

# Introduction and Critical Analysis of Anti-dumping Regime and Practice in China Pending Entry of WTO: Transition toward a WTO-Modeled Trade Legal Mechanism

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## I. Introduction

It has been twenty-one years since China began its economic reform and opened its doors, which ended its economic isolation from the rest of the world. The Chinese economy has been greatly exposed to the global market. When trade increases, disputes may also arise. One such dispute concerns anti-dumping laws. Products from China frequently find themselves on anti-dumping questionnaires, but China filed no anti-dumping complaints against foreign products until the end of 1997. Trade volume may account for this. China's total trade volume amounted to \$60.26 billion in the first two months of year 2000, an increase of 47.1 percent over the same period in 1999.<sup>1</sup>

Facing entry into the World Trade Organization (WTO), China must learn how to handle the disputes within the WTO mechanism. From the adoption of the Antidumping and Countervailing Regulation of the People's Republic of China<sup>2</sup> (Regulation), sometimes inaccurately reported or referred to as the Antidumping Law of China in 1997, China

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1. See *China's Total Trade Volume in Jan.-Feb. at \$60.26 bil*, ASIAN ECONOMIC NEWS, Mar. 20, 2000, available at 2000 WL 9195013.

2. See The Anti-dumping and Anti-subsidy Regulations of the People's Republic of China, Order No. 214 of the State Council of the People's Republic of China, promulgated March 25, 1997, effective from promulgation date. English version of the law and regulation in this article is available at <http://www.qis.chinanet/lawtran1.htm>.

initiated five anti-dumping investigations against foreign products. Among them, three reached final judgment, one in mid-1999, and the other two in August and September of 2000.

This article focuses on current anti-dumping law and practice in China. Part II introduces the main background of China's establishment of an anti-dumping legal mechanism. Part III concerns the anti-dumping regime, in particular, the Regulation. Parts IV and V illustrate the first anti-dumping case in China, *i.e.*, the Newsprint Case, and the following cases to date. In Part VI, the author lists general characteristics of the subject issue, and then critically analyzes the Chinese anti-dumping regime and its practice in the cases. Finally, in Part VII, the author forecasts the future development of anti-dumping in China.

## II. The Trend of Anti-Dumping

Free trade is more efficient than isolation and protectionism and benefits the whole world. The General Agreement of Tariff and Trade (GATT), the predecessor of the WTO, is based on a system of tariff concessions that are set officially at periodic rounds of talks. All signatory countries agreed to open their markets to competition from foreign products.<sup>3</sup> But increased foreign competition and/or the necessity to cope with the adverse economic effects of sharp economic slow-downs, such as the Asian finance crisis, force many countries into protectionism. And while a protectionist stance cannot be sustained as broadly and for as long as before GATT, it still occurs periodically. When these countries found that anti-dumping measures against foreign imports under normal value are legitimate under Article VI of GATT, they sought legal protections under those measures. This trend has multiplied throughout the world.

Historically, developed nations such as the United States, the nations comprising the European Union (EU), and Canada have been the primary users of anti-dumping laws, accounting for over two-thirds of the anti-dumping cases initiated between 1990 and 1995.<sup>4</sup> Developing countries have learned well from their example. In 1993, the original members of the Association of Southeast Asian Nations initiated only three anti-dumping cases, but those six countries launched forty-six cases in 1996 and forty-two in 1997.<sup>5</sup> Mexico is the predominant user of anti-dumping laws in Latin America. By June 30, 1997, Mexico had ninety-seven anti-dumping measures in force and fifteen ongoing anti-dumping investigations. For the period ending December 31, 1994, Mexico only had forty-two measures in force.<sup>6</sup>

No one disputes that Chinese products are the most frequent objects of anti-dumping investigations. By the end of 1996 there were approximately 270 investigations against Chinese products.<sup>7</sup> By August 2000, the number of the investigations reached approximately

3. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

4. See Christopher F. Corr, *Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures*, 18 Nw. J. INT'L L. & Bus. 49, 55 (1997).

5. See *Anti-dumping Suits Grow in Asia*, NAT'L L.J., Mar. 1, 1999, at A8.

6. See Joseph W. Dorn & Stephen J. Orava, *Latin Nations Are Pursuing Trade Abuses*, NAT'L L.J., Apr. 6, 1998, at B7.

7. See Wei Huo, *Anti-dumping: Abandon Misunderstanding First*, YOUTH DAILY OF BEIJING, Nov. 17, 1997. This article makes reference to some newspapers and journals in Chinese. The author translated them into English.

400.<sup>8</sup> These investigations ranged from raw materials to steel and iron products, electronic products, machineries, bulk textile, and light industrial products, such as bicycles, textiles, and shoes, etc. Some anti-dumping duty impositions froze Chinese products out of the markets. For instance, bicycle imports from China to the EU amounted to 2,000,000 in 1991. After the imposition of a 30.6 percent anti-dumping duty in 1993, Chinese bicycles disappeared from the EU market.<sup>9</sup> For another example, Mexico imposed anti-dumping duties on shoes from China at the rate of 1,105 percent.<sup>10</sup>

There are various reasons to explain why so many anti-dumping investigations are targeted at Chinese products. First, the labor and materials cost in China is relatively cheap. Second, competition among exporters urges the exporters to lower their price intentionally. Third, the status of Chinese economy is still deemed as a "non-market economy."<sup>11</sup>

Then what is the situation of anti-dumping against foreign products in China? In fact, there are numerous surveys about foreign dumping. Foreign dumping alone "costs China ten billion Yuan (1.2 billion dollars) every year in losses."<sup>12</sup> But there was no anti-dumping complaint from Chinese domestic industry until the end of 1997. It appears that Chinese domestic industries are much more tolerant than their foreign counterparts.

