and practical than the old one when determining normal values for imports from transitional economies.

Considering the possibility that EIT may have some sectors which have already moved to the ME level, Australian Customs admit that it is inappropriate to apply the same rules for NMEs to imports in these sectors of EIT. According to the law, an assessment of the influence or control a government has over domestic selling prices and the method used for determining normal values is made on a case-by-case basis. Based on the different economic development level of an economy in transition, Customs may use alternative methods to calculate its normal values. There will be one of the two situations.

⁶⁷ John Carroll, *fn* 13 at p 2.

- a. When it finds out in the process of an anti-dumping investigation that the domestic selling prices of such products concerned are subject to price control, the normal values will be determined on a basis of information obtained from both an analogue country and a transitional economy.
- b. If the Customs find there is no price control, it may proceed to examine the cost of production of the imports from EIT. In case of raw materials being supplied by a state wholly owned enterprise,⁶⁸ a substitute raw material cost may be used in the calculation of the normal value.

The method of determining the substitute raw material cost will depend on the circumstances of each case. The legislation provides for the substitute raw material cost to be based on one of the following options: the raw material price in the domestic market of a analogue country; the raw material export price from a analogue country to an appropriate third country; the cost to make and sell the raw material in a analogue country; or the selling price of the raw material in Australia.

The normal value for goods that are found to incorporate raw materials from a state wholly owned enterprise may be determined having regard to all relevant information. This can include the sum of: the cost of the substitute raw material; the actual costs of production of the exported goods (excluding the actual costs for the affected raw material); and the administrative, selling and general costs and profit associated with the export sale.⁶⁹

2. More specific rules for EIT – Australian Customs Dumping Notice No.

⁶⁸ i.e. a raw material input to the manufacture of the exported goods, that accounts for more than 10% of the costs of production, is supplied by a state wholly owned enterprise.

⁶⁹ 'Australia's Anti-Dumping and Countervailing Administration', *fn* 32 at p 7.

2000/60.⁷⁰

On 7 December 2000, the Minister for Justice and Customs issued the following guidelines in relation to a price control situation in an economy in transition. Under this law, exporters in such a country have the opportunity to submit claims to establish that a price control situation does not apply to the goods under consideration. In that case, the producer or exporter bears the burden of proof, and should provide the information to show that a price control situation does not exist. There are four criteria to judge whether a price control situation exists.

- a. Decisions of the relevant producers or exporters relating to prices, costs, inputs, sales and investments are made in response to market signals and without significant state interference.⁷¹

To meet this criterion, four factors should be found:

i) genuinely private companies or parties hold the majority shareholding of the relevant producer or exporter; ii) state or provincial officials appearing on the board or in key management positions are in a clear minority; iii) the relevant producer or exporter has the guaranteed freedom to carry on business activities as evidenced by the following: there is no restriction on selling on the domestic market, the right to do business cannot be withdrawn outside proper contractual terms, and in the case of joint venture companies, profits can be exported and capital invested can be repatriated; iv) major production inputs of the relevant producer or exporter are not supplied by state owned or controlled enterprises at prices which do not substantially reflect free market conditions. Inputs shall

⁷⁰ 'Ministerial Guidelines - Section 269tac(5e), Customs Act 1901', available from: <<http://www.customs.gov.au/notices/acdn00/acdn0060.htm>> (1 December 2002).

⁷¹ Ibid.

include, inter alia, raw materials, labour, energy and technology costs.

- b. One clear set of basic accounting records is kept by the relevant producer or exporter and is independently audited and is maintained in accordance with either generally accepted accounting principles in the country of export or in line with international accounting standards.
- c. The production costs and financial situation of the relevant producer or exporter are not subject to any significant distortions carried over from the non-market economy system.
- d. The relevant producer or exporter is subject to bankruptcy and property laws, which guarantee legal certainty and stability.⁷²

According to the Notice, the following factors should be taken into account before determining whether a price control situation exists.

- i) The relevant producer or exporter of the goods under consideration forms part of a broader market or sector in which the presence of a State owned enterprise or enterprises has influenced prices;
- ii) The supply of utilities should be guaranteed on the basis of contracts that reflect normal commercial terms and prices which are generally available throughout the economy;
- iii) The land on which facilities of the company are built should be rented from the State at conditions comparable to those in an ME (e.g. Proper contractual leases);
- iv) The company should have the right to hire and dismiss employees and the right to fix salaries.⁷³

The above legislation towards EIT shows that Australian anti-dumping authority is fully

⁷² Ibid.

⁷³ Ibid.

aware of the important fact that in the broad spectrum of economic development, different sectors in EIT may be at different economic development levels. Since the law provides different rules applicable to these different levels, it well matches this feature of the EIT. In addition, because it is more specific, the anti-dumping authority has less discretion when it judges the facts about dumping. As a result, it enables the assessment of dumping towards imports from Chinese to be impartial and fair. This can be perceived from the following case study.

3. Case study

a. Brief introduction to the case.

This is a recent Australian anti-dumping case against imports from the People's Republic of China. It is a typical case to analyze because the investigation was initiated soon after the rules for EIT was enacted. Therefore, it shows how the Australian Customs utilize the updated legislation to determine the normal values of imports from China as a transitional economy, and thereafter arrive at a reasonable conclusion in anti-dumping investigations.

On 14 May 2001 Monsanto Australia Limited (Monsanto), the predominant manufacturer of glyphosate in Australia, lodged a Customs application for a dumping duty notice in respect of glyphosate exported to Australia from China.⁷⁴ Monsanto claimed that the goods had caused material injury to the Australian industry producing like goods. It also claimed that the glyphosate market in China was subject to price control and was, for this and other reasons, unsuitable to assess normal values with Chinese domestic prices. It asked that Customs assess normal values using India as an analogue country.

⁷⁴ 'Australian Customs Dumping Notice - 2002/12 - Wednesday 27 February 2002, Customs Act 1901 - part xvb Notice pursuant to Section 269TL Finding on Glyphosate Exported from the People's Republic of China'. Available from http://www.customs.gov.au/site/index.cfm?area_id=5&content_id=13972 (1 December 2002).

Customs initiated its investigation into Monsanto's allegations on 12 June 2001. After assessing the information submitted by Chinese exporters and consulting with the Chinese government and representatives of the Chinese glyphosate industry, Customs concluded that the Chinese glyphosate market was not subject to price controls. Therefore, it decided that the domestic market prices were suitable for assessing normal values. As a result of the investigation, the Chinese products were not dumped, and no anti-dumping measure would be taken.

b. Detailed analysis of the procedures and methods taken to determine the normal value of the case.

i. Legal basis.

In this case, the legal basis to determine the normal value of Chinese products include Subsection 269TAC(5D), Subsection 269TAC(5E) and Subsection 269TAC(5G) of the Customs Act 1901 (Act).

Subsection 269TAC(5D) covers price control situations in EIT. Subsection 269TAC(5E) of the Act defines a price control situation in relation to the domestic price of like goods as where exporters or other sellers of like goods and the domestic prices of the like goods in the country are controlled or substantially controlled by the government of that country.

If the domestic sales of like goods by the exporter or other sellers in the country of export do not exist, Subsection 269TAC(5D) of the Act can not be applied. In that case, Customs will examine the source of raw materials used in the production of the exported good and their costs according to 269TAC(5G) of the Act. Where the supply of raw materials used in producing the exported goods is affected by the government of the export country, and the cost actually incurred by that producer in procuring that raw material so supplied exceeds 10 percent of the costs actually incurred by the producer in producing the

exported goods, the normal value of the goods must be constructed in accordance with the method set out in paragraphs (f) to (h) of s. 269TAC(5G) of the Act.

ii. Findings of the investigation.

After receiving exporter questionnaires from Chinese glyphosate manufacturers and exporters, Australian Customs visited five of them to verify the information provided. It also sought information about the economic development level of the country and the industry from the Chinese government and various Chambers of Commerce and industry representative organisations, including MOFTEC (Ministry of Foreign Trade and Economic Cooperation) and CCPIT (China Council for the Promotion of International Trade Sub-Council of Chemical Industry). Based on the facts, Customs arrived at the following conclusions.

- No price control situation exists in respect of China's domestic market for agricultural chemicals.⁷⁵
- There were insufficient sales of like goods on the domestic market in China that would be relevant for determining normal values under Subsection 269TAC(1) of the Act.⁷⁶
- No raw materials which accounted for more than 10 percent of production costs incurred in manufacturing the exported product were supplied by an enterprise that was wholly owned by any level of government.⁷⁷

Therefore, under Subsection 269TAC of the Act, provisions for determining normal values in respect of economies in transition are not applicable in this case. That is to say,

⁷⁵ 8 (3)(7) 'Customs' Conclusions re price control', *ibid.*

⁷⁶ 8 (3)(8) 'Domestic Sales of Like Goods', *ibid.*

⁷⁷ 8 (3)(9), 'Source of Significant Inputs', *ibid.*

the corresponding methods for Market Economies will be adopted here. Customs calculated weighted average export prices and normal values for the five Chinese companies, and then determined dumping margins for each of them. As a result of the investigation, four companies had negative dumping margins, and the other had a slight dumping margin of 5.81 percent.⁷⁸

In addition, Customs examined reasons for the injury claimed by Monsanto (Monsanto Australia Limited) in its anti-dumping investigation application, and confirmed that it was not the alleged dumped goods that caused the material injury. Based on the above facts, Customs recommends that the Minister shall not publish a dumping duty notice in respect of the goods.

It is noticed that Australian Customs findings differ from those of the EU in its recent investigation of alleged dumping of glyphosate exported from China. The significant difference in the two findings is that Australian Customs used information verified in China to establish normal values and the EU used an analogue (surrogate) country. This difference arose as a result of differences between relevant EU and Australian legislation in respect of the treatment of economies in transition.

Both the Australian and EU authorities will examine the economic status of relevant Chinese companies respectively before they determine the method to calculate normal value of Chinese imports concerned. However, the Australian Customs have a better and correct understanding of this issue. It can be shown by another case study.

A very important factor to assess the economic status of a company is substantial interference by government or state. In this case, a Chinese joint venture's investment up to Renminbi (RMB) 50m was approved by the provincial government, over RMB 200m

⁷⁸ *fn* 74 at p 25.

by the State Council and RMB 50m to RMB 200m by State Planning and Development Commission. The Customs found out through investigation that these approvals only related to investment and did not restrict production quantities. For approval of investment the parties must submit a business plan. Such a business plan may include projected production, but did not restrict production. The purpose of the plan was to demonstrate that the proposed investment was sound. Based on this fact, it did not become the barrier for the joint venture to obtain MET in the anti-dumping investigation.

However, such an approval of investment by the state may lead to different judgement under the EU institutions. It can be regarded as substantial state interference and NME behaviour by the EU according to its conventional practice towards Chinese exporters. Therefore, the joint venture's application for MET is likely to be rejected by the EU. That is to say, prices from a third ME rather than the domestic sales prices will be used to determine the normal value of the joint venture's exports. Afterwards, a very high anti-dumping duty will be imposed following the artificially maximized dumping margin as the result of the investigation.

From the above case analysis, we can perceive the most important differences between the Australian and the EU anti-dumping legislation towards the People's Republic of China. The former has more detailed and reasonable provisions to determine normal values of imports from China. Therefore, its authorities (Customs) enjoy less discretion when determining dumping and injury in an anti-dumping investigation. Besides, Customs calculate dumping margins for each exporter concerned, which means that individual treatment is applied in every case. All of these can meet the needs in reality, i.e. the great complexity of anti-dumping cases involving economies in transition. Therefore, compared with the EU law, the Australian legislation ensures a more accurate and fair judgement of dumping and injury in such anti-dumping investigations.

D. New Zealand

Unlike the EU, New Zealand has removed specific provisions determining normal values of imports from NMEs and EIT. Recognizing the dramatic progress gained in economic reforms of these countries in the past decades, New Zealand considers it difficult to meet the conditions provided in the Interpretative Note 2⁷⁹ to paragraph 1 of Article VI of GATT 1994. Therefore, in case of domestic prices or factor costs of the products concerned might not be based on market considerations, standard provisions of the Dumping Act will be applied case by case. On a few occasions, price and cost information from analogue countries might still be used where exports from an NME is under anti-dumping investigation. However, such a situation will be the exception rather than the rule.⁸⁰ Besides, in cases of recent years,⁸¹ Chinese companies were granted individual treatment by the New Zealand authority automatically. Thus, dumping margins of dumped goods are calculated on an individual basis. In addition, the authority pays great attention to explore the exact reasons of depression of its domestic industry in anti-dumping investigations, so that the injury caused by dumped goods can be examined properly.

All of these are helpful to get an accurate assessment of dumping facts without overestimating them in anti-dumping investigations. Therefore, they bring out

⁷⁹ GATT Ad *Art. VI* Paragraph 1.2 provides: 'It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate'

⁸⁰ 'Anti-Dumping Law and Practice in New Zealand', *fn* 16 above.

⁸¹ 'Glass, Clear Float; from China, Indonesia and Thailand' (New Zealand anti-dumping case, completed on 12 May 1998), <http://www.med.govt.nz/buslt/trade_rem/reports/glass.html> (1 December 2002).

'Lead Acid Batteries from the People's Republic of China', (New Zealand anti-dumping case, completed on 22 July 1999), <http://www.med.govt.nz/buslt/trade_rem/reports/cbatterm.html> (1 December 2002).

completely different judgments towards Chinese companies, which shows the very difference between New Zealand and the EU anti-dumping legislation towards NMEs and EIT. It will be illustrated further in the following case.

Case Study.

This is a New Zealand anti-dumping case against imports from the People's Republic of China. During the investigation, the authority specifically examined Chinese domestic cement market and concluded that it is not significantly affected by the government at any level. Therefore, it is a typical case to show how the New Zealand authority of today determines the normal values of the Chinese products according to the latter's economic status as a transitional economy. As a result of such practice, the authority is able to get a right conclusion of dumping facts in anti-dumping investigations.

1. Brief introduction to the case.

On 8 October 1997, Golden Bay and Milburn (the New Zealand Portland Cement industry) submitted an anti-dumping investigation application to the Ministry of Commerce. It stated that imports of Portland cement from China were being dumped, and threatening to cause material injury to the New Zealand industry.⁸²

In accordance with section 10 of the Dumping and Countervailing Duties Act 1988 ("the Act"), on 20 November 1997, the Secretary of Commerce formally initiated an investigation. Both the existence and effect of the alleged dumping of Portland cement from China were found as a result. Therefore, the New Zealand industry requested in its application that provisional measures be imposed. However, on 18 February 1998 the Minister of Commerce declined the request on the ground that action under section 16 was not necessary to prevent material injury being caused during the remaining period of

⁸². 'Portland Cement from China', (New Zealand anti-dumping case, completed on 14 May 1998), <http://www.med.govt.nz/buslt/trade_rem/chinacement/final/index.html> (1 December 2002).

the investigation, and even further imports were unlikely to cause material injury to the New Zealand industry during this period. Consequently, no anti-dumping measures were taken towards imports from China.

