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## ANDREW P. VANCE MEMORIAL WRITING COMPETITION WINNER: Legal Strategies for Challenging the Current EU Anti-Dumping Campaign Against Imports from China: A Chinese Perspective

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# LEGAL STRATEGIES FOR CHALLENGING THE CURRENT EU ANTI-DUMPING CAMPAIGN AGAINST IMPORTS FROM CHINA: A CHINESE PERSPECTIVE

*Hongliu Gong\**

## I. INTRODUCTION

Over the past twenty years, trade relations between the European Union ("EU") and China have been growing dramatically. Consider the imports into the EU from China. The value increased thirty-fold, from 2.107 billion euros in 1980, to 70.103 billion euros in 2000, covering a variety of products like machinery, chemical products textiles and clothing.<sup>1</sup> Today, China is the EU's third most important trading partner (after the United States and Japan), and the EU continuously maintained a trade deficit with China in the amount of roughly 32 billion euros during the first nine months of 2000.<sup>2</sup>

This may partly explain why there has been an accelerated anti-dumping campaign in recent years within the EU against Chinese products.<sup>3</sup> Chinese industries, whose competitiveness has increased in the European market, inevitably upset their

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1. Europa, *Bilateral Trade Relations: China, Statistics*, at [http://europa.eu.int/comm/trade/pdf/bilstat/econo\\_china.xls](http://europa.eu.int/comm/trade/pdf/bilstat/econo_china.xls) (last visited Feb. 24, 2002) [hereinafter Europa I].

2. *Id.* See also Europa, *Overview: Bilateral Trade and Investment Relations*, at <http://europa.eu.int/comm/trade/bilateral/china/china.htm> (last visited Feb. 24, 2002).

3. See Ke Ma, *Women Wei Shenmo Zong Bei Fan Qingxiao?* [Why Have We Always Been Targeted by the Anti-Dumping Campaigns?], SOUTHERN WEEKLY (Aug. 18, 2000) (on file with Journal).

European counterparts. It has further triggered the EU's anti-dumping process, where European companies continue to initiate anti-dumping proceedings to defend their own regimes. But a more important reason relates to China's "quasi-market economy" status under EU anti-dumping law and practice.<sup>4</sup> In most cases, the European Commission ("Commission") and the Council of the European Union ("Council") have regarded China as a non-market economy ("NME") country, and applied arguably discriminatory methodology and unfair policy in determining the margin of dumping and injury to alleged Chinese exporters/producers. Thus, an artificially high dumping/injury margin would easily be established.<sup>5</sup>

As a result, China has become one of the most significant targets in the EU anti-dumping practice. Since 1988, anti-dumping proceedings against China have substantially increased.<sup>6</sup> Even worse from this perspective, most of the proceedings against Chinese enterprises resulted in high anti-dumping duties or minimum undertakings.<sup>7</sup>

By the end of 1999, the Commission and Council had 151 anti-dumping measures and five anti-subsidy measures in force, covering sixty-three products and thirty-five countries. Of these 156 measures, thirty-three concerned China, eleven concerned Russia and eleven measures applied to other NME countries. In other words, the EU anti-dumping measures against China accounted for 21% of the whole, and 35% of those concerned NME countries.<sup>8</sup> These measures severely undermined the competitive capability of many Chinese industries involved, and virtually excluded them from the European mar-

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4. *Id.*

5. See Donghui Fu, *EC Anti-Dumping Law and Individual Treatment Policy in Cases Involving Imports from China*, 31 J. WORLD TRADE 73, 78-79 (1997).

6. *Id.*

7. Overview of the Monitoring of Third Country Safeguard Cases and of the Implementation of the Trade Barriers Regulation: Eighteenth Annual Report from the Commission to the European Parliament on the Community's Anti-Dumping and Anti-Subsidy Activities, COM(00)440 final at 19-20, available at [http://europa.eu.int/comm/trade/pdf/adrep\\_2000\\_en.pdf](http://europa.eu.int/comm/trade/pdf/adrep_2000_en.pdf) (last visited Feb. 12, 2002) [hereinafter Eighteenth Annual Report].