The main reason for this tolerance was the absence of an anti-dumping law and regime. Although the domestic industry complained strongly, there was no guidance for it to even put its complaint into writing. So, when faced with numerous anti-dumping investigations, domestic enterprises and industrial sectors in China urged the government to formulate anti-dumping regulations and laws "as a means to protect domestic industries in accordance with trade protection methods [all]owed by the [GATT] and the [WTO]."<sup>13</sup>

The Chinese government expressed its attitude by the adoption of the Regulation on March 25, 1997. Mr. Shi Guangsheng, former Vice Minister and now Minister of the Ministry of Foreign Trade and Economic Cooperation (MOFTEC), stated that as the Chinese market opens to the outside world, China would not tolerate foreign enterprises dumping goods into the Chinese market at prices below their normal values. He urged Chinese enterprises to familiarize themselves with the Regulation and learn how to utilize this as a weapon to protect their lawful rights and interests and boycott foreign dumping.<sup>14</sup>

Academics said that the Chinese have decided, "to give as good as it gets" to catch up with the "Trend of Anti-dumping" of the decade.<sup>15</sup> That is the lesson China must learn when it becomes a new member in the world trade society, the WTO. Using anti-dumping

8. See *International Anti-dumping: China the Largest Victim*, CHINA NEWS AGENCY, Aug. 8, 2000.

9. See *id.*

10. See *id.*

11. The frequent conclusion of Chinese dumping and those very high dumping margins generally reflect the cumulative effect of a series of burdensome presumptions on the part of the investigation authorities. For instance, the Department of Commerce of the United States (DOC) generally constructs the foreign market value of Chinese products on the basis of a surrogate country, whose economy is deemed to be market-driven. Thus, it puts the Chinese producers and exporters in a very difficult position to participate effectively in the anti-dumping investigations. There are only limited exceptions, as in the investigation of Silicon Carbide from China; DOC announced that it did not presume a Chinese entity is government-controlled merely because "its Article of Association states that all of its assets belong to the state." Leonard E. Santos & Thomas V. Vakerics, *Chinese Imports Face Tough Anti-dumping Rules*, NAT'L L.J., Sept. 19, 1994, at C13.

12. *China to Crack down on Dumping of Imported Goods*, AGENCE FR.-PRESSE, Mar. 29, 1997.

13. *Anti-dumping Guaranteed by Law*, BEIJING REV., Apr. 28, 1997.

14. See *China to Strengthen Anti-dumping Work*, PEOPLE'S DAILY, May 13, 1997.

15. *Competition and Anti-dumping Policy: A Painful Encounter*, GLOBAL COMPETITION REV. Dec. 1997-Jan. 1998.

measures to protect Chinese domestic industry is also the way to counter-balance the unfairness levied against Chinese exports.

### III. Anti-dumping Regime of China

China established its own anti-dumping regime based on three levels of legal authority.

#### A. GATT PROVISIONS AND WTO ANTI-DUMPING AGREEMENT

The General Civil Principles of the People's Republic of China,<sup>16</sup> the basic guideline governing civil relations in China, stipulate that the provisions of the international treaties have supreme power if there is discord between the provisions of the civil laws of China and the international treaties to which China is a signatory party, except for the clauses over which China made reservations. This article also provides that if there is no provision both in Chinese laws and the international treaties to which China is a signatory party, the international practice may be adopted.<sup>17</sup>

Although currently China is neither a contracting party of the GATT nor a member of the WTO, Article VI of the GATT and the WTO Implementing Agreement (Anti-dumping Agreement) supply an important source of law to the Chinese anti-dumping mechanism, especially on the occasions where there are no provisions in the current anti-dumping law and regulation.

The Chinese government reiterated on numerous occasions that China would adhere to the rules of WTO and perform its commitments. Shi Guangsheng, Minister of MOFTEC, expressed that anti-dumping is an important measure in the market economy. He said that although China is not a WTO member, its anti-dumping procedure and basis are in accordance with Chinese anti-dumping and countervailing legal provisions that make great reference to relevant WTO rules.<sup>18</sup>

On the other hand, the adoption of a WTO-modeled trade regulation mechanism was undoubtedly designed to help convince the world of China's willingness and ability to adhere to WTO rules. In some popular words in Chinese this means, "to join the track of international practice (yu guo ji guan li jie gui)."

#### B. THE FOREIGN TRADE LAW OF THE PEOPLE'S REPUBLIC OF CHINA

Promulgated in 1994, the Foreign Trade Law of the People's Republic of China<sup>19</sup> (FTL) stipulates that the state may take necessary measures to eliminate or reduce the damage or threat of damage or hindrance where foreign products are imported at prices lower than their normal value, thereby causing substantial damage or threat of substantial damage to existing domestic industries, or substantially hindering the establishment of relevant domestic industries.<sup>20</sup>

16. See General Principles of the Civil Law of the People's Republic of China, Order No. 37, enacted April 12, 1986, at the 4th Sess. of the 6th NPC, effective Jan. 1, 1987. English translation available at <http://www.qis.chinanet/lawtran1.htm>.

17. See *id.* art. 142.

18. See Shi Guangsheng, *China Adheres to the WTO Rules*, INT'L FIN. DAILY, Aug. 4, 2000.

19. See Foreign Trade Law of the People's Republic of China, Order No. 22, enacted May 12, 1994, at the 7th Sess. of the Standing Committee of the 8th NPC, effective July 1, 1994. English translation available at <http://www.qis.chinanet/lawtran1.htm>.

20. See *id.* art. 30.

Though it is the first time Chinese legislation stipulates that the state may take measures against unfair trade from abroad, the FTL is silent over how to enforce these measures. There is no mention about dumping and anti-dumping in the FTL.<sup>21</sup> The FTL only established a broad legal framework of Chinese anti-dumping mechanism. And as any other law of China, subsequent legislative or administrative regulations, rules or judicial explanations must be issued to make it enforceable. Nevertheless, the FTL has made some historically important signals both to the domestic industries and to the world.