2. Methods taken to determine the normal value of Chinese products in the case.

During the anti-dumping investigation, the authority found the following facts: first, sales of Portland cement on the Chinese domestic market are not set or influenced by the Government (at any level), and that prices are established according to the market. Second, sales are not made at a loss, and are made in sufficient quantities to be used to establish normal values. Based on above points, Normal values are determined in accordance with section 5 of the Act which states (inter alia) as follows:

Subject to this section, for the purposes of this Act, the normal value of any goods imported or intended to be imported into New Zealand shall be the price paid for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arm's length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

Therefore, the domestic sales prices of Chinese cement were adopted to calculate the normal values and dumping margins. Dumping margins have been calculated on a per tonne basis for cement packed in 40kg bags and in one tonne bags for the export shipment made to New Zealand during the period of investigation of 1 October 1996 to 30 September 1997. As a result, the cement in 40kg bags was found to be dumped with a dumping margin, i.e. 5 percent of export price.

However, in the injury investigation, the New Zealand authority concluded that there is no evidence that material injury is being threatened as a result of the probable volume effects of further imports. There is evidence of a likely loss of market share, decline in

profits, a reduction in utilization of production capacity, a decline in employment levels, and a reduction of cash flow, but the likely impact is not so significant as to threaten material injury. Therefore, no anti-dumping measure was taken towards the Chinese goods.

In this case, methods that the New Zealand authority adopted to determine the normal value of imports from China is highlighted, because it is crucial to determine the dumping margin and assess the actual effect of the dumped goods on the New Zealand industry. After making sure of the non-interference from government to Chinese domestic cement market, the authority applied MET to determine normal values and dumping margins of the goods concerned. Consequently, the effects of the dumped goods to New Zealand industry were assessed in a proper manner, and no anti-dumping measure was taken.

On the contrary, if it were the EU who would decide this case, it would make a completely different judgement towards Chinese companies. According to its routine practice, it is likely to adopt the analogue country method (i.e. refer to the domestic sales prices of a third ME) to calculate the normal values of Chinese goods. As a result, normal values and dumping margins of the imports concerned can be artificially enhanced. Thus, the injury caused by the dumped goods will be maximized. In the meantime, under ‘one country one duty’ principle of the EU, a unified and high anti-dumping duty will be imposed on all Chinese companies related to the dumped goods.

E. Japan: less stringent and more practical approach towards Chinese exports.

Japan’s anti-dumping policy towards NMEs seems similar to that of the EU in words. However, there are two significant differences in practice.

First, unlike the EU, Japan does not frequently apply its anti-dumping instrument as a protectionist measure for its domestic industry against imports from NMEs. Though

Japan compiled its anti-dumping law a long time ago, it seldom uses it. Up to 1 June 2001, only six anti-dumping petitions had been filed against foreign products, and three of them were finally withdrawn.⁸³

Second, the Japanese authorities in practice adopt fairly flexible methods to assess normal values of imports from transitional economies like the People's Republic of China. This can be seen in the following case.

Both of the two facts bring out quite different outcomes of the legislation of Japan and the EU with regard to their anti-dumping measures taken towards EIT.

Ferro-silico-manganese was the first case leading to anti-dumping measures by the Japanese government.⁸⁴ It is also a typical case which can show how the Japanese government determines normal value of imports from the People's Republic of China as a transitional economy.

1. Brief introduction to the Ferro-silico-manganese case.

On 8 October 1991, the Japanese Ferro-Alloy Association initiated anti-dumping petitions against ferro-silico-manganese imported from the People's Republic of China, the Kingdom of Norway and the Republic of South Africa, because the Japanese industry of ferro-silico-manganese argued that it was threatened by the low priced imports. The anti-dumping investigation was carried out on 29 November 1991. As a result of a positive dumping finding, anti-dumping measures were taken towards different Chinese companies respectively.

2. Method to calculate the normal value of imports from Chinese companies—

⁸³ 'WTO Anti-Dumping Statistics', *fn* 19 above.

⁸⁴ Ministry of Finance, Customs Weekly Reports, 12 February 1993, No 2089, pp. 1-3.

conditional MET.

In the process of the dumping investigation, the Japanese government determined the normal value of the Chinese products with the same method applicable to MEs (i.e. use domestic price) due to two facts.⁸⁵

- Ferro-silico-manganese is one of the 'free items' exempt from State control.
- Though Chinese producers concerned are province-owned or collective-corporate operated, they decide the sales prices and pay a corporate tax independently.

After an on-the-spot investigation, the Japanese authority considered the direct domestic sales prices were reliable. Therefore, normal value of the imported ferro-silico-manganese was calculated at a direct sales level from producers to domestic users in China.

3. Methods to determine dumping margin and anti-dumping duty rates – individual treatment.

Since the domestic sales prices adopted to calculate the normal value were different and were supplied by several Chinese exporters, the Japanese authority determined dumping margin and duty rates for those companies respectively. Here, different methods were taken towards three groups of Chinese exporters.

- a. Considering seven Chinese exporters who have cooperated to supply information during the investigation, anti-dumping duty rates were determined on an individual basis, i.e. 4.5-19.1 percent.
- b. As to non-co-operators, dumping margins and duty rates were based on best available

⁸⁵ Norio Komuro, 'Japan's First Anti-Dumping Measures in the Ferro-Silico-Managanese Case', (1993) 27 J.W.T., 6 at p 18.

information, which exceeded the highest rates in the former case, i.e. 27.2 percent.

- c. As to new producers who began to manufacture the same products after the anti-dumping investigation, dumping margin was the weighted average margin for co-operators in the first case, i.e. 8.9 percent.

Here, the method adopted by the Japanese government to determine normal value and dumping margin of the Chinese products is noticeable, because the EU would take different methodology in that case. The ownership of the Chinese producers concerned (province-owned and collective-corporate operated) will become the trigger for the EU to apply traditional NME treatment to them mechanically. In EU practice, the normal value of the Chinese products will be calculated with the domestic price paid (or the export price to third countries) of like products in an analogue market-economy country. A maximized dumping margin is likely to appear afterwards, and then a single high anti-dumping duty will be imposed on all relevant Chinese producers.

Compared with the EU, the methods taken by the Japanese authority have brought out an accurate and fair outcome in this case. In addition, since dumping margins for non-co-operators are based on the best information available, and they are higher than those of cooperating exporters, it will actually encourage foreign exporters to cooperate in future anti-dumping investigations. All of these show the significant differences between Japan and the EU's anti-dumping policy against imports from transitional economies like the People's Republic of China.

V. Different methodologies to determine anti-dumping duty rates for dumped Chinese exporters.

A. The EU's one country one duty rule and individual treatment.

The EU's anti-dumping Regulation stipulates that in the cases of imports from NMEs, a single average rate of duty is applied to all imports from that country.⁸⁶ In practice since the early 1990s, the Commission has stressed repeatedly that in anti-dumping proceedings with regard to imports from NMEs, it will generally impose a single anti-dumping duty on all exports from such countries on a country-by-country basis.⁸⁷

Due to the favourable progress gained in the economic reform of original NMEs such as the People's Republic of China, the EU provided conditional individual treatment. If an NME exporter can meet the criteria of the treatment to show that its export activities are not subject to state interference, its anti-dumping duty will be determined on an individual basis according to its export price. The latest legislation was updated in Council Regulation (EC) No 1972/2002.⁸⁸ It sets five criteria for the conditional individual treatment.

- (a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;
- (b) export prices and quantities, and conditions and terms of sale are freely determined;
- (c) the majority of the shares belong to private persons. State officials appearing on the

⁸⁶ Art. 9 (5), Council Regulation (EC) No 905/98.

⁸⁷ Jianyu Wang, *fn* 65 above at p 123.

⁸⁸ Council Regulation (EC) No 1972/2002 of 5 November 2002 amending Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Community. OJ 2002 L305/1.

board of Directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from state interference;

(d) exchange rate conversions are carried out at the market rate; and

(e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.⁸⁹

The conditional individual treatment seems to be much more flexible and reasonable than the one country one duty rule. However, even the EU itself admit that the criteria of the treatment are so strict that very few exporters has been granted the treatment in practice since the method was stipulated. Under the regime, within three years since the method was firstly provided in 1997, only 3 out of 27 Chinese companies qualified for individual treatment.⁹⁰ Therefore, it is applied as an exception rather than a general rule. Furthermore, Council Regulation (EC) No 1972/2002 explicitly provides that only wholly or partly foreign owned firms or joint ventures are eligible to apply for the individual treatment. This, compared with the corresponding legislation of the U.S., Australia, New Zealand and Japan, is an additional requirement which is far from reasonable.

B. The U.S. Australia, New Zealand and Japan's individual treatment for imports from NMEs or transitional economies.

Unlike the EU, the U.S. adopts individual treatment towards NMEs in a more flexible and realistic way. Once a company from an NME can demonstrate that it operates

⁸⁹ Art. 1(6), Council Regulation (EC) No 1972/2002.

⁹⁰ Proposal for a Council Regulation amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community /* COM/2000/0363 final - ACC 2000/0160 */ pp. 3, 5 & 13.

independently and is free of government control from both law and fact aspects, its anti-dumping duty will be determined by the U.S. authorities on an individual basis. As a result, towards imports from the People's Republic of China, the U.S. grants individual treatment almost in every case, including Chinese state-owned enterprises.⁹¹

In the Silicon Carbide case,⁹² the U.S. anti-dumping authorities made an investigation of both law and facts, and concluded that ownership by all the people is not synonymous to central government control. The state-controlled companies concerned were no longer subject to government control in law or in fact. Therefore, they were granted individual treatment.

Following the idea, recognizing the changes gained in China's economic reform, the rule of individual treatment has been confirmed in numerous U.S. anti-dumping cases. On the contrary, the EU authorities have systematically refused to grant individual treatment to Chinese exporters, even to China-foreign joint ventures. From this point of view, we can see that though both the U.S. and the EU have similar provision for individual treatment in law, the way they apply it makes a significant difference to the outcomes.

As to other developed countries such as Australia, New Zealand and Japan, their anti-dumping authorities grant individual treatment automatically to Chinese exports to determine their respective duty rate in anti-dumping proceedings.

From the above analysis, it is apparent that the EU adopts an overly strict approach to apply individual treatment to Chinese exporters. It not only unreasonably exerts an extra burden of proof on them, but also is likely to bring out rather high anti-dumping duty as a result of the investigation.

⁹¹ Jianyu Wang, *fn* 65 above at p 139.

⁹² Silicon carbide from the People's Republic of China, U.S. Federal Register, Vol. 59, 2 May 1994, p. 22587.

Conclusion.

This chapter compares the anti-dumping legislation (towards NMEs and EIT) of the EU and the U.S., Australia, New Zealand and Japan. It indicates the differences between the EU and the other four countries' anti-dumping rules by analysing them from both legal and practical aspects (see Table 5.1). It particularly focuses on the different methods and attitudes that these countries take when they determine normal values and anti-dumping duties towards the People's Republic of China as a transitional economy in anti-dumping investigations.

Table 5.1. Summary of the different approaches to anti-dumping legislation applicable to China.

Country		EU	U.S.	Australia	N.Z ⁹³	Japan
Determination of Normal Value	Default ⁹⁴	ACM ⁹⁵	CVM+SCM	ACM	MET	SCM
	Exception ⁹⁶	MET	MET	MET ⁹⁷		MET ⁹⁸
Determination of AD duty	Default	OCODR	IT	IT	IT	IT
	Exception	IT				

In summary, compared with the EU, the U.S. Australia, New Zealand and Japan have adopted less stringent but more practical approach towards imports from China through

⁹³ N.Z: New Zealand.

⁹⁴ If Chinese exporters do not apply or fail to reach certain criteria, such a methodology will be applied automatically.

⁹⁵ ACM: analogue country method; SCM: surrogate country method; CVM: constructed value method; MET: market economy treatment; OCODR: one country one duty rule; IT: individual treatment.

⁹⁶ Exception here means those methods applied as exceptions rather than rules by anti-dumping authorities, because exporters bear the burden of proof, and it is very difficult for them to meet the criteria.

⁹⁷ Under Australian anti-dumping law, Chinese exporters bear the burden of proof to get MET. However, the law provides more specific and practical criteria so that most Chinese exporters can get MET in investigations of recent years.

⁹⁸ Japanese anti-dumping law does not grant MET to Chinese exporters automatically. However, Japanese authority adopts a more flexible and less stringent approach to assess Chinese exporters economic status in anti-dumping proceedings.

their anti-dumping legislation.

1. They have much more detailed provisions in anti-dumping investigations, which match the complexity of the broad spectrum of transitional economies. That is to say, under the law, normal values of exports from specific industries which developed at an advanced economic level in a transitional economy can be determined with more accuracy.
2. They have more substantive and procedural rules regulating their authority's practice in anti-dumping investigations. The authorities are endowed with less discretion while determining dumping and injury. According to the laws, they are required to examine more essential facts before reaching a conclusion, and this brings out a more accurate and reasonable judgement in anti-dumping investigations.
3. They apply the new approaches⁹⁹ to Chinese exports more often than the EU at least from a statistical point of view. In other words, the new treatment is adopted by these four countries as a rule rather than exceptions in practice. As a result, more Chinese companies have been granted MET and individual treatment in anti-dumping investigations. This fact shows that the amended law actually meets its target, i.e. to match the favourable changes achieved in China's economic reform.

In short, this chapter makes an effort to understand the most appropriate approaches to determine normal values and dumping duties for Chinese exports in anti-dumping investigations. Therefore, by analyzing other developed countries' anti-dumping policy towards China, it provides a necessary and comprehensive study for the conclusion of this thesis, which will set out proposals on certain key issues in the EU's current anti-dumping legislation applicable to exports from the People's Republic of China.

⁹⁹ i.e. conditional MET and individual treatment.

Annex

Table 5.2. Anti-Dumping: Initiations: by reporting party from 01/01/95 to 30/06/01

Reporting Party	1995	1996	1997	1998	1999	2000	2001	Totals
Argentina	27	22	15	8	24	45	10	151
Australia	5	17	42	13	24	15	10	126
Brazil	5	18	11	18	16	11	3	82
Canada	11	5	14	8	18	21	23	100
Chile	4	3	0	2	0	5	0	14
Colombia	4	1	1	6	2	3	0	17
Costa Rica	0	4	1	1	0	0	0	6
Czech Republic	0	0	0	2	1	0	0	3
Ecuador	0	0	0	1	0	0	0	1
Egypt	0	0	7	12	5	1	0	25
European Community	33	25	41	22	65	31	13	230
Guatemala	0	1	0	0	0	0	0	1
India	6	21	13	27	65	41	16	189
Indonesia	0	11	5	8	10	3	1	38
Israel	5	6	3	7	0	1	2	24
Japan	0	0	0	0	0	0	2	2
Korea, Rep. of	4	13	15	3	6	2	3	46
Malaysia	3	2	8	1	2	0	0	16
Mexico	4	4	6	12	11	7	1	45
New Zealand	10	4	5	1	4	10	1	35
Nicaragua	0	0	0	2	0	0	0	2
Panama	0	0	0	2	0	0	0	2
Peru	2	7	2	3	8	1	0	23
Philippines	1	1	2	3	6	2	0	15
Poland	0	0	1	0	7	0	0	8

Reporting Party	1995	1996	1997	1998	1999	2000	2001	Totals
Slovenia	0	0	0	0	1	0	0	1
South Africa	16	33	23	41	16	21	5	155
Thailand	0	1	3	0	0	0	1	5
Trinidad and Tobago	0	1	0	4	3	1	0	9
Turkey	0	0	4	1	8	2	1	16
U.S.	14	22	15	36	47	47	39	220
Uruguay	0	0	0	0	0	1	2	3
Venezuela	3	2	6	10	7	1	1	30
Totals for 01/01/95 - 30/06/01	157	224	243	254	356	272	134	1640

Source: WTO Secretariat.¹⁰⁰

Table 5.3 Anti-dumping (AD) investigations V measures taken by European Union, United States, Australia, New Zealand and Japan towards imports from China during 1 January 1995- 30 June 2002.