8. *Id.*

ket. In this sense, China has also become the most distinctive victim of the EU anti-dumping practice.<sup>9</sup>

In this Article, from a Chinese perspective, the author will suggest legitimate and effective strategies for challenging the current EU anti-dumping campaign against imports from China. Part II will illustrate the EU anti-dumping law applicable to imports from China. Part III will discuss the EU anti-dumping practice in relation to China. Part IV will describe the impact of the campaign on Chinese industries and emphasize the necessity for a Chinese challenge. Part V will propose a series of legal strategies for China to achieve the goal of true fair trade. Part VI will draw a conclusion.

## II. EU ANTI-DUMPING LAW APPLICABLE TO IMPORTS FROM CHINA

Dumping is a major aspect of the unfair trading practice in the EU's external trading relations.<sup>10</sup> Determination of dumping depends on three elements: (1) normal value; (2) export price; and (3) dumping margin (a result of the comparison of the former two).<sup>11</sup> According to the EU anti-dumping legislation, "A product is to be considered as being dumped if its export price to the Community is less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country."<sup>12</sup> Here, the comparable price means the normal value at which exporters sell goods on their domestic market.<sup>13</sup> In the EU anti-dumping practice, the targeted exporting countries are categorized as either a market economy ("ME") or an NME. The functioning of the EU anti-dumping instrument is based on these two respective categories.<sup>14</sup>

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9. See Ma, *supra* note 3.

10. TRADE IN ACTION, TRADE POLICY INSTRUMENT: ON GUARD FOR UNFAIR PRACTICE (2001), available at [http://europa.eu.int/comm/trade/policy/index\\_en.htm](http://europa.eu.int/comm/trade/policy/index_en.htm) (last visited Feb. 24, 2002).

11. Council Regulation 384/96 on Protection Against Dumped Imports from Countries Not Members of the European Community, art. 2, 1996 O.J. (L 56) 1, 4.

12. *Id.* art. 1(2).

13. See *id.* art. 2(1).

14. Jianyu Wang, *A Critique of the Application to China of the Non-Market Economy Rules of Antidumping Legislation and Practice of the European Union*, 33 J. WORLD TRADE 117, 119-20 (1999).

The main practical difference between the treatment of an ME and an NME is related to the methodologies adopted to determine the existence of dumping for the purpose of anti-dumping investigation.<sup>15</sup> For the exporters from an ME country, normal value is based on their own domestic price. For those who come from NME countries, the calculation relies on an analogue country methodology, which means normal value is based on the domestic price of an analogue country selected, other than that of the exporter's own country.<sup>16</sup> Adoption of the analogue country methodology seems merely a technical matter, but in fact is vital. It makes the dumping margin artificially high, and subsequently leads to a large amount of the anti-dumping duty imposed on exporters.<sup>17</sup>

Unless it is evident that a dumped product has caused the "material injury" to certain industries of the EU, no anti-dumping measure will be taken against this product.<sup>18</sup> So, the evaluation of injury is a primary step for an anti-dumping proceeding. Another primary step is the consideration of community interests.<sup>19</sup>

In general, the legal sources of the EU anti-dumping instrument are at three levels. The primary source is the "common commercial policy" ("CCP") laid down in Article 133 (ex Art. 113) of the Treaty Establishing the European Community.<sup>20</sup> It provides that the CCP "shall be based on uniform principles, particularly in regard to . . . export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies."<sup>21</sup>

Subject to the CCP, the Council has developed a comprehensive body of regulations to govern dumped imports from outside countries.<sup>22</sup> These are secondary sources of EU anti-dumping

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15. *Id.* at 120.

16. See Council Regulation 384/96, *supra* note 11, art. 2(1).

17. *Fu*, *supra* note 5, at 81.

18. Council Regulation 384/96, *supra* note 11, art. 3.

19. See *id.* art. 21.

20. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, art. 113, O.J. (C 340) 3, 237 (1997), available at [http://europa.eu.int/eur-lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf) (last visited Feb. 12, 2002).