### C. THE REGULATION

After several years of drafting, the State Council of China promulgated the Regulation on March 25, 1997. It was the result of comprehensive reference to and research on international practice and foreign experience. It brought the relevant concepts, rules, and proceedings of the GATT and the WTO into the emerging anti-dumping regime of China. Despite room for improvement, it signals another major step forward for China in the establishment of transparent regime of foreign laws.<sup>22</sup>

#### 1. Substantive Provisions

##### a. Dumping

In the Regulation, "dumping" is defined as "the export price of the imported product is below its normal value."<sup>23</sup> Normal value is to be determined by the comparable price of identical or like products to the imported products in the export country's market. If there is no comparable price in the market of export country, the normal value is either the comparable price of such identical or like product exported to a third country, or the production cost of such identical or like product plus a reasonable amount of expenses and profits.<sup>24</sup> Article 5 of the Regulation stipulates that the "export price" refers to the actual paid or payable price of the imported product.<sup>25</sup> Provided that there is no actual paid or payable price of the imported product or it is difficult to determine, the "export price" of such imported product is either to be based on the first resale price to an unrelated (independent) purchaser, or MOFTEC, upon consultation with the General Administration of Customs (GAC), will determine the price on reasonable deductive price.<sup>26</sup> The difference between the normal value and the export price is the dumping margin. The export price of an imported product and its normal value should be compared in a fair and reasonable manner so as to accurately ascertain the true dumping margin.<sup>27</sup>

##### b. Injury

Consistent with FTL, the term "injury" in the Regulation is defined as (1) substantial injury caused by dumping to the existing domestic industry; (2) substantial threat of injury

21. See *id.* arts. 29–32.

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

23. Anti-dumping and Anti-Subsidy Regulations of the People's Republic of China, *supra* note 2.

24. See *id.*

25. See *id.* art. 5.

26. See *id.*

27. See Anti-dumping and Anti-Subsidy Regulations of the People's Republic of China, *supra* note 2, art. 3–6.

by dumping to the existing domestic industry; or (3) substantially hindering the establishment of relevant domestic industries.<sup>28</sup> When determining injury caused by the dumping product the investigating authorities may examine the quantity and price of the dumping product, the impact of the dumping product on domestic industry, and the production capacity, export capacity, and inventory of the dumping product of the exporting country.<sup>29</sup>

Under Article 9 of the Regulation, cumulative assessment may be conducted if the anti-dumping investigation involves import from two or more countries.<sup>30</sup>

### c. Standing and Causation

In Article 10, the Regulation defines “domestic industry” as “all manufacturers or those manufacturers whose collective output of the product accounts for the great proportion of the total domestic production of identical or like product.”<sup>31</sup> But those domestic manufacturers, who are related to the exporter or importers, or who themselves are importers of the dumping product, may be excluded from the scope of domestic industry.<sup>32</sup>

Under either the FTL or the Regulation, causation must be established between the injury to the domestic industry and the alleged dumping, and must be reviewed by the investigating organs.<sup>33</sup>

## 2. Procedural Provisions

### a. Investigation Authorities

Like the Department of Commerce (DOC) and the International Trade Commission (ITC) in the United States, MOFTEC and the State Economic and Trade Commission (SETC) are the most important government agencies to conduct anti-dumping investigation in China. Generally MOFTEC calculates the margin of dumping and determines the appropriate remedial duties while SETC assesses the injurious effect of the dumping upon the domestic industry.<sup>34</sup>

### b. Initiation of Investigation

Any domestic manufacturers of identical or similar product meeting the requirement of standing may submit a written complaint against foreign dumping to MOFTEC.<sup>35</sup> Under some extraordinary circumstances, MOFTEC, upon consultation with SETC, may initiate investigations when there is sufficient proof of dumping, injury, and the causal link.<sup>36</sup>

### c. Preliminary Decision on Acceptance of the Complaint

Upon receipt of the complaint, MOFTEC shall examine the complaint and attached evidentiary materials, and shall make a decision whether to accept it to further the investigation. This decision also shall be taken upon consultation with SETC.<sup>37</sup>

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28. *See id.* art. 7.

29. *See id.* art. 8.

30. *See id.* art. 9.

31. *Id.* art. 10.

32. *See id.*

33. *See id.* art. 2; *see also* Foreign Trade Law of the People’s Republic of China, *supra* note 19, art. 30.

34. *See* Anti-dumping and Anti-Subsidy Regulations of the People’s Republic of China, *supra* note 2, ch. 3.

35. *See id.* art. 14.

36. *See id.*

37. *See id.* art. 13.

The decision made by MOFTEC shall be published and with notification to the interested parties such as the petitioner, importers, government of the exporting country, and exporters already known to the authorities.<sup>38</sup>

#### d. The Investigation

Upon acceptance and proclamation of the complaint, the anti-dumping investigation shall formally proceed. The Regulation requires separate investigation, conducted by MOFTEC, SETC, and other government organs, which is designed to reach a preliminary judgment. There must be both the dumping of import product and injury to the domestic industry of an identical or like product in order to proceed with further investigation of dumping, dumping margin, injury, and the extent of the injury until final judgment. MOFTEC, jointly with GAC, is in charge of investigating the dumping and dumping margin of the imported product. The investigation of the injury and its extent is carried out by SETC and relevant departments (generally the department in charge of the regulation of the concerned industry) under the Council of State. MOFTEC and SETC shall make the preliminary and final judgment separately, but all proclamations are made by MOFTEC.<sup>39</sup>

Article 15 provides that the time period for anti-dumping investigations shall be no longer than twelve months from the date of the proclamation of the acceptance of the complaint to the date of the proclamation of the final judgment. Under extraordinary circumstances the time limit may be extended an additional six months.