Importing country	AD investigations launched	Definitive measures taken
European Union	38	25
United States	37	32
Australia	14	3
New Zealand	4	0
Japan	0	0

Sources: WTO Reports on anti-dumping (G/ADP/N series). WTO trade data. Author's computations.

¹⁰⁰ WTO Anti-Dumping Statistics, *fn* 19 above.

Table 5.4 New **definitive** anti-dumping measures (exclude reviews) taken and **undertakings** accepted during 1 January 1998 - 31 December 2002 against imports from China by European Union, United States, Australia, New Zealand and Japan.

Importing countries	Product	Date of initiation	Definitive duty	Effective date
European Union	Steel ropes and cables	20.05.98	60.4%	17.08.99
	Hot-rolled flat products of non-alloy steel	13.05.99	8.1% net free-at-Cty-frontier price, before duty	10.08.2000
	Malleable cast iron tube or pipe fittings	29.05.99	49.4%	18.08.2000
	Electronic weighing scales	16.09.99	0-30.7%	30.11.2000
	Coke of coal in pieces with diameter of more than 80 mm	16.09.99	equal to fixed amount of EUR 32.6 per tonne of dry net weight	15.12.2000
	Aluminium foil	18.02.2000	15%	17.05.2001
	Colour television receivers	01.04.2000	24,5-44,6%, undertakings accepted	29.08.2002
	Integrated electronic compact fluorescent lamps	17.05.2000	0,0-66,1%	19.07.2001
	Ferro-molybdenum	9.11.2000	22.5%	6.2.2002
	Zinc oxides	20.12.2000	6-28%	5.3.2002
	Sulphanilic acid	6.7.2001	21%	25.7.2002
	United States	Preserved Mushrooms	02.02.98	154-198%
Creatine Monohydrate		10.03.99	0.00-50.32%	04.02.00
Aspirin		23.06.99	16.51-144.02%	11.07.00
Cold-Rolled Carbon Steel Plate		25.06.99	20.64-23.54%	27.09.00
Concentrated Apple Juice		06.07.99	0.00-51.74%	05.06.00
Synthetic Indigo		28.07.99	79.7-129.6%	19.06.00
Steel Concrete Reinforcing Bars		25.7.2000	133.00%	07.09.01
Foundry Coke		17.10.00	76.19-214.89%	17.09.01
Honey		26.10.00	25.88-183.80%	10.12.01
Certain Hot-Rolled Carbon Steel Flat Products		04.12.00	64.20-90.83%	29.11.01
Pure Magnesium		14.11.00	24.67-305.56%	19.11.01
Folding Gift Boxes		19.03.01	1.67-164.75%	08.01.02
Automotive Replacement Glass Windshields		27.03.01	3.71-124.50%	04.04.02
Folding Metal Tables and Chairs		24.05.01	0.00-70.71%	27.06.02
Structural Steel Beams		20.06.01	15.23-89.17%	18.06.02
Certain Circular Welded Carbon Quality Steel Pipe		21.06.01	0.00-36.42%	24.05.02
Cold-Rolled Carbon Steel Flat Products		26.10.01	105.35%	03.10.02
Ferrovandium	26.12.01	13.03-66.71%	29.11.02	
Australia	Steel shelving kits	15.09.00	38-114%	03.10.01
	Sodium metabisulfide	12.09.01	83%	04.06.02
New Zealand	No new anti-dumping measure was taken towards China during 1 January 1998-31 December 2002.			

Japan	No new anti-dumping measure was taken towards China during 1 January 1998–31 December 2002.
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Sources: WTO Reports on anti-dumping (G/ADP/N series). WTO trade data. Author's computations.

Chapter Six

New Issues with regard to the EU's Anti-Dumping Practice towards Imports from China after the Latter's accession to the WTO

Introduction

Anti-dumping decisions of the European Union (EU) are made by the European Commission and Council. Under Article 230 of the Treaty establishing the European Community, the European Court of Justice has the jurisdiction to review the legality of acts of the Council and the Commission. An application can be lodged by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. If a measure is of direct and individual concern to a natural or legal person, he can challenge it before the Court as well.¹

In the field of anti-dumping, the Court of First Instance has jurisdiction to hear such applications.² Therefore, before China entered the World Trade Organisation (WTO), if there was any dispute relating to the EU's anti-dumping measures imposed on Chinese exports, these decisions could be challenged before the Court of First Instance by Chinese exporters, European importers or complainants under Article 230.³

¹ Para. 1 of Art. 230 (ex Art. 173), Treaty establishing the European Community.

² Ivo Van Bael & Jean-Francois Bellis, *Anti-Dumping and other Trade Protection Laws of the EC* 3rd edn. (Bicester: CCH Europe, 1996) at p 10.

³ 'The case law of the Court has now developed to the point where it may be said that, as a general rule, complainants, exporters and importers have standing under Article 173', Ivo Van Bael & Jean-Francois Bellis, *fn 2* above at p 330.

Since the first anti-dumping investigation against China⁴ was initiated by the EU in August 1979, six measures relating to Chinese exports have been challenged before the Court of First Instance. Among these cases, two were brought by European importers against the European Commission and the Council, and the contested Regulations were declared to be invalid in both cases.⁵ However, as to the other four measures challenged by Chinese exporters (including two Hong Kong exporters),⁶ all of them failed.

It is interesting to note that only cases brought by European exporters have been successful, and it could be argued therefore that the Court reflects the trade interests of the EU itself. It is also recognized that, in practice, the Court is unwilling to interfere in the detailed determinations of the Commission and the Council.⁷

China entered the WTO on 11 December 2001. This changes the processes and procedures of the settlement of anti-dumping disputes with EU, because now China is entitled to the rights for WTO developing country Members. In the context of WTO membership, new issues and disputes may arise with regard to the EU's anti-dumping practice. First, under the WTO trade and legal system, the EU bears the obligation in anti-dumping proceedings to treat China in a way consistent with the GATT and WTO laws from both a procedural and substantive perspectives. Second, China enjoys the

⁴ 80/1116/EEC: Commission Decision of 4 December 1980 accepting undertakings offered by the exporters of saccharin and its salts originating in China and the United States of America and terminating the proceedings concerning imports of saccharin and its salts from China, Japan and the United States of America. OJ 1980 L 331/41.

⁵ Case 16/90, Detlef Nölle, trading as 'Eugen Nölle' v Hauptzollamt Bremen-Freihafen, ECR 1991 I-05163. Case 358/89, Extramet Industrie SA v Council of the European Communities, ECR 1992 I-03813.

⁶ Case 75/92, Gao Yao (Hong Kong) Hua Fa Industrial Co. Ltd v Council of the European Union, ECR 1994 I-03141. Case 161/94, Sinochem Heilongjiang v Council of the European Union, ECR 1996 II-00695. Case 155/94, Climax Paper Converters Ltd v Council of the European Union, ECR 1996 II-00873. Case 170/94, Shanghai Bicycle Corporation v Council of the European Union, ECR 1997 II-01383.

⁷ Ivo Van Bael & Jean-Francois Bellis, *fn* 2 above at p 335.

special and differential treatment for developing countries provided by the WTO agreements. Third, the dispute settlement mechanism of the WTO is based on the principle that any Member can challenge trade measures taken by any other Member, so that even those countries that are economically weak can challenge the more economically powerful.⁸ Therefore, China can make use of the system to solve disputes with other Members.

This chapter examines these issues in four sections. It analyzes the special and differential treatment provisions contained in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

Section one analyzes Article 15 of the Anti-Dumping Agreement, which provides a developed country Member's obligation to actively consider the possibility of constructive remedies prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country. In order to explain its implications in practice, the interpretation given by the WTO Panel in the Indian Bed Linen case is analyzed.⁹

In the second part, I illustrate the special and differential treatment for developing and least-developed country Members under the WTO dispute settlement system. Corresponding provisions are contained in the DSU, including Article 3(12), Article 4(10), Article 8(10), Article 12(10), Article 12(11), Article 21.2, 21(7) and 21(8), Article

⁸ Julio Lacarte-Muro & Petina Gappah, 'Developing Countries and the WTO Legal and Dispute Settlement System: a View from the Bench' (2000) 3(3) *Journal of International Economic Law*, 395 at p 395.

⁹ 'European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India', Report of the Panel, WTO document code: WT/DS141/R. Available by searching through <http://docsonline.wto.org/gen_search.asp> (1 December 2002).

24 and Article 27(2) of the DSU. In this part, I also analyze the application of the DSU in the context of the Anti-Dumping Agreement.

Two types of foreseeable EU-China anti-dumping disputes after China's accession to the WTO are enumerated in the third section. They include disputes involving normal value calculation for the imports in question, and disputes based on the EU's practice of use-out domestic data and zeroing methodology in its anti-dumping investigations.

In the last part of the chapter, I indicate the potential difficulties for China to invoke the WTO special and differential treatment provisions to protect its trade interests against the EU's anti-dumping decisions. Generally speaking, these are also the difficulties that other developing countries face when they try to seek proper dispute settlements under DSU and other WTO laws.

In short, this chapter focuses on new issues that may arise with regard to the EU's anti-dumping practice towards China. It illustrates the WTO special and differential treatment provisions that China may invoke after its accession to the WTO, and several foreseeable disputes that may arise in future. In this way, it deepens the study of this thesis from a prospective point of view.

1. Article 15 of the WTO Anti-Dumping Agreement.¹⁰

A. General introduction.

Article 15 of the WTO Anti-Dumping Agreement provides that:

It is recognized that special regard must be given by developed country Members to the

¹⁰ WTO Anti-Dumping refers to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

special situation of developing country Members when considering the application of anti-dumping measures under this Agreement.

Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

The number of anti-dumping measures against imports from developing countries and the adverse effects of these measures have increased. Therefore, WTO developing country Members have emphasized that Members should take any anti-dumping action with care and responsibility, and ensure that any such action should be in compliance with the Agreement, so as not to disrupt trade between Members unnecessarily.¹¹ Based on this idea, particular attention was given to Article 15 of the WTO Anti-Dumping Agreement in the WTO Doha 4th Ministerial Conference in 2001. During the session, it was emphasized that Article 15 of the Anti-Dumping Agreement is a mandatory provision, and the modalities for its application would benefit from clarification. In the meantime, the Committee on Anti-Dumping Practices was instructed, through its working group on Implementation, to examine this issue and to draw up appropriate recommendations within twelve months on how to operationalize this provision.¹²

¹¹ 'Concerns Regarding Special and Differential Treatment Provisions in WTO Agreements and Decisions', WTO document code: WT/COMTD/W/66. Available by searching through <http://docsonline.wto.org/gen_search.asp> (1 December 2002).

¹² 'WTO Ministerial Conferences - Doha 4th Ministerial - Implementation-Related Issues and Concerns, Doha WTO Ministerial 2001: Ministerial Declarations and Decisions', WTO document code: WT/MIN(01)/DEC/17. Available from: <http://www.wto.org/wto/english/thewto_e/minist_e/min01_e/mindecl_implementation_e.htm> (1 December 2002).

B. Interpretation of Article 15 in the Indian bed linen case.¹³

The Indian Bed Linen case is a good example to analyze Article 15. First, the WTO Panel interpreted the provision in great detail, which gives important reference and guidance to its future application. Second, India's claim based on the rule was sustained. The WTO Panel decision is beneficial to the Indian textile industry, which is crucial to the country's economy. Third, this case has had a great influence. It has led to several amendments of the EU's anti-dumping regulations.¹⁴ The chain of events and culminating acts are unique in the legal history of the European Community¹⁵ and also rather rare in that of the WTO.¹⁶

Furthermore, it is significant to examine The Indian Bed Linen case when we analyze the future application of Article 15 of the WTO Anti-Dumping Agreement by China. India is a huge developing country among WTO Members, with a high percentage of linen and textile among its exports. China is in the same situation as India at this point, so the WTO ruling is an important reference to similar cases involving China in the future.

¹³ 'European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India', *fn 9* above.

¹⁴ Regulation (EC) 2398/97 imposing definitive anti-dumping duties against imports of bed linen originating in India, Egypt and Pakistan, OJ 1997 L332/1, as last amended by Regulation (EC) 554/2000, OJ 2000 L68/1.

Council Regulation (EC) 1644/2001 of August 7, 2001 amending Regulation (EC) 2398/97 imposing a definitive anti-dumping duty on imports of cotton type bed linen originating in Egypt, India and Pakistan and suspending its application with regard to imports originating in India, OJ 2000 L219/1.

¹⁵ Since 'European Community' and 'European Communities' are used in the WTO documents relating to dispute settlement, I will use these terms rather than the 'European Union (EU)' when I analyze the Indian Linen case in this chapter.

¹⁶ Dan Horowitz, 'International Trade (Editorial) A Regulated Scope for E.U. Compliance with WTO Rulings', (2001) 7(6) *Int.T.L.R.*, 153 at p 153.

1. Background.

On 28 November 1997, the European Community adopted Council Regulation (EC) No 2398/97, imposing final anti-dumping duties on imports of cotton-type bed linen from India.¹⁷ The Indian government thought that the measure was inconsistent with the WTO Anti-Dumping Agreement, and its due benefits under the WTO Agreement had been nullified or impaired as a result. Therefore, on 3 August 1998, it requested consultations with the European Community pursuant to Article 4 of the DSU, Article XXIII of the General Agreement on Tariffs and Trade 1994 ('GATT 1994') and Article 17 of the Anti-Dumping Agreement.¹⁸

On 18 September 1998 and 15 April 1999, India and the European Community held consultations in Geneva, but they failed to reach a mutually satisfactory resolution of the matter. According to Article XXIII:2 of GATT 1994, Article 6 of the DSU and Article 17 of the Anti-Dumping Agreement, India requested the establishment of a Panel to examine the matter on 7 September 1999.¹⁹ Based on the request, the Dispute Settlement Body established a Panel on 27 October 1999.²⁰

In India's submission to the Panel, it requested that the Panel find that the anti-dumping measure taken by the European Communities violated many provisions of the WTO

¹⁷ Council Regulation (EC) 2398/97 imposing definitive anti-dumping duties against imports of bed linen originating in India, Egypt and Pakistan, OJ 1997 L332/1

¹⁸ 'European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed-Linen from India - Request for Consultations from India', WTO document code: WT/DS141/1. Available by searching through <http://docsonline.wto.org/gen_search.asp> (1 December 2002).

¹⁹ 'European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bedlinen from India - Request for the Establishment of a Panel by India', WTO document code: WT/DS141/3. Available by searching through <http://docsonline.wto.org/gen_search.asp> (1 December 2002).