21. *Id.*

22. See Eighteenth Annual Report, *supra* note 7, at 12. See generally Council Regulation 384/96, *supra* note 11; Council Regulation 2026/97, 1997 O.J. (L 288) 1.

law. Due to their operative and administrative nature, Council Regulations are the major source of law governing most aspects of the EU anti-dumping practice, providing general principles and implementing rules.<sup>23</sup>

Case law is the third major source of EU anti-dumping law.<sup>24</sup> With a competence to review anti-dumping cases, the European Court of Justice ("ECJ") and the European Court of the First Instance ("CFI") hear a large number of such cases to ensure correct implementation of EU rules. The judgments of these courts constitute another concrete legal basis for the EU anti-dumping instrument.<sup>25</sup>

### A. Brief Legislative History

The first anti-dumping law of the European Community ("EC") on "protection against dumping or the granting of bounties or subsidies by countries which are not members" was passed on April 5, 1968.<sup>26</sup> Since then, legislation in this field has developed over the last thirty years, reflecting the result of the General Agreement on Tariffs and Trade ("GATT") negotiations, judgments of the ECJ, new accessions to the EU or simple procedural or substantive refinements.<sup>27</sup> Of course, the changing economic situation of the EU's external trading partners, particularly NME countries, has also been taken into account.

The first law codifying the EC anti-dumping practice towards NME countries was Council Regulation 1681/79, introduced in 1979.<sup>28</sup> It contained a hierarchy of discriminatory special rules for calculating the normal value of products originating in NME countries.<sup>29</sup> Three years later, the EC promulgated

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23. See *infra* Part II.A. for an elaboration.

24. See Eighteenth Annual Report, *supra* note 7, at 16, 90-93.

25. *Id.*

26. Council Regulation 459/68 on Protection Against Dumping or the Granting of Bounties or Subsidies by Countries Which are Not Members of the European Economic Community, art. 1, 1968 O.J. (L 93) 1, 2.

27. See Wang, *supra* note 14, at 119.

28. Council Regulation 1681/79 Amending Council Regulation 459/68 on Protection Against Dumping or the Granting of Bounties or Subsidies by Countries Which are Not Members of the European Economic Community, 1979 O.J. (L 196) 1.

29. See *id.*

Council Regulations 1765/82<sup>30</sup> and 1766/82,<sup>31</sup> indirectly enumerating a number of NME countries to which the special anti-dumping rules should apply. China was counted as one of those countries.<sup>32</sup> In 1994, the two Regulations were repealed and replaced by Council Regulation 519/94, of which Annex 1 listed a group of countries considered as "state-trading countries" for anti-dumping calculation purposes.<sup>33</sup> China subsequently was covered in that list.<sup>34</sup>

The special anti-dumping rules applicable to NME countries continuously developed and were recently laid down in Article 2(7) of Council Regulation 384/96 ("Basic Anti-dumping Regulation" or "Basic Regulation") as the analogue country methodology.<sup>35</sup> Since its passage in 1995, the Basic Regulation has been the primary anti-dumping legislation of the EU.<sup>36</sup> Article 9(5) further codified a one country, one duty rule, and applied it to NME countries.<sup>37</sup>

In April 1998, the EU issued a new regulation, Council Regulation 905/98 ("New Anti-dumping Rule"), to amend Article 2(7) of the Basic Regulation.<sup>38</sup> The amendment eliminated China from the list of NME countries, and replaced the analogue country methodology with a case-by-case approach.<sup>39</sup> In the case of China, it means that the domestic prices and costs of the targeted Chinese products may be used to calculate normal value in the anti-dumping proceedings against imports if the country met certain criteria.<sup>40</sup> Regulation 905/98 represented significant progress in EU legislation, as it reflected efforts and

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30. Council Regulation 1765/82 on Common Rules for Imports from State-Trading Countries, 1982 O.J. (L 195) 1.

31. Council Regulation 1766/82 on Common Rules for Imports from the People's Republic of China, 1982 O.J. (L 195) 21.

32. See Wang, *supra* note 14, at 119.

33. Council Regulation 519/94 on Common Rules for Imports from Certain Third Countries and Repealing Regulation 1765/82, 1766/82 and 3420/83, Annex 1, 1994 O.J. (L 67) 89, 97.

34. See Wang, *supra* note 14, at 119.

35. Council Regulation 384/96, *supra* note 11, art. 2(7).

36. See Wang, *supra* note 14, at 119.

37. See Council Regulation 384/96, *supra* note 11, art. 9(5).

38. Council Regulation 905/98 Amending Council Regulation 384/96 on Protection against Dumped Imports from Countries Not Members of the European Community, art. 1, 1998 O.J. (L 128) 18, 19.

39. *Id.* art. 1.