Provided the preliminary judgment or final judgment finds no dumping and/or injury, or the dumping margin or the account of the dumping product could be negligible, the investigation may be terminated. Termination may also occur when the petitioner(s) withdraw their complaint.<sup>40</sup>

Under Article 19 the investigation authorities may distribute questionnaires and take samples from interested parties, and should provide an opportunity for the interested parties to state their opinions "upon the parties' request."<sup>41</sup> MOFTEC has the discretion to dispatch personnel to relevant countries for investigation, provided there is "no objection from the relevant countries."<sup>42</sup>

Articles 20 and 21 are concerned with the information and materials in the investigation. Article 20 provides that if the interested parties fail to accurately provide information and relevant materials to the investigating authorities, or hinder the investigation by any other means, MOFTEC and SETC shall make their decision based on the information and materials available to them. MOFTEC and SETC should allow the petitioner and interested parties access to the materials of the pending anti-dumping case, except for those kept confidential.<sup>43</sup>

### 3. *Anti-dumping Measures*

#### a. Provisional Measures

Provided that the preliminary judgment finds the existence of dumping of a foreign product and injury to the domestic industry, the government may take the following pro-

38. See *id.* art. 16.

39. See *id.* art. 17, ¶¶ 1-2.

40. See Anti-dumping and Anti-Subsidy Regulations of the People's Republic of China, *supra* note 2, art. 18.

41. *Id.* art. 19.

42. *Id.* ¶¶ 1-2.

43. See *id.* arts. 20-21.

visional actions: (1) imposing provisional anti-dumping duty in accordance with prescribed procedure, and (2) requiring a cash deposit or other form of security. The amount of the provisional anti-dumping duty and the amount of cash deposit or other form of security should be in proportion to the dumping margin determined in the preliminary judgment.<sup>44</sup> The Tariff Schedule Commission of the State Council (TSC), upon proposal by MOFTEC, shall determine the imposition of the provisional anti-dumping duty. The requirement of a cash deposit or other form of security will be made solely by MOFTEC. Those provisional anti-dumping measures shall be announced by MOFTEC and put into effect by GAC and local customs.<sup>45</sup>

The time period of provisional anti-dumping measures, provided in Article 24, is four months from the date of the proclamation of the provisional measures. In extraordinary circumstances the period may be extended to nine months.<sup>46</sup>

#### b. Price Commitment and Suspension of Investigation Proceeding

Under Article 25, when the exporters of dumping products and the exporting government commit to take effective measures to eliminate the injury caused to the domestic industry, MOFTEC, upon consultation with SETC, may decide to suspend the anti-dumping investigation proceeding and make a public announcement. MOFTEC may require the exporter or exporting government to periodically supply relevant data on their commitment.<sup>47</sup>

#### c. Imposition of Anti-dumping Duties

Article 27 states that if the final judgment finds the existence of dumping, the state may impose anti-dumping duties against the dumped product "in accordance with the prescribed proceeding."<sup>48</sup> The second paragraph of this article provides "the prescribed proceeding" as proposed by MOFTEC, determined by TSC, and enforced by GAC and local customs.<sup>49</sup>

Articles 28 and 29 provide that the importer of the dumped product is the party responsible for paying the anti-dumping duties. And the amount of an anti-dumping duty may not exceed the dumping margin ascertained in the final judgment.<sup>50</sup>

Except for the provisional and final anti-dumping measures, the Regulation contains provisions about price commitment from the alleged dumping companies and their governments, suspension of investigation proceedings, the retroactive imposition of anti-dumping duties, and adjustments of anti-dumping duties, etc.

#### d. Adjustment of Anti-dumping Duties

Under Article 30, if there is a difference between the provisional duty and the duty finally determined, the adjustment may be made only when the final duty is lower than the provisional duty by refund of the overcharged portion of the duty. Provided the final determined anti-dumping duty is higher than the provisional duty, there will be no retroactive payment for the unpaid portion.<sup>51</sup>

44. See *id.* art. 22, ¶¶ 1-3.

45. See *id.* art. 23.

46. See Anti-dumping and Anti-Subsidy Regulations of the People's Republic of China, *supra* note 2, art. 24.

47. See *id.* art. 25.

48. *Id.* art. 27.

49. See *id.*

50. See *id.* arts. 27-29.

51. See *id.* art. 30.



If the final judgment is negative upon imposition of anti-dumping duty, any provisional duty imposed or any cash deposit or other security received shall be returned.<sup>52</sup>

e. Retroactive Imposition of Anti-dumping Duty

Provided that “(1) the dumping product had a history of causing injury to the relevant domestic industry, and the importer of the dumping product knew or should have known that the exporter of the product was dumping, and such dumping would cause injury to the relevant domestic industry; and (2) within a short period of time the dumping product was imported in large quantity and have caused injury to the relevant domestic industry,” Article 32 of the Regulation grants the power to competent authorities to impose retroactive anti-dumping duty, if both of the requirements are met.<sup>53</sup> The determination of imposing retroactive anti-dumping duty may be made by TSC upon proposal of MOFTEC within ninety days prior to the date of proclamation of the decision to adopt the provisional anti-dumping measures.<sup>54</sup>

f. Duration of the Anti-dumping Duty and Review by the Authorities

The Regulation provides in Article 33 that the duration of imposition of anti-dumping duty and price commitment is five years. During this period MOFTEC, upon consultation with SETC, has the power of its own, or upon the petition of the interested party, to review the decision of anti-dumping duty imposition. Within twelve months from the review, MOFTEC shall propose on modification, elimination or continuation of the imposition decision of the anti-dumping duty to TSC. The determination of review will be made by TSC then announced by MOFTEC.<sup>55</sup>

g. Refund of Anti-dumping Duty

If an importer of the dumping product has proof that the amount of the anti-dumping duty already paid exceeds the dumping margin, under Article 34, it may apply to MOFTEC for a duty-refund. Upon application, MOFTEC and GAC shall jointly investigate and verify relevant proofs. The refund proposal may be submitted by MOFTEC to the TSC for determination and GAC is in charge of enforcement of the refund.<sup>56</sup>

h. Actions against Evasion of Anti-dumping Measures

Article 35 states that MOFTEC, SETC, and relevant departments under the State Council may adopt appropriate actions to prevent evasion of anti-dumping measures.<sup>57</sup>

4. *Special Provisions for Anti-subsidiary*

Chapter 5 of the Regulation is concerned with the provisions of anti-subsidiary. Article 39 observes that the relevant provisions of anti-dumping “shall apply to injuries caused by subsidies, anti-subsidy investigation, and enforcement of anti-subsidy measures.”<sup>58</sup>

52. See Anti-dumping and Anti-Subsidy Regulations of the People’s Republic of China, *supra* note 2, art. 31.

53. *Id.* art. 32.