²⁰ 'European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bedlinen from India - Constitution of the Panel Established at the Request of India - Note by the Secretariat', WTO document code: WT/DS141/4. Available by searching through <http://docsonline.wto.org/gen_search.asp> (1 December 2002).

Anti-Dumping Agreement such as Article 15, under which, India claimed, the EC failed to explore possibilities of constructive remedies before imposing anti-dumping duties, as the rule requires.

Here, I should indicate that The Indian Bed Linen case is rather complex as a whole, and the proceeding is ongoing. The WTO ruling is not only based on the consideration of Article 15, but also other provisions of the Anti-Dumping Agreement.²¹ For the purposes of this chapter, I will only examine India's claim under Article 15, and the corresponding interpretation given by the WTO Panel.

2. Understanding of the first sentence of Article 15 of the WTO Anti-Dumping Agreement.

The first sentence provides: 'It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement.'

India argued that this sentence states a preference that the special situation of developing countries should be an element to be weighed when a developed country makes that evaluation. Therefore, the first part of Article 15 does not impose any specific legal obligation.²² Both the Panel and the EU agreed with this interpretation.

3. Understanding of the second sentence of Article 15.

The second sentence provides that 'possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would

²¹ In the first submission of India of 6 March 2000, India claims 31 inconsistencies of the EU's practice with the WTO Anti-Dumping Agreement.

²² 6.21, 'European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India', *fn* 9 above.

affect the essential interests of developing country Members.’

India’s claims under Article 15 are mainly based on this part of the provision. India indicated that the second sentence contains a stricter obligation than the first one, because it uses the word ‘shall’, which shows a clear and specific legal obligation to ‘explore possibilities’ by developed country Members.

From this point of view, in its submission to the Panel, India first stressed the importance of the bed linen and textile industries to its economy as a developing country, and that the EU’s anti-dumping duties would ‘affect’ these essential interests. However, the Commission did not even mention it, or consider the possibilities of constructive remedies.²³

Second, India suggests that the reference to remedies provided for by the Anti-Dumping Agreement indicates that such remedies may consist in the non-imposition of anti-dumping measures or in the acceptance of an undertaking. Texprocil, the Cotton Textiles Export Promotion Council of India, acting on behalf of Indian producers and exporters, tried to offer price undertakings. However, these were rejected by the European Communities without substantive consideration. Therefore, India asserted that the European Communities acted inconsistently with Article 15 of the Anti-Dumping Agreement.

4. WTO Panel’s interpretation and recommendation.

The Panel noted that both parties agree that the second sentence of Article 15 imposes legal obligations on developed country Members. With regard to India’s first claims, there is no dispute that the application of anti-dumping duties would affect the essential interests of India as a developing country. As to the second point, however, both parties

disagreed on what constitutes ‘constructive remedies provided for by this Agreement’ and what is required by the obligation to ‘explore’ the ‘possibilities’ of such remedies.²⁴

After examining the wording of the provision in the context of the WTO Anti-Dumping Agreement, the Panel disagreed with India’s suggestion that a ‘constructive remedy’ might be a decision not to impose anti-dumping duties at all. Instead, it indicated that imposition of a lesser duty or acceptance of a price undertaking would constitute ‘constructive remedies’ within the meaning of Article 15.²⁵

The Panel further explained that Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered.²⁶ It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to the imposition of an anti-dumping measure that would affect the essential interests of a developing country.

Based on this understanding, the Panel pointed out that the key issue in this case is whether the EU authorities actively considered with an open mind the possibilities of price undertakings with Indian exporters prior to the imposition of final anti-dumping

²³ Recital 6.219, *ibid.*

²⁴ Recital 6.227, *ibid.*

²⁵ Recital 6.229, *ibid.*

²⁶ In footnote 92 of the Panel Report (*ibid.*), it provided following explanation: We note that our interpretation of Art. 15 in this regard is consistent with that of a GATT Panel which considered the predecessor of that provision, Art. 13 of the Tokyo Round Anti-Dumping Code, which provision is substantively identical to present Art. 15. That Panel found:

‘The Panel noted that if the application of anti-dumping measures ‘would affect the essential interests of developing countries’, the obligation that then arose was to explore the ‘possibilities’ of ‘constructive remedies’. **It was clear from the words ‘possibilities’ and ‘explored’ that the investigating authorities were not required to adopt constructive remedies merely because they were proposed.**’ *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Panel Report, ADP/137, adopted 30 October 1995, para. 584 (emphasis added).

measures in the bed linen investigation.²⁷ Due to the bare rejection of Texprocil's undertaking by the European Communities, the Panel found nothing would demonstrate that the EU had actively explored the possibilities of constructive remedies. Therefore, the EU failed to act consistently with its obligations under Article 15 of the Anti-Dumping Agreement.²⁸

C. Article 15 of the WTO Anti-Dumping Agreement and China.

From the Indian Bed Linen case, it is clear that 'constructive remedy' does not refer to complete elimination of anti-dumping duties. However, imposition of a lesser duty, a price undertaking or other acceptable actions might be adopted as a 'constructive remedy' within the context of Article 15.

In recent years, if Chinese products are found to have been dumped in anti-dumping investigations, anti-dumping duties will be imposed subsequently regardless undertakings offered by exporters. In fact, statistics shows that from 1990, the Commission seldom accepts undertakings proposed by Chinese exporters. It gives the reason that undertakings are not normally accepted from companies operating in NMEs due to the high risk of circumvention.²⁹ However, such argument hardly can be justified under WTO trade laws.

China entered the WTO on 11 December 2001 as a developing country. Therefore, in future anti-dumping proceedings initiated by developed country Members such as the EU, it is entitled to the special treatment provided by Article 15. This will make a welcome

²⁷ Recital 6.234, *ibid.*

²⁸ Recital 6.238, *ibid.*

²⁹ Council Regulation (EC) No 393/98 of 16 February 1998 imposing a definitive anti-dumping duty on imports of stainless steel fasteners and parts thereof originating in the People's Republic of China, India, the Republic of Korea, Malaysia, Taiwan and Thailand, OJ 1998 L50/1.

difference for China in anti-dumping proceedings launched by WTO developed country Members, including EU's obligation to consider the acceptance of undertakings offered by Chinese producers.

In the EU's anti-dumping investigations in the past, the Commission never mentioned China's status as a developing country. But it has to do so now, and to further explore possibilities of constructive remedies. Otherwise, it will be regarded as a violation of Article 15 of the WTO Anti-Dumping Agreement.

II. The WTO Dispute Settlement System.

'Dispute settlement system is generally considered to be one of the cornerstones of the multilateral trade order.'³⁰ As a great success of the Uruguay Round and the establishment of the WTO, it has been significantly strengthened and streamlined through the DSU.³¹

The WTO dispute settlement system ensures that commitments and obligations negotiated and agreed upon will be respected and enforced. In case of disputes which may arise in the course of implementing WTO agreements, it does not impose new obligations, but it does enforce those already agreed by providing Members with a clear legal framework to achieve a desirable solution.

The WTO dispute settlement system is able to protect weaker Members against unilateral action by the strongest under DSU and other WTO laws. Therefore, after China's accession to the WTO, it can resort to the Dispute Settlement Mechanism to claim its due

³⁰ 'A Summary of the Final Act of the Uruguay Round', <http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding> (1 December 2002).

³¹ Annex 2, to the Marrakesh Agreement Establishing the WTO in the Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts GATT/WTO Secretariat, Geneva (1994).

rights in trade disputes against other Members. Furthermore, as a developing country, China is entitled to the special and differential treatment for developing countries provided by the DSU on a procedural level, together with those substantive rules offered in WTO Agreements contained in Annex 1 to the Marrakech Agreement Establishing the World Trade Organization.

What are the basic requirements and rules of DSU? What are provisions of the special and differential treatment for developing country Members contained in the DSU? How does China invoke them to settle disputes in case of anti-dumping proceedings initiated by developed country Members such as the EU? I will answer these questions in the following part.

A. Brief introduction to the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

The DSU is a horizontal WTO agreement. It sets up procedures for solving disputes which may arise among WTO Members in the implementation of different WTO agreements.³² For this purpose, a Dispute Settlement Body includes representatives of all WTO Members and is established to be responsible for the management of the DSU. It is empowered to establish Panels of experts to examine a case, adopt Panel and Appellate Body reports, monitor the implementation of Panel recommendations and authorize the suspension of concessions when a country does not comply with a ruling.³³

The DSU emphasizes that Members shall not themselves make determinations of violations or suspend concessions, but shall make use of the dispute settlement system. So, it specifies detailed time-frames and procedures throughout the whole process of

³² Art. 1 (1), Understanding on Rules and Procedures Governing the Settlement of Disputes.

³³ Art. 2 (1), Understanding on Rules and Procedures Governing the Settlement of Disputes.

dispute settlement, including consultation, Panel recommendation and Appellate review.³⁴ It also sets out rules for compensation or the suspension of concessions in the event of non-implementation. In the meantime, as an important feature of the DSU, it provides a number of provisions taking into account the specific interests of the developing and the least-developed country Members.

B. Special and differential treatment provisions for developing and the least-developed countries contained in the DSU.

The DSU has established a number of provisions in accordance with special and differential treatment for developing and the least-developed country Members with regard to dispute settlement. They include Article 3(12), Article 4(10), Article 8(10), Article 12(10), Article 12(11), Article 21(2), 21(7) and 21(8), Article 24 and Article 27(2) of the DSU.

1. Article 3(12)

Article 3(12) of DSU provides when a developing country Member brings a complaint against a developed country Member under a relevant WTO agreement, it has the right to invoke the provisions contained in the Decision of 1966³⁵ as an alternative to those of the DSU. In case of conflicts of the two sets of rules, the Decision of 1966 will precede. However, Article 3(12) has never been invoked by any developing country Member because the new rules offer similar or even better treatment in practice.³⁶

³⁴ 'WTO Settling Disputes, the Panel Process', <http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm> (1 December 2002).

³⁵ Decision of 5 April 1966 on Procedures under Art. XXIII, BISD 14S/18.

³⁶ Mary E. Footer, 'International Trade Developing Country Practice in the Matter of WTO Dispute Settlement', (2001) 35(1) J.W.T., 55 at p 63.

2. Article 4 (10)

It stipulates that Members should give special attention to particular problems and interests of developing country Members during consultations.

3. Article 8(10)

It relates to the composition of the Panel. It enables a developing Member, upon its request, to have at least one of the three Panel members from a developing country Member in case of disputes with developed country Members. This provision is well observed, under which developing country Member's interests can be better considered.

4. Article 12

- Under Article 12(10), sufficient time must be given to a developing country Member to prepare its argument when it is a defendant in a dispute.
- Article 12(11) provides that the Panel should explicitly indicate the relevant provisions of special and differential treatment contained in the agreements that have been raised.

5. Article 21.

- Article 21.2 asks for particular attention to be paid to matters affecting developing countries with regard to the surveillance of the Dispute Settlement Body recommendations.

This Article was invoked in the Indonesian Automobile case in July 1998,³⁷ in which

³⁷ Indonesia – Certain Measures Affecting the Automobile Industry, complaint by the European Community, WTO document code: WT/DS54/R. Available by searching through <http://docsonline.wto.org/gen_search.asp> (1 December 2002)

Indonesia's request for an extension of extra six months to implement the rulings of the Dispute Settlement Body was supported.

- Article 21(7): 'If the matter is one which has been raised by a developing country Member, the Dispute Settlement Body shall consider what further action it might take which would be appropriate to the circumstances.'
- Article 21(8) requires the Dispute Settlement Body to consider not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned before it decides what appropriate action might be taken.

6. Article 24: Special Procedures Involving Least-Developed Country Members

Article 24.1 asks for particular consideration to be given to the special situation of the least-developed countries (LDCs) and due restraint to be exercised towards them by developed country Members in dispute settlement proceedings.

Article 24.2 provides where consultations involving an LDC have not been successful, special procedures such as the intermediation of the WTO Director-General can be introduced before a Panel is established.

However, since no LDC has been involved in WTO disputes so far, Article 24 has never been invoked.³⁸

³⁸ M. E. Footer, *fn* 36 at p 73.

7. Article 27(2)

Article 27(2) specifies the WTO Secretariat's obligation to provide additional legal advice and assistance or a qualified legal expert from the WTO technical cooperation services to any developing country Member at its request in respect of dispute settlement.

However, such legal assistance is not satisfactory from the developing country Members' point of view. They consider that its quality and quantity is insufficient.

Based on the above description, it is clear that, in theory, developing country and least-developed country Members' interests are given special consideration in dispute settlement proceedings under the DSU. However, the developed country Members' performance in practice is far from satisfactory as to this point, mainly because most of the special and differential treatment provisions in the DSU are too general and loose to become compulsory. So, there is a need and trend for the improvement of the DSU with regard to special and differential treatment to developing country and least-developed country Members.

This is an interesting issue, but as it is not relevant to this thesis, it will not be explained further. What I want to stress through the above illustration is that after China's accession to the WTO, it can make use of these special and differential treatment provisions of DSU in cases of anti-dumping disputes against a developed Member such as the EU. In spite of the existing deficiencies of the DSU, China will benefit more and more from the WTO dispute settlement system following its reform and improvement.

C. Application of the Dispute Settlement Understanding under the WTO Anti-Dumping Agreement.

Article 17 of the WTO Anti-Dumping Agreement is about Consultation and Dispute

Settlement. Article 17.1 establishes the general principle that the Dispute Settlement Understanding is applicable to anti-dumping disputes.

However, it is noticeable that Article 17.6 provides a special standard of review by Panels in examining disputes in anti-dumping cases with regard to both matters of fact and questions of interpretation of the Agreement. As to the establishment of facts, if it was found proper and the evaluation was unbiased during a Member's anti-dumping investigation, even though the Panel might have reached a different conclusion, the evaluation shall not be overturned. In addition, a Panel's interpretation of a provision of the Anti-Dumping Agreement according to customary rules of interpretation of public international law³⁹ shall also be in conformity with the Agreement. When a provision in question has several permissible interpretations, if the one on which the anti-dumping authority's measure is based is consistent with the Anti-Dumping Agreement, then the Panel must adopt this very interpretation.

This provision may limit the Panel's power in the WTO dispute settlement process, and there has some controversy about its side effects.⁴⁰ Nevertheless, such a review defends factual decisions and legal interpretations of national authorities, and is intended to prevent dispute settlement Panels from making decisions purely based on their own views.

³⁹ Arts. 31 & 32 of the Vienna Convention on the Law of Treaties.

⁴⁰ Jacques H.J. Bourgeois, 'International Law WTO Dispute Settlement in the Field of Anti-Dumping Law', (1998) 1(2) J.I.E.L. pp. 259-276.

III. Foreseeable EU-China anti-dumping disputes after China's accession to the WTO.

There are two types of disputes which are likely to arise in the EU's anti-dumping proceedings involving Chinese products. The first one relates to the implementation of the Protocol published upon China's accession to the WTO (Protocol),⁴¹ which contains provisions governing other WTO Members' practice to determine normal values of imports from China without using price information from China in anti-dumping investigations. The second kind of disputes are those already in existence but have not been settled properly yet.⁴² Due to China's WTO membership, these issues can now get a clear solution under the WTO dispute settlement mechanism and relevant special and differential treatment provisions for developing and least-developed country Members.