40. See *id.*

intent to make the anti-dumping instrument adherent to the changing economic reality of the EU's NME trading partners so as to act "appropriate[ly]." <sup>41</sup>

### *B. Current Applicable Law*

Today, having experienced many amendments and changes in practice, the EU anti-dumping law applicable to imports from China as well as other NME countries is moving along toward greater maturity. The analogue country methodology and the one country, one duty rule, which have long been the cornerstone of the EU anti-dumping instrument against NME trading partners, and have long been severely criticized by Chinese scholars and practitioners as "discriminatory" and "unfair," <sup>42</sup> are phasing out as the EU introduces a new case-by-case approach into the anti-dumping practice against China and Russia. <sup>43</sup>

Such progress has been fixed by two Council Regulations currently in force: The Basic Anti-dumping Regulation and the New Anti-dumping Rule. As the primary anti-dumping law, the Basic Regulation provides general principles, overall procedures and guidelines for most of the substantive issues within the EU. <sup>44</sup> The general principles cover: (1) definitions of dumping and dumping-related factors (such as normal value, and like products); (2) determinations of dumping, injury and EU industry; (3) consultation; (4) verification visits; (5) non-cooperation; (6) confidentiality; and (7) disclosure. <sup>45</sup> Despite frequent and sometimes significant alterations in anti-dumping legislation, these general principles have continued unchanged.

The Basic Regulation also establishes a set of procedures for the operation of each anti-dumping proceeding, regardless of which country the targeted imports come from, whether MEs or NMEs. The overall procedures are illustrated as: (1) initiation of proceedings; (2) investigation; (3) provisional measures;

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41. *Id.* at 18.

42. Fu, *supra* note 5, at 79.

43. See Council Regulation 905/98, *supra* note 38, art. 1.

44. See Council Regulation 384/96, *supra* note 11.

45. See *id.* art. 1.

(4) undertakings; (5) termination without measures/imposition of definitive duties; and (6) duration, reviews and refunds.<sup>46</sup>

Article 2(7) of the Basic Regulation sets forth the analogue country methodology applied to imports from enumerated NME countries (including China) for calculation of normal value. It provides:

In the case of imports from non-market economy countries . . . normal value shall be determined on the basis of the price or constructed value in a market economy third country, 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 . . . .<sup>47</sup>

Article 9(5) of the Basic Regulation sets forth the one country, one duty rule applied to imports from enumerated NME countries in imposition of anti-dumping duty. It provides:

An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis . . . . 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.<sup>48</sup>

Accordingly, under the one country, one duty rule, the EU treats all suppliers of a certain industry from China as a unified body, therefore denying the individual export prices charged by each supplier, and imposing a single anti-dumping duty on all the suppliers concerned.<sup>49</sup> As the result of this rule, even an innocent Chinese exporter who does not commit dumping is subject to a duty, if other Chinese exporters in its industry do so. Further, the cooperating exporters have to pay a higher anti-dumping duty than their dumping margin, since a single duty rate is calculated on the basis of the average export prices of all the cooperating and non-cooperating exporters.<sup>50</sup>

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46. *See id.* arts. 5-9, 11.

47. *See id.* art. 2(7).

48. *See id.* art. 9(5).

49. Fu, *supra* note 5, at 80.

50. *Id.*

In addition, the export price of non-cooperating exporters is always determined on the basis of the facts then available, which can lead to a very high dumping margin.<sup>51</sup>

It is notable that the application of the one country, one duty rule in the EU anti-dumping practice against China is not exclusive, as some exceptions followed on occasion.<sup>52</sup> Those exceptions are subject to an "individual treatment" policy, under which the individual export prices charged by each accused Chinese exporter/producer would be counted to calculate an individual dumping margin, and any anti-dumping duty that may be imposed would be a specific one based on the particular situation.<sup>53</sup>

However, the implementation of the individual treatment policy by the EU is neither consistent nor predictable. In the 1990 "Tungsten Ores and Concentrate" case, the Commission determined separate dumping margins of 47.4% and 53.2% for two Chinese state trading companies, the China National Non-Ferrous Metals Import & Export Corporation and the China National Metals and Minerals Import & Export Corporation.<sup>54</sup> Subsequently, separate provisional duties were set for, and undertakings were offered to the two companies. But the EU did not explicitly pronounce any rules in this case to explain on what grounds it granted individual treatment.<sup>55</sup>

It was in the 1991 matter of "small-screen colour television[s]"("SCTVs") that the Commission and Council set up the relevant rules to examine whether individual treatment should

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51. *Id.*

52. *See id.* at 81, 84.