54. *See id.*

55. *See id.* art. 33.

56. *See id.* art. 34.

57. *See id.* art. 35.

58. The Anti-dumping and Anti-Subsidy Regulations of the People’s Republic of China, *supra* note 2, art. 39.

### 5. *Supplementary Provisions*

Among the supplementary provisions in chapter 6, Article 40 clarifies that the State may adopt corresponding measures based on actual circumstances against any country or region adopting discriminatory anti-dumping or anti-subsidy measures against exports from the People's Republic of China.<sup>59</sup>

## IV. Newsprint Case

### A. BACKGROUND

After years of economic reform, the cultural and entertainment needs of the Chinese domestic market surged rapidly. As a result, consumer demand for local, national, and international news led to an increased demand for newsprint. China's total demand for newsprint in 1996 totaled 900,000 tons, with local producers traditionally able to fulfill the market demands without keeping surplus stock.<sup>60</sup> During 1994–1995, the market share of the domestic newsprint industry remained at 80 percent. During this period foreign newsprint flooded into the Chinese market at a shocking speed and amount. By the second half of 1996, the market share of the domestic newsprint industry declined to approximately 70 percent. It then declined to 56.25 percent in the first quarter of 1997, 25.74 percent less compared to the same period in 1996.<sup>61</sup> In May 1996, at the meeting of national newsprint industry, one-third of the output of the domestic industry found no purchasers and was turned into stock.<sup>62</sup> This kind of situation never happened before. So, among the industrial sectors urging the government to take measures against unfair imports, the newsprint industry is the predominant one. It began anti-dumping preparation following promulgation of the Regulation. Ultimately, after almost two years of legal proceedings, the newsprint industry became the first in China to effectively utilize the anti-dumping sword against their foreign competitors.

### B. PETITIONERS

The nine petitioners filing the complaint included Jilin Papermaking Co., Guanzhou Papermaking Co., Yinbin Papermaking Co., Jiangxi Papermaking Co., Yueyang Papermaking Co., and four other paper mills. They are the major manufacturers of newsprint in China, with approximately 80 percent of the output of China's domestic industry.<sup>63</sup>

### C. PROCEEDING

Almost on the same day as the promulgation of the Regulation, the petitioners authorized a law firm in Beijing to represent them. The lawyers made careful preparations before submission of the written complaint and attached proofs to MOFTEC on October 16,

59. See *id.* art. 40.

60. See *Chinese Paper Producers Complain of Newsprint Dumping*, ASIAN ECONOMIC NEWS, Oct. 27, 1997, available at 1997 WL 15782602.

61. See Dorn & Orava, *supra* note 6.

62. See *Victory of First Anti-dumping Case in China*, CHINA NEWS AGENCY, Oct. 9, 1999.

63. See *id.*

1997. Then a news conference was held. That day was described as "a historical moment in the anti-dumping history of China."<sup>64</sup>

According to the complaint, large quantities of newsprint from the United States, Canada, and South Korea were imported into China's domestic market. Chinese customs statistics indicated that imported newsprint surged to 356,000 tons in 1996, compared with 49,000 tons in 1995, while 353,000 tons were imported through the end of August in 1997.<sup>65</sup> The price of the imported product dropped while the quantity imported increased sharply. It was alleged that the import price per ton declined from \$649 in 1995, to \$460 in 1996, to \$350 in 1997, compared with its normal value of the same period at \$637, \$658 and \$550, respectively.<sup>66</sup>

On December 10, 1997, MOFTEC accepted the anti-dumping complaint after consultation with SETC. The first anti-dumping investigation formally began. MOFTEC sent the written complaint to the foreign companies alleged dumping. The Ministry received responses from five Canadian companies and one Korean company within the required time period, but no response from any U.S. companies. SETC issued questionnaires to the affected Chinese companies in order to assess the damage, and all were returned in the required time period.<sup>67</sup>

MOFTEC announced the preliminary judgment on July 9, 1998. It stated that the Ministry found the existence of dumping of foreign newsprint product. On the same day, the preliminary judgment of SETC announced that there was material injury to the domestic newsprint industry and a causal link between the dumping and the injury. The authorities took provisional anti-dumping measures requiring the importers to provide a cash deposit corresponding to the dumping margin determined by the preliminary judgment.<sup>68</sup>

#### D. FINAL JUDGMENT

On June 3, 1999, MOFTEC and SETC both made final judgments affirming the determination of the preliminary judgments. MOFTEC concluded that all the relevant foreign companies were guilty of dumping to different degrees. SETC confirmed that dumping of the imported newsprint severely crippled the Chinese newsprint industry. The domestic newsprint output shrunk drastically, sales volume and revenues plummeted, prices fell, and inventories built up. Low production and decreasing profits put the Chinese newsprint manufacturers in a dire situation, and large numbers of workers in the newsprint industry were laid off.<sup>69</sup>

From that day, the anti-dumping duty was levied at the rate of 57 percent to 78 percent for four Canadian companies and 78 percent for the remainder of the Canadian companies; 9 percent for one Korean company, and 55 percent for the remainder of Korean company; and 78 percent for all U.S. companies.<sup>70</sup>

64. Dorn & Orava, *supra* note 6.

65. See Anti-dumping and Anti-Subsidy Regulations of the People's Republic of China, *supra* note 2.

66. See *id.* art. 23.

67. See *First Anti-dumping Case in China Slaps Import Duties on Newsprint from U.S., Canada, Korea*, CHINAONLINE, June 4, 1999, available at LEXIS, News, ChinaOnline File.