A. Disputes based on provisions of normal value calculation contained in the Protocol upon China's accession to the WTO (Protocol).

New EU-China anti-dumping issues may arise under the Protocol. In the 'Report of the working party on the accession of China',⁴³ China agreed that other WTO Members may not adopt the domestic prices or costs of Chinese products to determine their normal values in anti-dumping investigations.⁴⁴ As a part of the report, the 'draft protocol on the accession of the People's Republic of China' provides that:

The importing WTO Member may use a methodology that is not based on a strict

⁴¹ 'Report of the Working Party on the Accession of China', 1 October 2001. WTO document code: WT/ACC/CHN/49. Available by searching through <http://docsonline.wto.org/gen_search.asp> (1 December 2002).

⁴² They will be analyzed later in this chapter.

⁴³ 'Report of the Working Party on the Accession of China', *fn* 41 above.

⁴⁴ *Fn* 41 at p 79.

comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.⁴⁵

It is agreed that the above provision will be valid for 15 years after China entered the WTO.⁴⁶ This concession was made by China as part of the conditions on its accession. Under the legislation, the EU's analogue country method of determining the normal values for Chinese products is explicitly legalized until its provision expires. However, China also specifies the following requirements in order to prevent other WTO Members from abusing their rights:

(a) The WTO Member which initiates the anti-dumping investigation shall establish and publish in advance the criteria for determining whether the application of market economy treatment (MET) is appropriate and the methodology in determining price comparability. (Summary of the original text.)

(b) The importing WTO Member should ensure that it had notified its market-economy criteria and its methodology for determining price comparability to the Committee on Anti-Dumping Practices before they were applied.⁴⁷

(c) The process of investigation should be transparent and sufficient opportunities should be given to Chinese producers or exporters to make comments, especially comments on the application of the methodology for determining price comparability in a particular case.⁴⁸

⁴⁵ Section 15.a.(ii), 'Draft Protocol', *ibid.*

⁴⁶ Section 15.d, *ibid.*

⁴⁷ Recital 151, 'Report of the Working Party on the Accession of China', *fn* 41 above.

⁴⁸ *Ibid.*

(d) The importing WTO Member should give notice of information which it required and provide Chinese producers and exporters an ample opportunity to present evidence in writing in a particular case.⁴⁹

(e) The importing WTO Member should provide Chinese producers and exporters a full opportunity for the defence of their interests in a particular case.⁵⁰

(f) The importing WTO Member should provide a sufficiently detailed reasoning of its preliminary and final determinations in a particular case.⁵¹

In summary, these six requirements ask for more consideration to be given to Chinese producer interests, and more transparency for both the anti-dumping proceedings and the anti-dumping authority's decisions when WTO Members use other methodologies rather than the Chinese product's domestic prices to determine their normal values.

However, examining these provisions carefully, two issues stand out. First, they use 'should' rather than 'shall' in the wording, so they do not actually impose exact obligations on the WTO Members, strictly speaking. Second, their content is too general, with a lack of necessary definition and explanation. For example, subparagraph (e) stipulates that the importing WTO Member should provide Chinese producers and exporters a full opportunity for the defence of their interests in a particular case. However, it does not specify what constitutes a 'full opportunity'; the criteria given by an importing country and exporting country can be quite different due to their contrary interests in an anti-dumping proceeding. Likewise, subparagraph (f) asks for 'sufficiently detailed reasoning' of determination, but does not offer a detailed explanation.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

These problems will be reflected in anti-dumping investigations involving Chinese products after China's accession to the WTO. At that time, implementation of the aforementioned provisions may bring out new issues and disputes. As a result, EU's anti-dumping proceeding towards imports from China may become more complex than ever. Under such circumstances, both China and the EU may resort to the WTO dispute settlement system for a clear solution to discrepancies under the Anti-Dumping Agreement.

B. Other disputes in EU-China anti-dumping proceedings that can be settled under the WTO dispute settlement mechanism.

Under the WTO Anti-Dumping Agreement, if a Member considers that its due benefit is being nullified or impaired directly or indirectly by another Member, it may ask the Member for consultation or refer such matters to the Dispute Settlement Body.⁵² In that case, the respondent country of the anti-dumping proceeding may build its claim on the ground that it finds the authority's measure is inconsistent with one or more provisions of the Anti-Dumping Agreement.

In addition, there remain ambiguities in the WTO Anti-Dumping Agreement, and it still leaves room for significant differences in approach to the enforcement of anti-dumping laws. These differences are likely to bring out disputes, because the investigating side and the respondent side may disagree about the approach, due to their respective interests. The respondent country may bring such disputes to the Dispute Settlement Body.⁵³

It is impossible to enumerate all anti-dumping disputes and their causes in this chapter.

⁵² Art. 17, WTO Anti-Dumping Agreement.

⁵³ M. Koulen, 'The New Anti-Dumping Code through its Negotiating History' in J.J.J. Bourgeois, F.Berrod, E. Gippini (eds), *The Uruguay Round: A European Lawyers' Perspective* (EUP: Brussels 1996) 152 at p 195.

Therefore, only two of them will be examined here, both of which are likely to arise in respect of EU's anti-dumping practice against imports from China, and in which China may have solid reasons to support its claim under the WTO DSU and Anti-Dumping Agreement.

1. Dispute over use-out domestic data methodology.

Disputes over use-out domestic data methodology may only arise in cases of imports from China or other countries⁵⁴ subject to the EU's conditional MET.⁵⁵ According to the EU's anti-dumping policy towards China, use-out domestic data methodology refers to the practice when a Chinese exporter A gets MET in an anti-dumping investigation (which means the normal values of the products will be based on their domestic sales prices).⁵⁶ Instead of using the price elements of Company A, the authority will adopt the data from a third market economy (ME) to determine normal values for other Chinese exporters.

In the EU's anti-dumping investigations in the past, Chinese exporters found use-out domestic data methodology extremely unacceptable, mainly because it is unreasonable both in theory and in practice, and it is likely to bring out artificially higher dumping margins and heavier anti-dumping measures as a result.

a. Use-out domestic data methodology is unreasonable.

⁵⁴ Art. 1, Council Regulation (EC) No 2238/2000 of 9 October 2000 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community, OJ 2000 L257/2.

⁵⁵ Art. 2, Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community. OJ 1998 L 128/18.

⁵⁶ This issue is fully illustrated in section II of chapter three.

In theory, the use-out domestic data methodology deliberately keeps the flaws of the EU's traditional analogue country method. The rationale for the analogue country method is based on the presumption that price information from non-market economies (NMEs) is unreliable due to strict state control. Therefore, data from a third ME will be used to calculate normal values for imports from NMEs, because they can reflect market signals better. As discussed in chapter three of this thesis, the analogue country method normally brings out artificially high dumping margins due to the actual differences in the development levels of two countries. In order to minimize such differences, Article 2 (A)(7) of the EU's Anti-Dumping Regulation⁵⁷ provides that 'an appropriate market economy third country shall be selected in a not unreasonable manner'. However, the flaws of the analogue country method can be completely avoided if the authority adopts the domestic price from the Chinese company who get MET to calculate normal values for other Chinese exporters in the same anti-dumping investigation. Since the development levels of these enterprises in a country are quite similar, the price from the company who gets MET is the best reference to determine normal values for others. As a result, it will bring out dumping margins which are closest to fact in anti-dumping investigations.

Surprisingly, the EU authority refuses to do so and insists on applying the use-out domestic data methodology towards imports from China in anti-dumping investigations. In an interview with an official of the EU trade Directorate General (DG),⁵⁸ he explained that the authority's practice of the use-out domestic data methodology is consistent with the current Anti-Dumping Regulation.⁵⁹ First, the Regulation does not specify that the authority shall use one Chinese exporter's domestic price to determine normal values for

⁵⁷ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ 1996 L 56/1.

⁵⁸ Interview with the Administer of the European Commission, DG Trade, Brussels, 12 July 2002.

⁵⁹ Council Regulation (EC) No 384/96.

others if it gets MET. Second, in accordance with the legislation, a third ME is selected before the decision of MET is made by the Commission. Therefore, the Commission will not have enough time to calculate the normal value for other Chinese exporters again by using the domestic sales price of the company which gets MET. Besides, the Commission should ask the European industry to comment in that case, and it will make the proceeding take longer. At that stage, it is simply impossible to recalculate normal values for all other Chinese exporters.

Chinese exporters may find the above theoretical explanation unacceptable. With regard to the first reason, it can argue that the EU's current legislation also does not explicitly prohibit the use of a company's price information as reference to others in an anti-dumping proceeding. With regard to another reason based on time sufficiency, it is clear that use of existing domestic price of the exporter who gets MET can rule out all inconvenience and difficulties to get similar information from a third economy, so it will actually save time and cost for the authority.

b. Use-out domestic data methodology leads to artificially higher antidumping duties.

As explained before, use-out domestic data methodology keeps the flaws of analogue country method, i.e. to maximize dumping margins of the imports concerned, so it will result in heavier anti-dumping measures to be imposed on Chinese products.

In the Chinese fluorescent lamps case of 2001,⁶⁰ two Chinese exporting producers were granted MET, and some of the others requested the Commission to use the domestic sales prices of those two companies to determine the normal values of their products. However,

⁶⁰ Council Regulation (EC) No 1470/2001 of 16 July 2001 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China OJ 2001 L195/8.

the Commission rejected the proposal on the ground that

Article 2(7) of Council Regulation (EC) No 384/96 provides that in the case of imports from countries like the PRC, the normal values are to be established on the basis of the price or constructed value in **an ME third country** unless an exporting producer meets the criteria set out in subparagraph (c) of paragraph 7 of that Article.⁶¹

Therefore, Mexico was selected as an analogue country in this case. As the result of use-out domestic data methodology, the two Chinese companies who got MET were found not to be dumped, while others were imposed with different anti-dumping duties as high as 66.1 percent.

The issue whether use-out domestic data methodology is consistent with the WTO Anti-Dumping Agreement needs more detailed interpretation, and this can be achieved through the WTO dispute settlement mechanism. Since it is easy to find out that if the two Chinese companies' price information is adopted as reference to others exporters, a lesser duty could be concluded as the result of an anti-dumping investigation, the Chinese exporter's proposal might be supported under Article 15 of the Anti-Dumping Agreement. Under that provision, if China can convince the dispute settlement authority that the imposition of anti-dumping duties will affect its essential interests, the EU will have the obligation to explore the possibility of constructive remedies, including the application of the use-out domestic data methodology which can bring out less anti-dumping duties.

2. Dispute over the EU authority's zeroing methodology.

Unlike disputes of use-out domestic data methodology, disputes on the EU authority's

⁶¹ Recital 11, Council Regulation (EC) No 1470/2001. (Emphasis not in original)

zeroing methodology may be put forward by any country when the EU authority adopts zeroing methodology in anti-dumping investigations to calculate dumping margins, i.e. make comparison between normal values and export prices of the imports in question.

a. Concept and effect of zeroing methodology.

The practice of ‘zeroing’ arises in situations where an investigating authority makes multiple comparisons of export price and normal value, and then aggregates the results of these individual comparisons to calculate a dumping margin for the product as a whole.⁶²

Sometimes the imports in question include several modes of the products, so comparisons will be made for each mode at first, then the authority will get a total dumping amount by aggregating the outcomes of all comparisons. As the result of a single comparison, the export price may be either lower or higher than the normal value. It is called a ‘negative’ margin when the export price is higher than normal value. With regard to the European Communities’ practice, it counts a negative margin as zero of the dumping amount in course of comparison, then arrives at the total dumping amount by aggregating the results of comparisons of all modes of imports. This is the so-called ‘zeroing methodology’.

As a result of such calculations, the overall dumping amount will be larger than it actually is, due to the exclusion of those negative dumped values (see Table 6.1). The authority will divide the total dumping amount by the value of all imports to get dumping margins. The larger dumping amount is, the higher the dumping margin will be. Since the zeroing method artificially increases the dumping amount, it results in a bigger dumping margin than the actual one. Consequently, a more severe anti-dumping measure may be imposed

⁶² ‘European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India’, *fn 9* above at p 32.

on imports than is necessary (see Table 6.2).

Table 6.1.

Product mode	Dumping amount (DA)	DA under zeroing method
1	\$100	\$100
2	-\$50	\$0

Table 6.2. If the total export value (EV) is \$150, then

	Total dumping amount (TDA)	Dumping Margin (TDA/EV)
Zeroing method	$\$100 + \$0 = \$100$	$100/150 = 66.67$ percent
Non-zeroing Method	$\$100 - \$50 = \$50$	$50/150 = 33.33$ percent

b WTO Panel's opinion towards zeroing methodology in the Indian Bed Linen case.⁶³

In the Indian Bed Linen case, the European Communities compared weighted averages of export prices and the normal value for each of several models or product types of bed linen.⁶⁴ The authority adopted the zeroing methodology to arrive at a total dumping amount, and then divided it by the value of the exports involved, including the value of those models for which the individual margin was negative.

The EC's practice of zeroing methodology was challenged by India under Article 2(4)(2) of the WTO Anti-Dumping Agreement.⁶⁵ India indicated that the use of the word

⁶³ 'European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India', *fn* 9 above at p 32.

⁶⁴ Council Regulation (EC) No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, OJ 1997 L 332/1.

⁶⁵ Art. 2 (4)(2) of the Anti-Dumping Agreement provides: 'Subject to the provisions governing fair comparison in [Article 2.4], the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a

‘average’ and ‘all’ in Article 2(4)(2) clearly precludes excluding certain amounts from the calculation simply because they showed ‘negative’ dumping. Therefore, India argued that the practice of zeroing methodology is not consistent with the requirement set forth in Article 2(4)(2) that the comparison should take into account the ‘weighted average of prices of all comparable export transactions’.

According to Article 2 (4) of the Anti-Dumping Agreement, which requires that ‘a fair comparison shall be made between the export price and the normal value’, the Panel interpreted Article 2(4)(2) as obligating an investigating authority to make its determination in a way which fully accounts for the export prices on all comparable transactions. However, an overall dumping margin calculated on the basis of zeroing ‘negative’ margins is not based on comparisons which fully reflect all comparable export prices.

Based on the above points, the Panel concluded that the European Communities acted inconsistently with Article 2(4)(2) of the Anti-Dumping Agreement in establishing the existence of margins of dumping on the basis of a methodology, which included zeroing negative price differences calculated for some models of bed linen.⁶⁶ As a result, in order to comply with the ruling and its WTO obligations linked to such rulings, the E.C. was obliged to take steps to rectify the illegality of the initial 1997 bed linen Regulation.⁶⁷

weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.’

⁶⁶ ‘European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India’, *fn* 9 above at p 38.

⁶⁷ Council Regulation (EC) No 160/2002 of 28 January 2002 amending Council Regulation (EC) No 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, and terminating the proceeding with regard to imports originating in Pakistan. OJ2002 L 26/1.

c. Disputes about zeroing methodology in future.

Article 2(4)(2) of WTO Anti-Dumping Agreement provides for three possibilities to establish a dumping margin:

- (i) A comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions;
- (ii) A comparison of normal value and export prices on a transaction-to-transaction basis; or
- (iii) A comparison of the normal value established on a weighted average basis to prices of individual export transactions (in certain specific cases).

In the Indian Bed Linen case, the European Communities applied the first option in establishing the dumping margin for Indian products, and its practice of the zeroing methodology was halted by the Panel. However, the WTO ruling does not limit the application of zeroing method in the second and the third options. This implies that in future anti-dumping proceedings, the EU authority will possibly not use the zeroing method when comparing a weighted average normal value with a weighted average of prices of all comparable export transactions, but alternatively, it may continue such a practice for comparisons of normal value and export prices on a transaction-to-transaction basis or comparison of the normal value established on a weighted average basis to prices of individual export transactions.

If this happens in anti-dumping proceedings towards Chinese products, using the Indian Bed Linen case as a good example, China may ask for a clear interpretation and ruling through the dispute settlement system under the WTO DSU and Anti-Dumping

Agreement.

More and more disputes based on different reasons will come up in the EU's anti-dumping proceedings concerning imports from China. What I have analyzed above are just two of them, which are very likely to be put forth by China and to be settled under the DSU after her accession to the WTO.

IV. Potential difficulties for China to invoke WTO laws to protect its interests against EU's anti-dumping decisions.

With WTO membership, China now can make use of special and differential treatment provisions contained in the Anti-Dumping Agreement and DSU to protect its trade interests and settle disputes occurring in the EU's anti-dumping proceedings. However, difficulties may arise when such an attempt is made. Generally speaking, these are common to many developing countries, and they are reasons why only a small number of cases are presented by developing country Members under DSU and other WTO laws.⁶⁸

A. Shortage of necessary human resources.

A developing country such as China lacks the necessary human resources and administrative structures to detect possible inconsistencies with WTO agreements and then to maximize their use of the WTO dispute settlement system effectively. It is noticed that the most frequent users of the dispute settlement system have extensive human and financial resources to bring and defend complaints. They cooperate with export interest groups very well, and they have global commercial and diplomatic representation, which

⁶⁸ 'Up to September 2000, only 53 claims were presented by developing countries among total 207 requests for consultations'.

Jose Luis Perez Gabilondo, 'International Trade Developing Countries in the WTO Dispute Settlement Procedures'. (2001) 35(4) J.W.T., 483.

allows extensive contacts within and outside the Geneva circuit.⁶⁹ So, shortages of relevant human resources and institutions will become key impediments to the capacity of China to benefit from international trade and technical assistance.

B. Deficiencies of the WTO Dispute Settlement System.

Other major difficulties for China in making good use of the special and differential treatment provisions in case of anti-dumping disputes with the EU are the deficiencies of the current WTO dispute settlement system.

1. Time consuming procedures.

The duration of a dispute settlement and enforcement is too long to be good for the party to a dispute even if a favourable ruling is made in the end. A standard and complete procedure needs one year and three months in total,⁷⁰ but in practice, it normally takes much longer to achieve a solution. Considering the high-speed rhythm of today's global trade, the side effects due to the timing of the WTO dispute settlement system are worth noting.

2. Ineffective enforcement of the WTO rulings.

The actual enforcement of the WTO ruling can make dispute settlement more complicated and time consuming. For example, in the Indian Bed Linen case,⁷¹ the proceedings began on 7 August 1998, and the Panel Report, favourable to India, was

⁶⁹ Horn, H. and Mavroidis, P., 'Remedies in the WTO Dispute Settlement System and Developing Country Interests', Paper for the World Bank (11 April 1999) at p 28. <<http://www.worldbank.org>> (21 July 2002).

⁷⁰ 'WTO Settling Disputes, the Panel Process', *fn* 34 above.

⁷¹ Section 6.102, 'European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India,' *fn* 9 above at p 32.

published on 30 October 2000.⁷² However, the dispute has not been settled properly so far due to the EU's unsatisfactory implementation of the WTO ruling.

3. Trend towards stricter or narrower interpretation of special and differential treatment provisions.

When we examine these special and differential treatment provisions carefully, it is easy to see that some of them are too general to be invoked directly. Under such circumstances, a proper interpretation is needed. However, developing countries may feel the trend towards stricter interpretation by the WTO Panel when they try to make use of these rules to protect their trade interests against developed Members.⁷³ The stricter the interpretation is, the less likely that the developing country concerned is able to invoke it. So, it is no doubt that a stricter interpretation of such provisions given under the WTO dispute settlement system will prevent developing and least-developed countries to benefit from the original intention of the special and differential treatment.

From this point of view, China may find it difficult when it tries to invoke special and differential treatment provisions contained in the WTO Anti-Dumping Agreement and DSU to protect its interests against the EU's anti-dumping decisions. However, with its continuous replenishment of the human resource in the field of WTO laws, and following the irresistible trend of the WTO dispute settlement system's reform, China will be able to benefit more and more from the WTO trade system while seeking settlement of anti-dumping disputes with the EU.

⁷² 'Request for Consultations by India on 7 August 1998', <<http://mkaccdb.eu.int/dsu/doc/ds141-1.doc>> (1 December 2002).

⁷³ M E. Footer, *fn* 36 at p 84.

Conclusion.

As a developing country, China's WTO membership entitles it to special and differential treatment and the right to solve disputes with other Members through the WTO dispute settlement system. As a result, new issues and disputes may arise with regard to the EU's anti-dumping practice towards China.

Special and differential treatment provisions that China may invoke to protect its trade interests against the EU's anti-dumping decisions include Article 5 of the Anti-Dumping Agreement and Article 3(12), Article 4 (10), Article 8(10), Article 12(10), Article 12(11), Article 21.2, 21(7) and 21(8), Article 24 and Article 27(2) of the DSU.

Article 15 of the Anti-Dumping Agreement specifically considers the interests of developing Members. Under this provision, the EU has the obligation to actively consider the possibility of constructive remedies prior to imposition of an anti-dumping measure that would affect the essential interests of China. In the meantime, China can suggest the imposition of a lesser duty, a price undertaking or other acceptable actions that might be adopted as 'constructive remedy' within the context of Anti-Dumping Agreement.

With regard to the WTO dispute settlement system, the DSU has established a number of provisions in accordance with special and differential treatment for developing and least-developed country Members. China may invoke them to seek proper settlement of anti-dumping disputes with the EU. Such disputes may be caused by the EU's practice of Normal value calculation, use-out domestic data and zeroing methodology in its anti-dumping investigations.

Like other developing countries, China may find it difficult to invoke these special and differential treatment provisions in practice due to the shortage of necessary expertise and

the existing deficiencies of the WTO dispute settlement system. However, such a situation may be improved by China's attempts to develop capacity in this area and the irresistible trend towards the WTO dispute settlement system's reform.

Chapter Seven

Conclusions

I. The EU's anti-dumping approach to imports from China and underlying reasons.

From 1 January 1995 to 31 December 2001, the European Commission initiated 36 anti-dumping investigations against imports from China, which accounts for 24 percent of the EU's total anti-dumping proceedings for the same period.¹ However, at present, imports from China only account for around 7 percent of all exports to the EU.² In addition, over the past twenty years, the overall number of EU's anti-dumping cases has gone down, while those against China has risen sharply especially in the past ten years. Furthermore, as the result of the EU's anti-dumping investigations, most Chinese exports were found to be dumped and high definitive anti-dumping duties were imposed on them.

These show that the EU has launched a disproportionately large amount of anti-dumping investigations towards imports from China and imposed severe anti-dumping measures on them afterwards. The reasons for this should be found by examining issues arising both in the EU and in China.

A. On the EU side.

With regard to the EU, its current approach is to be found in its anti-dumping legislation,

¹ 'Initiations: by Importing Country from 01/01/95 to 30/06/02' (2002) WTO Anti-Dumping Statistics <http://www.wto.org/english/tratop_e/adp_e/adp_stattab2_e.htm> (1 December, 2002).

² 'Trade in Goods Statistics' (2001) <<http://europa.eu.int/comm/trade/goods/stats.htm>> (1 December, 2002)

in particular, how this legislation is applied in practice with regard to Chinese exports. The EU treats China as a non-market economy (NME) in anti-dumping proceedings. As analyzed in the first chapter, due to a lack of concrete provisions in the WTO anti-dumping legal framework to determine normal values and anti-dumping duty levels of imports from NMEs, the EU adopts a hybrid regime towards China. It includes the analogue country method, one country one duty rule, conditional market economy treatment (MET) and individual treatment.

The first two are the traditional methods used by the EU in relation to NMEs. The others are renewed policies now applied due to the dramatic progress achieved by China's economic reforms. In the EU's anti-dumping investigations, traditional NME treatment will be applied to imports from China automatically, unless Chinese exporters can meet the criteria set for conditional MET or individual treatment. Traditional NME treatment maximizes dumping margins artificially, therefore, it creates huge unfairness to Chinese exporters. Conditional MET and individual treatment are welcome amendments made for the old policy, but they have been adopted as the exception rather than the rule since published. So, all of the four methodologies contain unreasonable factors either in theory or in practice.

1. The analogue country method.³

This is the method that the EU authority, the Commission routinely adopts to determine the normal values of imports from China. The analogue country is a very vague concept, and it brings out a series of questions without answers in the law. For example: what is the basis for the analogue? Should it be the development of the country concerned, or the respective production process, or the comparability of the products, or the comparability

³ Art 2(7), Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not Member of the European Community, OJ 1996 L56/1.

of the respective industry? All of these issues are not specified in the EU anti-dumping legislation. Therefore, the problem of comparing prices on different markets is compounded under the analogue country method. Even worse, an analogue country is firstly proposed by the complainant in the anti-dumping investigation, and the selection of such a country does not consider the relative level of economic development or GNP per capita of the third ME. As a result, the analogue country method brings to the anti-dumping authority an additional complex procedure to select a third market economy (ME). In the meantime, it results in huge unfairness to Chinese exporters.

- a. It maximizes the dumping margin artificially in anti-dumping investigations.
- b. It absolutely offsets NME's comparative advantages in international trade.
- c. The time limit for NMEs to comment is over strict.
- d. It makes the outcome of the selection to be unpredictable, so that NME exporters will never know how to avoid 'dumping' their goods. However, there is a need for certainty both in law and in the terms of trade.

2. One country one duty rule.⁴

Like the analogue country method, the one country one duty rule applies to imports from China automatically. Under this rule, all Chinese exports which are found dumped by the Commission in the anti-dumping investigation will be subject to the same rate of anti-dumping duty. The general rate will be the highest of all. To Chinese exporters, the rule is unacceptable because it neglects the fact that they operate independently of government control after China's enterprise reform. Besides, since all Chinese exporters receive the same duty under the one country one duty rule, it is unfair to those who make

⁴ Art. 9(5), Council Regulation (EC) No 384/96.

great efforts to cooperate with the Commission in anti-dumping investigations, because their duty rates should be based on their own dumping margin and information provided.

3. *Conditional MET.*⁵

In April 1998, the EU amended its anti-dumping legislation, and provided conditional MET for China and Russia. Under the new rule, if Chinese exporters can meet the five criteria,⁶ demonstrate that they operate under market conditions without significant state interference, then their domestic sales prices will be adopted to determine the normal values of their products.

In an anti-dumping investigation, Chinese companies hope to get MET, because it will normally bring low dumping margin or no dumping as a result. This can be seen from the following case.⁷

⁵ Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community. OJ 1998 L128/18.

⁶ Council Regulation (EC) No 905/98 provides the five criteria for conditional market economy treatment:

‘- decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

- firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

- the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

- the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

- exchange rate conversions are carried out at the market rate.’

⁷ Council Regulation (EC) No 1470/2001 of 16 July 2001 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China, OJ 2001 L195/8.

Table 7.1 A comparison of different levels of anti-dumping duty under the analogue country method and the MET.

Ownership of the manufacturer	Method adopted to determine the Normal Value	Rate of anti-dumping duty (percent)
Wholly foreign owned company	MET	0
Chinese firms (State-owned)	analogue country method	66.1

Source: OJ 2001 L195/8.

The conditional MET was provided to accommodate the new changes in China's economic development. However, since the law entered into force in 1998, less than 15 percent of Chinese exporters get such treatment.⁸ From this point of view, the change of the law does not meet its objective.

As the anti-dumping authority, the Commission usually refuses to grant MET to Chinese companies for four reasons. They are namely, information insufficiency, state interference, beyond deadline and non-standard accounting records. Examining these closely, it can be seen that the Commission interprets the criteria for MET excessively strictly.

a. Information insufficiency.

Information provided to the Commission by any firm applying for MET must encompass the entire industry of which it is a part. Even if only one firm exports to the EU, that firm must convince the entire industry to provide information about financial activity to the EU. Otherwise, it will be deemed as information insufficiency. But the fact is that it is extremely difficult to obtain industry wide information within the time deadlines

⁸ The data is collected by the author based on the EU Official Journal from April 1998 to April 2002.

specified by law. In the Glycine case of 2000,⁹ five Chinese companies were refused MET, one of the reasons given is that they could not provide information on the entire chemicals industry in China.

b. State interference.

In practice, Chinese state-owned companies never get MET, because the EU thinks that such ownership means significant state interference. As to other companies, if they sell part of their products to the state, its application for MET will be rejected, because the Commission presumes that the price of sales to the state would not be at market determined prices, therefore, it has indirect state interference in its industry pricing. If one of the inputs is state-controlled, the company will not get MET as well, because the EU think that such prices are determined by the state rather than the market This conclusion is unreasonable because Member States of the EU have many state controlled firms, such as utilities and transportation companies, and this does not negate their market treatment. Industries can sell their output to the government at preferential prices, and not be considered non-market. In the EU, there is also state ownership of some public goods, such as fisheries, which does not make the fishing industry non-market. From this point of view, normal business contact with the state should not be the reason for the Commission to reject a Chinese company's application for MET.

c. Beyond deadline.

Another reason of the rejection of MET is that Chinese companies failed to submit all the information needed within the time limit. In an anti-dumping investigation, exporters from ME shall submit their questionnaires within 40 days after initiation. If Chinese

⁹ Recital 11, Commission Regulation (EC) No 1043/2000 of 18 May 2000 imposing a provisional anti-dumping duty on imports of glycine originating in the People's Republic of China, OJ 2000 L118/6.

companies apply for MET, their burden of proof is even heavier, but the application and all information deemed necessary have to be given to the Commission within 21 days after the initiation. There is no apparent reason for this difference, so this is unfair as well.

d. Non-standard accounting records.

To grant conditional MET to Chinese exporters, the Commission requires that companies have one clear set of basic accounting records; these records must be independently audited in line with international accounting standards; and these records must be applied for all purposes.¹⁰

These requirements have been rigorously enforced and have been the justification for the rejection of the majority of applications for the conditional MET, mainly because they are cumulative in nature but all must be satisfied at the same time.¹¹ In addition, the completeness of accounting records is an issue relating to the firm's management rather than its economic nature. Some European firms do not have sound accounting records due to poor management, but we cannot therefore affirm that they operate on an NME basis. Likewise, if a Chinese company does not have a clear set of accounting records or if it has not been audited, it does not necessarily mean that the firm is of NME nature. However, in Malleable Cast Iron Tubes and Pipe Fittings case in 2000,¹² the Commission refused to grant MET to three Chinese exporters simply because they could not meet all the three requirements enumerated above at the same time.