68. See *id.*

69. See *id.*

70. See *id.*

## V. The Following Cases

### A. COLD ROLLED SILICON STEEL CASE

The second anti-dumping complaint was filed in December 1998 against cold rolled silicon steel from Russia. The petitioner, Wuhan Steel Company, is the sole manufacturer of identical or like product in China. The complaint alleged that in 1996 that 62,071.53 tons of Russian cold rolled silicon steel was imported into China, an increase of 56.94 percent compared to 1995. The price of Russian product declined 11.7 percent in 1997 compared to 1996. In 1998, the price declined 14.7 percent compared to 1997. And the alleged dumping caused significant injury to Chinese domestic industry.<sup>71</sup>

On March 12, 1999, MOFTEC announced the acceptance of the complaint and sent it to the Russian companies. Two companies, Novolipetsk Iron & Steel Corp. (Novo) and Viz Steel Co. Ltd. (Viz), responded during the prescribed time. SETC sent questionnaires to the domestic industry on May 19.

After investigation, MOFTEC and SETC announced the affirmative preliminary judgment of dumping and injury on December 30, 1999. The cash bond collected upon import from Novo was 11 percent, and the bond from Viz was 43 percent. The cash bond on import from other Russian steel companies was 73 percent.<sup>72</sup>

These two companies separately appointed law firms in Beijing to be their representatives. The companies filed counter-complaints within the stipulated time limit. Upon advice from their lawyers, the two companies submitted applications for public hearings to the investigating authorities.<sup>73</sup>

The public hearing was held in accordance with the provision of the Regulation in March and April of 2000. The adversarial lawyers contended with each other carefully and seriously. After the public hearing, MOFTEC and GAC sent officials to Russia for further investigation.<sup>74</sup>

On September 11, 2000, final judgment was made. The anti-dumping duty was imposed at the rate of 6 percent to 62 percent on the Russian companies. It should be noted that the investigating authorities eliminated the 43 percent preliminary tariff imposed on Viz and reduced Novo's tariff from the preliminary 11 percent to 6 percent in the final judgment.<sup>75</sup>

### B. POLYESTER FILM CASE

On April 16, 2000, MOFTEC made the proclamation to initiate anti-dumping investigation against polyester film imported from South Korea. The six petitioners were Yizheng Chemical Fibre Co., Shanghai Chemical Co., and four other chemical manufacturers from

71. See *Anti-dumping Case of Wuhan Steel Company v. Russian Companies Got Result*, YANGTZE RIVER DAILY, Jan. 5, 2000.

72. See MOFTEC Proclamation No. 13, Dec. 30, 1999; see also Dow Jones Finance and Economic Information (Apr. 5, 2000).

73. See *Finance and Economic News*, HOMEWAY, Oct. 13, 2000.

74. See Anti-dumping and Anti-Subsidy Regulations of the People's Republic of China, *supra* note 2, art. 34.

75. See Joseph A. Slobodzian, *China's Trade Justice Tilts West*, NAT'L L.J. (2000).

Foshan in Guangdong province, Weifang in Shandong province, Ningbo in Zhejiang province, and another Nanjing chemical mill.<sup>76</sup>

The anti-dumping investigation revealed an increase in the exports of South Korean polyester film to China from 1996 (8159.7 tons) to 1998 (14,227 tons).<sup>77</sup> The increase in 1998 was 328 percent from January to September compared with the same period in 1997.<sup>78</sup> The price of imported film declined from \$4,975 per ton in 1996 to \$1,717 in 1997. There was a further drop in 1998 to \$1,053 per ton. Over the same period, there was a 14.1 percent rise in the market share held by South Korean products, to 28 percent.<sup>79</sup>

In the proclamation of MOFTEC on December 29, 1999, the preliminary judgment required the collection of the cash bond from the importers of 22 percent to 74 percent as the provisional anti-dumping measure.<sup>80</sup>

Final judgment of this case was made on August 25, 2000. South Korean companies were found guilty of dumping and were thus subject to an anti-dumping duty of 13 percent to 46 percent. Among them SKC Co., Ltd. was subject to duties at 13 percent, with Hyosung Corp. and Saehan Industries Inc., subjected to duties at 33 percent. All other South Korean producers, including Kolon Industries Inc., faced duties of 46 percent.<sup>81</sup>

### C. COLD-ROLLED STAINLESS STEEL SHEETS CASE

MOFTEC began the anti-dumping investigation against cold-rolled stainless steel sheets from Japan and South Korea on June 17, 1999. The petitioners were Taiyuan Steel Co., Shanghai Pudong Co. and Shanxi Precise Metal Co. The investigation affected nine major stainless steel suppliers from Japan, including Nippon Steel Co. and Nisshin Steel Co., Kawasaki Steel Corp., Nippon Metal Industry Co., and Sumitomo Metal industries Ltd., as well as six companies from South Korea, including Pohang Iron & Steel Co. and Sammi Special Steel Co.<sup>82</sup>

After investigation, MOFTEC ruled on April 13, 2000 that the dumping margins of Japanese companies were between 26 percent and 75 percent, while Korean companies were between 6 percent and 69 percent. On the same day, in the preliminary judgment, SETC found material injury by the alleged dumped products to domestic industry.<sup>83</sup>

In September and November of 1999, SETC received a petition for public hearing from some Japanese and South Korean companies. On May 8, 2000, the authorities received comments and attachments to the preliminary judgments from nine Japanese companies. They petitioned again for public hearing over the issue of the injury to Chinese domestic industry. On July 6, 2000, the public hearing regarding industry injury was held by SETC

76. See *Finance and Economic News*, XINHUA NEWS WEB, Aug. 25, 2000.

77. See *China: Anti-dumping Precedent*, ASIAN CHEMICAL NEWS, CHEMICAL BUSINESS NEWSBASE, Sept. 20, 2000.

78. See *We Are Handling Anti-dumping Case—Dispute Arise Again in Sino-Korean Trade*, BEIJING MORNING POST, Aug. 31, 2000.

79. See *id.*

80. See Dorn & Orava, *supra* note 6; see also *Victory of First Anti-dumping Case in China*, *supra* note 62.

81. See Dorn & Orava, *supra* note 6.

82. See Tsukawa Furukawa, *China Sets Dumping Margins on Japanese, Korean Stainless*, AM. METAL MKT., Apr. 18, 2000.

83. See *China Takes Provisional Anti-dumping Measures against Cold-rolled Stainless Steel Sheets from Japan and South Korea*, XINHUA NEWS AGENCY, Apr. 15, 2000.

in Beijing. The three anti-dumping petitioners argued against thirteen Japanese and South Korean companies, and government representatives from their countries.<sup>84</sup> Some basic arguments of Japanese companies, such as Nippon Steel, were that "the product [exported] to China is not hurting Chinese industry because it is a high quality product which can not be made in China."<sup>85</sup> Nisshin Steel said that the steel sheet shipped to China "did not compete with Chinese-manufactured products."<sup>86</sup>

#### D. ACRYLATES CASE

The latest anti-dumping investigation concerned acrylate esters from Japan, the United States, and Germany on December 10, 1999. The complaints were from Dongfang Chemical Plant (under Beijing Chemical Industry Group), the Acrylic Acid Plant (under Shanghai Gaoqiao Petrochemical Corporation), and Jilin Petrochemicals Limited, all of the enterprises that manufacture the identical chemical product in China.<sup>87</sup>

Petitioners alleged that imports from these three countries flooded in during recent years. In 1996, imports from Japan, Germany, and the United States accounted for 64 percent of China's total imports of the product.<sup>88</sup> This percentage rose to 69 percent in 1997 and to 76 percent in 1998.<sup>89</sup> As the quantity of the import grew, the average price of the product dropped. In 1997, the chemical's price was 21 percent lower than that in 1996 and in 1998 its price dropped by 17.5 percent from the price in 1997.<sup>90</sup> During the first quarter of 1999, the average export price from these three countries was 19 percent lower than the same period of 1998.<sup>91</sup> The selling price of acrylate from these three countries was significantly lower than their domestic market prices.<sup>92</sup>

As reported, this case is still under anti-dumping investigation by MOFTEC, SETC, and other authorities.<sup>93</sup>

## VI. General Characteristics and Critical Analysis

### A. GENERAL CHARACTERISTICS

In reviewing the current anti-dumping law and practice of China, one may find the following general characteristics. First, although China is neither a member of the WTO nor the GATT, it took concepts and rules from the GATT mechanism into its own governing law and regulation. In essence, these provisions are consistent with the substantive and procedural requirements of the corresponding GATT or WTO mechanisms. Second,

84. See *The Judgment of Anti-dumping Case against Cold-rolled Stainless Steel Sheets from Japan and South Korea is Pending*, CHINA ECONOMIC AFFAIRS DAILY, July 7, 2000.

85. *China Makes Antidumping Move against Japanese Steel*, ASIAN ECONOMIC NEWS, Apr. 17, 2000.

86. Furukawa, *supra* note 82.

87. See *China's Chemical Dumping Complaint Moves to Investigative Stage*, CHINAONLINE, Dec. 28, 1999.

88. See *id.*

89. See *id.*

90. See *id.*

91. See *id.*

92. See *id.*; see also *Antidumping of Acrylates in Progress in China*, CHINA CHEMICAL REPORTER, CHEMICAL BUSINESS NEWSBASE, Jan. 28, 2000, available at 2000 WL 15270640.

93. See *China to Take Action against Japan, US Alleged Dumping Cases*, BBC MONITORING ASIA PACIFIC, Dec. 9, 1999.

it is a crucial time for China to begin its enactment and practice of anti-dumping. On one hand, China is learning international rules, or as observed by some foreign resources, "practicing anti-dumping investigations before it joins the [WTO]."<sup>94</sup> On the other hand, the anti-dumping measures are crucial to counter-balance the increasing unfairness against Chinese products abroad observed by the domestic industry. Third, China's current anti-dumping practice focuses on industries such as newsprint, steel, and chemicals, which are related to the national economy and the people's livelihood, in which there are a huge amount of workers engaged. In those industries there are also a large number of enterprises formerly owned by the government.

## B. CRITICAL ANALYSIS

Since it is the beginning of China's anti-dumping legislation and practice, many problems have emerged.

### 1. *Judicial Review*

The FTL and the Regulation failed to bring anti-dumping investigations under judicial review. Judicial review is the last resort of both the alleged dumping parties and the domestic industries. However, there is no provision of judicial review of the investigation and judgments in China. Compared with the Regulation, most WTO countries, at least on the domestic industry's injury, provide for hearings before a judicial or quasi-judicial tribunal, which include the right to call witnesses and cross-examine those witnesses called by other parties. The right to judicial review, at least on questions of law, is in the hands of higher tribunals. The absence of it puts the interested parties in the position of having no judicial protection where they need it most.

### 2. *Lack of Specificity of Substantive Norms*

The second problem is the lack of specificity of some substantive norms. For instance, the Regulation provides that when determining the normal value, the comparable price of the foreign product in its home market is the priority. But there is no definition of the comparable price or how to compute it in the foreign product's home country or in a third country.<sup>95</sup>

There are some other examples. In the newsprint case, when adjusting the reasonable cost and profit of the dumped product, because there is no guidance in detail on how to calculate the reasonable cost and profit, the domestic industry deducted 5 percent of the exporting price as a reasonable cost in the written complaint. Both the foreign alleged dumping companies and the trade officials from MOFTEC doubted the factual and legal basis for the 5 percent deduction.<sup>96</sup>

### 3. *Causation*

Both the FTL and the Regulation require the establishment of causation between the dumping and the injury to the corresponding domestic industry. But it is unclear whether it means that a foreign dumping is the actual cause of substantial injury to the relevant

94. *Japan Steelmakers Puzzled by China's Antidumping Probe*, JUI PRESS TICKER SERVICE, July 7, 1999.