¹⁰ Art. 2.7 (c), Council Regulation (EC) No 905/98.

¹¹ Robert M. MacLean, 'Evaluating the Impact of the E.C.'s Conditional Market Economy Principle in Chinese and Russian Anti-Dumping cases' (2001) 7(3) International Trade Law & Regulation 65 at 70.

¹² Commission Regulation (EC) No 449/2000 of 28 February 2000 imposing a provisional anti-dumping duty on imports of malleable cast iron tube or pipe fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand and accepting an undertaking offered by an exporting producer in the Czech Republic, OJ 2000 L55/3.

From the above analysis, it can be seen that main reason that only a few Chinese exporters get MET is because the criteria and the way the Commission interpret and apply them in anti-dumping investigations is too stringent.

4. Individual treatment.

When a Chinese exporter fails to get MET, it can still apply for individual treatment in order to have its individual anti-dumping duty based on its own dumping margin. However, like the conditional MET, the problem of individual treatment is that the Commission applies the rules in an excessively strict way in practice. Even the EU itself has to admit the overlap in the criteria of individual treatment has resulted in the fact that only those exporters that can fulfil the requirements for conditional MET are able to qualify for individual treatment.¹³

From this point of view, the main stream of the EU's current anti-dumping policy towards China is the traditional NME Treatment. Though the amendments of conditional MET and individual treatment are positive progresses in legislation, the Commission does not make their application to be consistent with the objective, i.e. to adapt to the change of economic status due to China's economic reform.

5. Non-use of anti-subsidy measures towards China.

In addition to the above unreasonable factors of the EU's current anti-dumping legislation towards China, the EU's non-use of countervailing measures may be another reason leading to the disproportionately high amount of the anti-dumping proceedings towards China.

¹³ Recital 53, Proposal for a Council Regulation amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community /* COM/2000/0363 final - ACC 2000/0160.

According to the provisions of the WTO Agreement on Subsidies and Countervailing Measures, a countervailable subsidy exists if the following facts are found.

- a. There is a financial contribution by the government, and
- b. The subsidy is directed at specific industries or sectors or at exports;
- c. There is a net benefit to the recipient and the conditions of normal competition must be adversely affected.¹⁴

Under the WTO legal framework, dumping and subsidy are two different concepts and they are governed by different sets of rules. However, as a result of subsidy, the export price may be lower than the normal value of an import, which also constitutes dumping. In that case, the importing country may impose either countervailing duties or anti-dumping measures on the import in question.¹⁵

Unlike its anti-dumping Regulation, the EU's Regulation on subsidy and countervailing measures¹⁶ does not provide any special provision for NMEs in countervailing duty investigations. This tacitly implies that 'such cases are not to be initiated against countries that are on the EU's NME list' because 'the subsidies concept had no meaning outside the context of a market-based economic system.'¹⁷

Consequently, there is hardly any countervailing duty investigation initiated towards imports from China within the past ten years. Instead, the EU has launched increasing

¹⁴ Arts 1(1), 1 (2) and (5), 'Agreement on Subsidies and Countervailing Measures' *The Results of the Uruguay Round of Multilateral Trade Negotiations* (GATT, Geneva, 1994)..

¹⁵ Art. VI (5), GATT.

¹⁶ Council Regulation (EC) No 2026/97 on protection against subsidised imports from countries not members of the European Community, OJ 1997 L 288/1.

¹⁷ Alexander Polouektov, 'Non-Market Economy Issues in the WTO Anti-Dumping Law and Accession Negotiations. Revival of a Two-Tier Membership?' (2002) 36 J.W.T 1 at pp. 23 & 25.

anti-dumping proceedings against these Chinese products.

B. On the side of China.

On the one hand, the EU's policy results in the large number of anti-dumping proceedings against imports from China and subsequently high anti-dumping duties. On the other hand, Chinese exporters are responsible for their own faults which have made things worse. They are mainly non-cooperation, untechnical response and genuine dumping in a few cases.

1. Non-cooperation.

Exporter's non-cooperation exists in any country's anti-dumping investigation, so it is not an exception in the case of the EU's anti-dumping proceedings towards China. However, statistics show that anti-dumping investigations against Chinese products are defended by the least number of manufacturers and exporters.¹⁸

Non-cooperation of those Chinese exporters in the EU's anti-dumping investigation may be attributed to two reasons. First of all, most of them are angry at the unfair treatment of NME that Chinese exporters normally get in the EU's anti-dumping investigations. Due to the extremely low percentage to get the MET and individual treatment in the past cases, they foresee the unfavourable judgement made under the analogue country method and the one country one duty rule, plus the high cost and difficulty of timely cooperation, they finally decide to give up their business in the European market as a result of non-cooperation.

In a few cases of non-cooperation, those Chinese exporters simply do not know the importance to respond to the Commission's questionnaires due to their lack of common

¹⁸ Robert M. Maclean, *fn* 11 above at 35.

knowledge of international trade.¹⁹ However, such cases become fewer and fewer due to the Chinese government's great effort to popularise this knowledge.

Without close cooperation with the European Commission in its anti-dumping investigations, Chinese exporters are subject to the analogue country method and the highest anti-dumping duty. The devastating consequences are increasingly known to Chinese exporters. Therefore, the number of cases of non-cooperation by Chinese companies has decreased sharply in recent years.²⁰

2. Untechnical response.

This happens when Chinese exporters cooperate with the Commission, while they are unable to provide favourable or timely information simply because their lawyers lack the necessary techniques to handle anti-dumping cases.

Considering the tight time limit and huge amount of information required, satisfactory completion of the EU's anti-dumping questionnaires in the case of imports from NMEs is a hard task. Good lawyers who are familiar with anti-dumping rules and international trade laws are necessary in that circumstance. Such professionals are not rare in foreign international law firms like those in Brussels, but there are not many in China. It is no doubt that China has a large quantity of good lawyers, but compared with those foreign ones, most of them are less experienced in the field of anti-dumping.

Normally, the problem for Chinese exporters to resort to these foreign law firms in response to anti-dumping proceedings is the high costs. The average charge of anti-dumping cases is above \$100,000 by a foreign law firm, while the cost asked by

¹⁹ This is analyzed by experienced anti-dumping lawyers during several interviews conducted in different law firms in Brussels, June 2002.

²⁰ This is found by analyzing the EU's anti-dumping cases before and after 1995.

Chinese domestic law firms can be \$5,000 or even lower. Given the difficulty for Chinese exporters to get conditional MET and individual treatment in the EU's anti-dumping investigations even with the help of foreign law firms in the past, most Chinese companies, especially small ones, are not willing to turn to foreign law firms when they receive anti-dumping questionnaires from the Commission.

Unprofessional lawyers are unable to make use of international trade law and principles freely to protect the interests of their client. As a result, an untechnical response from Chinese exporters may be deemed as inadequate cooperation by the Commission in anti-dumping investigations, and finally brings a less favourable outcome to them.

3. Lack of standard accounting records.

The second criteria of the MET requires that firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes.²¹ To Chinese exporters, the lack of such accounting records is one of the most frequent reasons leading to the rejection of MET in practice. Besides, it constitutes the main reason for the Commission to reject undertakings offered by Chinese companies.

4. Genuine dumping in a few cases.

In a few cases, high anti-dumping duties have been imposed on Chinese exporters since their products are actually dumped.²² The motive of such selling under cost is not because those manufacturers want to exclude competitors from the European market with a low

²¹ Art. 2(7)(c), Council Regulation (EC) No 905/98.

²² This was indicated by an anti-dumping lawyer during an interview in Brussels, June 2002. It is also the reason why the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China enacted the Interim Regulation of Punishing Companies which Export Products with Low Prices on 20 March 1996.

price strategy. Instead, it results from the side effect of Chinese government's encouraging export policy.

Following China's economic reform and the policy of opening up international trade, the government has realized more and more the importance of international trade and its advantages. Exports therefore become central to develop the country's economy. In order to promote export volumes, the Chinese government has developed policies to encourage exports. For example, under these rules, Chinese producers can have the tariffs on their exports partly reimbursed, and they can keep their foreign currency account, which is not available without certain amount of exports. Likewise, a high quantity of exports can help the company get other similar favourable treatment from the government, which might be beneficial to its development of other sectors.

Due to the above reason, it is easy to understand that a small number of Chinese companies are willing to sacrifice a part of profits from their exports, i.e. to dump the products, in order to increase the export volume, and then to be entitled to certain policies which might be favourable to their overall development. Therefore, genuine dumping sometimes can be found in the EU's anti-dumping investigations towards China.

II. Reform of the EU's anti-dumping policy.

A. Reasons for reform.

Considering the unreasonable factors in the EU's current anti-dumping policy towards China, there are essential economic interests and political reasons which call for reform.

1. To meet the objective of the amended anti-dumping policy towards China.

The EU amended its anti-dumping legislation in 1998, and the conditional MET was

provided for Chinese exporters as a result.²³ The intention of the change 'was in response to the ongoing reforms in those countries and the fact that some Russian and Chinese companies operate in market economy conditions and therefore their prices and costs may be appropriate for the calculation of normal value.'²⁴

However, due to the huge discretion exercised by the Commission and the strict interpretation given in specific cases, MET is seldom granted to Chinese exporters in practice. Therefore, the 1998 amendment and its application cannot reflect the change of China's economic reform, and further reform both in law and in practice is needed to meet the objective of the law.

2. For a better EU-China trade relationship and a stronger Europe.

Facing powerful competitors such as the U.S. and Japan in the world economy, the EU needs the cooperation of new rapidly developing economies to enhance its share of international trade and enhance its strength from both the political and economic perspective.

As analyzed in Chapter 4, China is one of the countries which has the fastest economic growth in the world. Its current average gross domestic product (GDP) growth is 7.55 percent per year,²⁵ and its average growth of export to the EU is 24.42 percent per year in the past three years.²⁶ Such trend of growth will be further strengthened by China's accession to the WTO, with which its share of world trade may double between 1995 and

²³ Council Regulation (EC) No 905/98.

²⁴ Fn 13 above at pp. 2 & 3.

²⁵ China's real GDP growth is 7.8 percent in 1998, 7.1 percent in 1999, 8.0 percent in 2000 and 7.3 percent in 2001. <<http://europa.eu.int/comm/trade/>> (1 December 2002).

²⁶ The value of imports from China to the EU is 49.7 billion Euro in 1999, 70.3 billion Euro in 2000 and 75.5 billion Euro in 2001, from: <<http://europa.eu.int/comm/trade/goods/stats.htm>> (1 December 2002).

2005.²⁷

It is estimated that China's real imports from Western Europe will increase from 28,571 Million US Dollars in 1995 to 50,182 Million US Dollars in 2005.²⁸ Therefore, China should be the best new trade partner to the EU in the near future. Besides, since China and the EU's economic development are at different levels, trade between them will greatly benefit both sides and therefore is sustainable from a long term point of view.

A sound trade relationship between China and the EU is essential to the increasing trade opportunities for both sides. However, the EU's anti-dumping policy towards China constitutes a threat to the further development of such a relationship. In fact, anti-dumping is a very sensitive issue. In particular, under the EU's current policy which empowers wide discretion to the Commission, nearly every Chinese export in the European market 'is potentially vulnerable to dumping accusations and calculations of inflated dumping margins.'²⁹ For this reason, the current anti-dumping legislation and the way that the EU authority applies it should be improved, and a less stringent and more impartial anti-dumping policy towards China is necessary for a better future.

3. Need to restore fair competition in international trade.

The intention of anti-dumping legislation is to restore fair competition in international trade. Anti-dumping measures should be targeted only to offset the unfavourable effects produced by dumped imports rather than give protection to domestic industry.

However, as the result of improper policies, excessive use of anti-dumping measure may

²⁷ D Bhattasali and M Kawai, 'Implications of China's Accession to the World Trade Organization' at p 1, <<http://www.worldbank.org.cn/English/content/wto-implications.pdf>> (1 December 2002).

²⁸ D Bhattasali and M Kawai, *ibid* at p 18.

²⁹ Alexander Polouektov, *fn* 17 above at p 31.

turn the outcome upside down. The EU's anti-dumping policy towards China maximizes the dumping margin of the imports in anti-dumping investigations. It actually expels those Chinese products out of European market with severe anti-dumping measures. It also should be borne in mind that the impact of these measures is not only confined to Chinese industry itself. European importers, distributors and agents involved in the selling of Chinese products inside the EU internal market will be affected adversely as well. To a certain extent, the commercial interests and confidence of their business can be spoiled by the unpredictable anti-dumping proceedings of the EU. In the meantime, European industries which use Chinese products as inputs, components or parts for manufacturing other goods will suffer the increased production costs if anti-dumping measures are taken towards these imports. Therefore, excessive use of these measures by the EU devastates business both in China and inside the European market.

Fair competition of international trade calls for correct use of anti-dumping instruments. From this point of view, the EU's anti-dumping policy towards China should be reformed to be more reasonable and impartial.

4. The need for gradual reform of the EU's current anti-dumping policy before the final withdrawal of the NME treatment in 2015.

As a part of concessions, China agreed to the EU keeping its current anti-dumping policy for 15 years after China's accession to the WTO.³⁰ In my opinion, this implies the maximum 15 years time limit for the EU to reform its anti-dumping policy, and completely eliminate the analogue country method and one country one duty rule from its anti-dumping legislation towards China. Without gradual reform beforehand, sudden withdrawal of the NME Treatment may let the EU's anti-dumping authority and certain

³⁰ Section 15.d, Draft protocol on the accession of the People's Republic of China, (Annex to Report of the working party on the accession of China, WT/ACC/CHN/49).
<http://www.wto.org/english/tratop_e/adp_e/adp_e.htm> (1 December 2002).

domestic industries feel it hard to react before the new and less protective legislation.

5. China's resort to the WTO Dispute Settlement Mechanism may accelerate the speed of reform of the EU's anti-dumping policy.

The EU's current anti-dumping legislation towards imports from NMEs is quite general, and it lacks concrete provisions to govern specific issues. Before China became a Member of the WTO, the European Commission enjoyed huge discretion on all of these disputes in its anti-dumping investigations. However, China's current WTO membership makes it eligible to bring disputes arising from the EU's anti-dumping decisions to the Dispute Settlement Mechanism. Under the WTO trade laws and principles, if the Panel decides to support China's argument, the EU should be responsible for the measures taken and revise the corresponding decisions. As a result, these proceedings may accelerate the reform of the EU's anti-dumping policy towards China.

B. Proposals for the EU.

Based on the analysis above, the following proposals are suggested to the EU with regard to its anti-dumping policy towards China.

1. Proposals towards NME status.

The first suggestion for the EU is to treat China as an ME. This idea sounds quite radical at first glance. However, it is reasonable considering the fact that Russia has been recognized as an ME by the EU since 5 November 2002,³¹ and the MET are now applied to Russian exporters automatically in the EU's anti-dumping proceedings. China's WTO membership indicates that the level of its economic development is much higher than

³¹ Council Regulation (EC) No 1972/2002 of 5 November 2002 amending Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Community OJ 2002 L305/1.