95. See Anti-dumping and Anti-Subsidy Regulations of the People's Republic of China, *supra* note 2, art. 4.

96. Statement according to the author's experience and information.

Chinese domestic industry. If multiple factors contribute to the injury, the questions arise that to what extent, as the proximate cause, or just one of the material causes, the foreign dumping should be responsible for the alleged injury and should be subject to further investigation and anti-dumping measures. When considering these problems, the relevant provisions of Article VI of the GATT and the Anti-dumping Agreement of the WTO should guide the anti-dumping investigating authorities.<sup>97</sup>

#### 4. *Accumulative Assessment*

Article 9 of the Regulation provides that the investigating authorities have the right to carry on accumulative assessment when the investigation involves products from more than two countries. But it gives no guidance regarding under what specific circumstances the accumulative assessment could be applied, what is the standard of it, what the procedure of it should be, etc.<sup>98</sup> The accumulative assessment is a powerful method of investigation. But if abused, the effect will be disastrous. The problem may be left to future judicial or administrative interpretation.

#### 5. *Standing*

There are standing requirements for the petitioners in the Regulation. But Article 11 of the Regulation does not require that the petitioners' collective output be a specific percentage of the general output of the whole domestic industry for the investigating authorities considering the complaint application to regard it as by or on behalf of the domestic industry.<sup>99</sup> It is a relatively liberal requirement in the Regulation. By comparison, the WTO Anti-dumping Agreements set forth the "50 percent + " standard and "25 percent-" standard. If the collective output of the domestic producers submitting the complaint outweighs that of the producers who oppose the complaint, the complaint shall be deemed "by or on behalf of the domestic industry."<sup>100</sup> At the same time if the collective output of the supporting domestic producers is less than 25 percent of the total domestic production of the petitioners, then the complaint shall not be considered to be "by or on behalf of the domestic industry."<sup>101</sup>

#### 6. *Anti-dumping Investigation Proceedings*

The Chinese anti-dumping investigation proceedings are the focus of criticism. Virtually all the problems illustrated above could be categorized as problems in the proceeding. Other than these, some time limits are murky. Upon receipt of the complaint there is no time limit for MOFTEC and SETC when considering acceptance of the complaint. Another problem is when the petitioners decide to withdraw their complaint during the investigation procedure; there is no time limit for their withdrawal. It should also be observed that the Regulation provides that the period of the provisional anti-dumping measures is four months, but it can "be extended to nine months in some extraordinary circumstances."<sup>102</sup> But it does not define what constitutes "extraordinary circumstances."<sup>103</sup>

97. See GATT, *supra* note 3, art. VI.

98. See Anti-dumping and Anti-Subsidy Regulations of the People's Republic of China, *supra* note 2, art. 9.

99. See *id.* art. 11.

100. *Id.*

101. Furukawa, *supra* note 82.

102. Anti-dumping and Anti-Subsidy Regulations of the People's Republic of China, *supra* note 2.

103. See *id.* art. 24.



In the newsprint case, the provisional anti-dumping measures were taken on July 9, 1998, and the final judgment was made on June 3, 1999. Some interested parties in the case criticized that the time period of provisional measures was extended to almost eleven months.<sup>104</sup>

"Liberal stipulation" or "stipulation only in principle" is another problem in the investigation proceedings. It could be interpreted as giving the anti-dumping authorities enough discretionary power to deal with various complicated issues. But the shortcoming is clear that the administrative officials may sometimes find themselves in an embarrassed position of lacking definite guidance, although everyone believes that the GATT-WTO mechanism and corresponding international practice is the ideal model. It will also be a source of foreign attack as to lack of transparency and due process.

This problem arose in the proceeding of the cases. For example, it is provided in article 19 of the Regulation that the investigating authorities shall provide an opportunity to the interested parties to express their opinion upon request.<sup>105</sup> In the cold-rolled stainless steel sheets case, SETC promulgated the "interim rule of public hearing for dumping to domestic injury" only one week before the holding of the public hearing.<sup>106</sup>

### 7. *Countervailing Issues*

The Regulation treats the countervailing issues generally the same as dumping. But only three clauses of special stipulations in chapter 5 could not cover the special characteristics, neither in substance nor in proceeding, of countervailing issues distinguished from anti-dumping. It would be confusing and burdensome for both the investigating officials and interested parties when applying the same rules of anti-dumping. For this reason the author agrees with the suggestion to divide the Regulation into two equal parts, or into two separate regulations, with one specifically dealing with anti-dumping measures and the other with countervailing measures.<sup>107</sup>

## VII. Forecast

Although there are many shortcomings in the law and practice of anti-dumping, China has achieved its first step in applying the WTO model of trade dispute resolution. The significance of this should not be underestimated. It may be, to paraphrase the ancient philosopher Lao-Tzu, the first step on a journey of a thousand miles.

In the EU there are at least 200 investigation personnel in charge of investigating dumping and injury. Critics have pointed out that the number of investigating officials in China is far less than one-tenth of the amount in the EU. Some experts said that after entry into the WTO there would be approximately thirty investigations initiated annually in China, the same level as the EU.<sup>108</sup>

104. Statement according to the author's experience and information.

105. Anti-dumping and Anti-Subsidy Regulations of the People's Republic of China, *supra* note 2, art. 19.

106. *First Anti-dumping Case in China Slaps Import Duties on Newsprint from U.S., Canada, Korea*, *supra* note 67.

107. See Guangsheng, *supra* note 18.

108. See *First Anti-dumping Case in China Slaps Import Duties on Newsprint from U.S., Canada, Korea*, *supra* note 67.

China should make further progress both to perfect its substantial provisions of the anti-dumping mechanism and to pay more attention to the issues of due process. According to some reports, a draft of the Anti-dumping and Countervailing Law of China has been submitted to the State Council for comments.<sup>109</sup> The draft is the recent summary of the experience and practice from the adoption of the Regulation in 1997. We expect it to lead the anti-dumping regime and practice in China into a transparent style consistent with the requirements of the WTO and global economic development.

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109. See *China is drafting the Anti-dumping Law*, LIBERATION DAILY, July 5, 2000; see also *Draft of the Anti-dumping and Countervailing Law of China will be submitted to the State Council*, DOW JONES FINANCE AND ECONOMIC INFORMATION, July 3, 2000.