Russia. Based on this point, it should be treated as an ME for the purpose of dumping determination as well. In that case, all disadvantages of the analogue country method can be avoided, and all Chinese exporters will get MET automatically in anti-dumping investigations.

2. Proposal for the analogue country method.

To be more realistic, the Commission should minimize the use of the analogue country method and its side effects produced on Chinese exporters in anti-dumping proceedings.

When one Chinese company gets MET, its domestic sales price should be adopted to determine normal values for other Chinese exporters in the same anti-dumping investigation.

If no Chinese company gets conditional MET in the EU's anti-dumping investigation, a third ME which is at a similar economic development level should be selected. In that case, the country which has a similar gross national income (GNI) to China should be regarded as an appropriate analogue country.

When cooperation from such a third ME is not available, the Constructed Value Method may be preferred and more than one third MEs price information should be referred in that case.³²

The EU should have more specific guidance to govern the selection of a third ME when the analogue country method has to be applied. Since it is a very complex procedure, and the choice is significant to the outcome of the anti-dumping investigation and the essential interests of exporters, less discretion should be given to the Commission as the

³² For example, use the labour cost of country A and the production cost information of country B, because each of them has similarities with China from different perspectives.

anti-dumping authority.

In addition, Chinese exporters should be given more time to comment on the selection of the third economy, because even the Commission itself admits that it is impossible to collect necessary information and give any advice within a mere 10 days.³³

3. Proposal for one country one duty rule and individual treatment.

The one country one duty practice should be abandoned completely towards a Member of the WTO such as China, which has already demonstrated its economic status and strength before accession. Like the anti-dumping authorities of the U.S., Australia, New Zealand and Japan, the Commission should determine the anti-dumping duty rate for different exporters according to their own dumping margins. That is to say, individual treatment should be granted to Chinese exporters automatically without burdensome application.

4. Proposal for the conditional MET.

In the EU's anti-dumping investigation towards imports from China, the Commission should assess Chinese exporter's application for the MET impartially. Particularly, their normal business contact with government and state-owned companies should not result in the rejection of application for the MET. In the meantime, trade behaviours with the state which may lead to the rejection of the MET should be specified in law rather than determined case by case by the Commission.

The EU's anti-dumping authority should interpret and apply the legislation of the conditional MET less stringently in practice. For example, it should accept the application from a Chinese company and grant them MET if it can meet most of the five criteria. Considering the unreasonable factors of the MET provisions discussed above,

³³ Interview with the Administer of the European Commission, DG Trade, Brussels, 12 July 2002.

the Commission should not refuse to grant MET to Chinese exporters simply because they fail to meet one of the five criteria.

In addition, the Commission should consider Chinese exporter's application for conditional MET during sunset reviews. At present, the Commission refuses to introduce the methodology of the conditional MET in sunset reviews carried out after the new legislation came into force.³⁴ It argues that existing anti-dumping measures can be modified only during interim reviews.³⁵ However, under the EU legislation,³⁶ the criteria to initiate an interim review are very stringent. As a result, Chinese exporters normally cannot apply for the new approach of the MET in proceedings with regard to the existing anti-dumping measures. The EU's practice is rather unfair to these exporters which may obtain fundamental progress from economic reforms of the past five years. Like other Chinese firms, they should have the same opportunity to apply for conditional MET. From this point, after five years elapses since the anti-dumping measures were taken, the EU authority should either allow the exporters to apply for conditional MET in sunset reviews, or consider their application in interim reviews which are initiated with less stringent criteria.

5. Acceptance of undertakings.

The Commission should accept undertakings from Chinese companies which have a sound management history. Undertakings are not normally accepted from companies operating in NMEs.³⁷ Due to the Commission's distrust, few undertakings from Chinese

³⁴ This issue has been analyzed in details in chapter three, section II.D.5.

³⁵ Para. 19, Council Regulation (EC) No 312/2002 of 18 February 2002 imposing a definitive anti-dumping duty on imports of certain magnetic disks (3,5 microdisks) originating in Japan and the People's Republic of China and terminating the proceeding in respect of imports of 3,5 microdisks originating in Taiwan. OJ 2002 L 50/24.

³⁶ Art. 11(3), Council Regulation (EC) No 384/96.

³⁷ Recital 58, Council Regulation (EC) No 393/98.

exporters have been accepted since 1990. However, undertakings from Chinese companies with standard accounting records should be considered, and the prejudice must be corrected after China's accession to the WTO. Otherwise, it will be regarded as a violation of the WTO's non-discrimination principle by the Panel in the case of dispute settlement.

III. Proposals to China.

As the direct victim of the EU's over severe anti-dumping policy, China should take corresponding strategies to claim its due rights and protect its trade interests.

A. Proposals to the government.

1. Capacity building.

Capacity building is the most important and effective strategy for China to protect its trade interests in anti-dumping proceedings launched by other countries. Here, it refers to the development of human capital, specialised in WTO anti-dumping legislation and other international economic laws and principles.

First of all, professional anti-dumping lawyers are essential to help exporters obtain proper treatment in anti-dumping investigations. Since they are familiar with the legislation and the anti-dumping authority's traditional practice, they not only can provide accurate information required on time and claim due rights for their clients on the base of law, but also can be very sensitive to any illegal point of decisions made by the authority, and then reply on a legal basis.

Besides, as analyzed in Chapter six, after China's accession to the WTO, it can resort to the Dispute Settlement Mechanism to resolve anti-dumping disputes with the EU.

However, China lacks necessary human resources and administrative structures to detect possible inconsistencies with the WTO agreements, and then to maximize their use of the WTO dispute settlement system effectively. Such a shortage will become key impediments to its capacity to benefit from the international trade system and the WTO's differential and favorable treatment for developing countries.

All of the above calls for capacity building urgently. China should emphasize the development of these human resources, and build extensive cooperation with other foreign experts in international organizations with sufficient financial backup. Only by doing this, can it defend its due rights properly under the WTO trade laws.

2. Encourage and attract European investment.

Considering companies which get the MET in the EU's anti-dumping investigations, all except one are foreign owned firms or joint ventures, which represent whole or part of the European investor's economic interests. Likewise, among six anti-dumping appeal cases, only two of them succeeded,³⁸ which were both brought by European importers.

These facts show that the EU's anti-dumping decisions are always based on its own essential commercial interests, and they are favourable to domestic industries or European investors. Therefore, if the Chinese government encourages and attracts European investment in the form of joint ventures in China, when these companies participate in the EU's anti-dumping proceedings, they may be treated more favourably than others. As a result, the part of interests of Chinese shareholders in the joint ventures can be protected simultaneously to a certain extent.

³⁸ Case 16/90, Detlef Nölle, trading as "Eugen Nölle" v Hauptzollamt Bremen-Freihafen, ECR 1991 I-05163 and Case 358/89, Extramet Industrie SA v Council of the European Communities, ECR 1992 I-03813.

3. Regulate the order of export transactions.

The Chinese government should regulate the normal order of export transactions. Normal export should be encouraged as an important part of the Opening Policy, but at the same time, the Chinese government should prohibit exporters from dumping their products in order to get other benefits. China enacted the Interim Regulation of Punishing Companies which Export Products with Low Prices in 1996.³⁹ However, there are few exporters punished accordingly since the law published. Therefore, the government really should put more emphasis to the implementation of such Regulations.

4. Continuous negotiation with the EU for ME status.

The Chinese government should negotiate with the EU authorities continuously for ME status. Considering the EU's recent change to recognize Russia as an ME, China's WTO membership is the best justification to ask for the same treatment.

B. Proposals for Chinese exporters.

1. Sound management of the company.

In the context of the EU's five criteria established to grant the MET, sound management particularly emphasizes a clear set of basic accounting records, which are in line with international accounting standards and principles. Since the legislation of the MET was enacted in 1998, lack of clear accounting records has become the main reason to prevent Chinese exporters from getting the MET.

According to China's accounting legislation as well as interviews with a Chinese

³⁹ It was enacted on 20 March 1996 by the Ministry of Foreign Trade and Economic Cooperation, PRC. This regulation is applicable to all foreign trade enterprises in China. <<http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/1/1-2-39.html>> (1 December 2002).

economic analyst and experienced anti-dumping lawyers,⁴⁰ it becomes clear that the accounting method adopted by Chinese companies is basically consistent with international standards. However, the Commission examines the accounting records so strictly that even some European companies may find it hard to provide the satisfactory accounting records required.

Therefore, Chinese companies should keep accurate and standard accounting records, which can withstand the Commission's careful assessment.

2. Sufficient cooperation with the Commission in anti-dumping investigations.

The prerequisite for exporters to protect their trade interests in anti-dumping investigations is to cooperate with the authority. With regard to the EU's anti-dumping proceedings towards China, sufficient cooperation means submitting anti-dumping questionnaires⁴¹ timeously to the Commission, and try to give any other information needed. Cooperation is necessary for Chinese companies to get individual anti-dumping duty rate and even MET in anti-dumping investigations if the Commission thinks that the firm operates by itself without significant state interference, i.e. it meets the five criteria for the MET.

Based on this point, Chinese exporters should be encouraged to cooperate with the Commission in anti-dumping investigations. In the meantime, necessary guidance and help should be provided by the Chamber of Commerce of the industry concerned.

In fact, China has enacted legislation to prohibit non-cooperation of its exporters in

⁴⁰ Interview with analyst, Research Institute of the Ministry of Foreign Trade and Economic Cooperation, People's Republic of China, Beijing, July 2001; Interviews with experienced anti-dumping lawyers were conducted in different law firms in Brussels, June 2002.

⁴¹ Questionnaires include normal 'Anti-Dumping Questionnaire' and 'Form for Companies claiming Market Economy Status and/or Individual Treatment in Anti-Dumping Proceedings.'

anti-dumping proceedings,⁴² and the Chambers of main industries have made efforts to offer training and to strengthen anti-dumping knowledge for Chinese enterprises. As a result of this effective strategy, there are fewer and fewer cases of non-cooperation of Chinese exporters today. These Chambers, therefore, should now turn to stress the important role that professional anti-dumping lawyers play in anti-dumping investigations, and try to give them some advice to find the right lawyer to ensure sufficient cooperation and technical response in anti-dumping investigations.

3. Build infonet of the same industry worldwide.

Under the EU's current anti-dumping legislation, if Chinese exporters fail to get conditional MET, they are still subject to the analogue country method. In that case, the European Commission gives the exporters 10 days to comment on the third ME envisaged.⁴³ In practice, Chinese exporters cannot give any constructive comment before the deadline because the time limit is too tight.⁴⁴

In the *Zinc Oxides* case of 2001,⁴⁵ the Commission showed its intention in the notice of initiation to use the United States (U.S.) as an appropriate analogue country for the purpose of establishing normal value for imports from China. Chinese exporting producers disagreed with this proposal by arguing the different levels of economic

⁴² The fifth Command of the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China in 2001 – Regulation Governing Chinese Exporter's Response Towards Anti-Dumping Investigations Initiated By Other Countries. It entered into force on 1 December 2001. <http://www.moftec.gov.cn/article/200207/20020700031595_1.xml> (1 December 2002).

⁴³ Art. 2 (7), Council Regulation (EC) No 384/96, O.J.

⁴⁴ This issue has been analyzed in chapter three, Section I.c Theoretical and practical analysis of the rule..

⁴⁵ Commission Regulation (EC) No 1827/2001 of 17 September 2001 imposing a provisional anti-dumping duty on imports of certain zinc oxides originating in the People's Republic of China. OJ 2001 L248/17.

development, position in the market,⁴⁶ end-uses⁴⁷ and cost structures⁴⁸ between the U.S. and China. Instead of the U.S., they suggested South Korea, Malaysia, Indonesia, Taiwan, or Thailand as the analogue country, but they could not substantiate their proposals. The Commission subsequently sent a request for information on sales and market conditions to these MEs. Unfortunately, only two producers in the countries suggested by Chinese exporters were willing to cooperate with the Commission, but they were not selected as the analogue country due to the low volumes of production and domestic sales. As a result, the Commission retained its initial decision to use the U.S. as the analogue country for Chinese products.

However, if the Chinese exporters had the information of producers worldwide of the same industry, their comment on the selection of the analogue country will be more persuasive. Furthermore, if they already had a sound relationship with the major foreign producers in the world, the latter might be willing to cooperate with the Commission when they were requested. In both circumstances,⁴⁹ there is a bigger possibility that the exporters' proposals could be adopted by the EU, and a relatively appropriate analogue country would be selected for them as a result.

⁴⁶ The U.S. producer's oligopolistic position on the US market which was alleged to lead to artificially high prices.

⁴⁷ As the rubber industry is the major US market for zinc oxide whereas Chinese exports to the Community seem to be used primarily in the ceramic industry.

⁴⁸ Different cost structure. It was claimed that the cost structure in the USA could not be compared with that in China, where labour costs, environmental compliance costs, etc. are lower than in the USA.

⁴⁹ Of course, such information exchange should not develop into a possible cartel arrangement which might fall foul of competition rules.

Summary

While exploring the genuine reasons why the EU's current anti-dumping policy after amendments cannot meet its objective to accommodate the change of China's economic status from an NME to a transitional economy as a result of its two decades' reform, it is particularly important for us to examine a fact – 'Commission officials admit that the formal rule change was more in name than in substance'.⁵⁰ The change of the rules was structured to allow the Commission to interpret the law as it saw fit on a case-by-case basis, and the Commission officials had no intention of administering the more beneficial rules to Chinese firms.⁵¹ Therefore, the EU bears most of the responsibility for the unfairness and the unfavourable impact produced by its anti-dumping policy towards China.

Not only Chinese exporters but also different European economic operators which are involved in the selling of Chinese products are unfavourably affected by the EU's excessive use of anti-dumping measures towards China. Such an impact will be enlarged following China's increasing exports to the European market after its accession to the WTO.

For this reason, proposals are made for both EU and China in this thesis based on the following research.

- a. An analysis of China's economic reforms and prospects backed by its national legislation, its WTO accession agreement and facts provided by international

⁵⁰ Cynthia M. Horne, 'Belief Stasis as an Impediment to Policy Implementation: Non-Market Economies and Western Trade Laws', paper prepared for American Political Science Association Conference, San Francisco, CA, August 30 – September 2, 2001, p. 24. <<http://pro.harvard.edu/papers/016/016010HorneCynth.pdf>> (1 December 2002).

⁵¹ Ibid.

organizations such as the World Bank;

- b. A comparative study of other major WTO developed country Member's anti-dumping policies towards China.

However, anti-dumping is the governmental protection of its domestic industry against dumped imports, and anti-dumping legislation is a political tool functioning in the field of the economy. Like other legislation, one country's anti-dumping policy towards another actually is the outcome of the contrast of the two sides' political and economic strength. Apparently, it is a very complex issue, and amendment of the legislation or change of the policy needs huge political impetus based on mutual economic interests.

Therefore, my research is not going to achieve the above task. To be more realistic, it proposes some practical suggestions for EU and China from an academic point of view, which may ensure that the implementation of the EU anti-dumping legislation be impartial to both sides.

Of course, only time can tell whether the Commission will adopt a less stringent approach to its anti-dumping policy towards China, but from a personal point of view, I believe some positive developments are essential in order to build stronger EU-China relations.

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