53. *Id.* at 81.

54. Commission Regulation 761/90 Imposing a Provisional Anti-Dumping Duty on Imports of Tungsten Ores and Concentrates Originating in the People's Republic of China, and Terminating the Proceeding Concerning Imports Originating in Hong Kong, 1990 O.J. (L 83) 23, 24-25. *See also* Council Regulation 2735/90 Imposing a Definitive Anti-Dumping Duty on Imports of Tungsten Ores and Concentrates Originating in the People's Republic of China and Definitive Collecting the Provisional Anti-Dumping Duty, 1990 O.J. (L 264) 1; Commission Decision 478/90 Accepting Undertakings Offered by Certain Exporters in Connection with the Anti-Dumping Proceeding Concerning Imports of Tungsten Ores and Concentrates Originating in the People's Republic of China and Terminating the Investigation with Regard to these Exporters, 1990 O.J. (L 264) 55.

55. *See* Fu, *supra* note 5, at 84.

be granted to Chinese exporters.<sup>56</sup> In this case, individual treatment was granted to Chinese joint-ventures with foreign investment, but not to state-owned companies.<sup>57</sup> Rules in the SCTVs matter were confirmed in other cases, for example "video tapes" in 1991,<sup>58</sup> and "certain polyester yarns" in 1992.<sup>59</sup> However, in the 1993 "bicycles" matter, the EU changed the policy, and individual treatment for Chinese companies was systematically refused.<sup>60</sup>

In April 1998, the New Anti-dumping Rule replaced Article 2(7) of the Basic Regulation and introduced a new case-by-case approach to the EU anti-dumping practice against China and Russia.<sup>61</sup> The New Anti-dumping Rule is composed of three subparagraphs. Subparagraph (a) maintains the provision of

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56. See Commission Regulation 129/91 Imposing a Provisional Anti-Dumping Duty on Imports of Small-Screen Colour Television Receivers Originating in Hong Kong and the People's Republic of China, 1991 O.J. (L 14) 31; Council Regulation 2093/91 on Imposing a Definitive Anti-Dumping Duty on Imports of Small-Screen Colour Television Receivers Originating in Hong Kong and the People's Republic of China and Collecting Definitively the Provisional Duty, 1991 O.J. (L 195) 1.

57. See Council Regulation 2093/91, *supra* note 56, at 5.

58. Commission Regulation 1034/91 Imposing a Provisional Anti-Dumping Duty on Imports of Video Tapes in Cassettes Originating in the People's Republic of China, 1991 O.J. (L 106) 15; Council Regulation 3091/91 Imposing a Definitive Anti-Dumping Duty on Imports of Video Tapes in Cassettes Originating in the People's Republic of China and Definitively Collecting the Provisional Duty, 1991 O.J. (L 293) 2.

59. Commission Regulation 2904/91 Imposing a Provisional Anti-Dumping Duty on Imports of Certain Polyester Yarns (Man-Made Staple Fibres) 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, 1991 O.J. (L 276) 7; Council Regulation 830/92 Imposing a Definitive Anti-Dumping Duty on Imports of Certain Polyester Yarns (Man-Made Staple Fibres) Originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and Collecting Definitively the Provisional Duty, 1992 O.J. (L 88) 1.

60. Commission Regulation 550/93 Imposing a Provisional Anti-Dumping Duty on Imports of Bicycles Originating in the People's Republic of China, 1993 O.J. (L 58) 12, 18-19; Council Regulation 2474/93 on 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, 1993 O.J. (L 228) 1, 3-4.

61. Council Regulation 905/98, *supra* note 38, art. 1.

the original Article 2(7) of the Basic Regulation.<sup>62</sup> Subparagraph (b) inserts the new case-by-case approach. It provides:

In anti-dumping investigations concerning imports from . . . the People's Republic of China, normal value will be determined in accordance with paragraph 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subjective to the investigation and in accordance with the criteria and procedures set out in subparagraph (c) that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under subparagraph (a) shall apply.<sup>63</sup>

Accordingly, China is not automatically designated as an ME country, so the targeted Chinese industries will not be entitled to full ME status in the determination of normal value and export price, unless they can prove the existence of prevailing ME conditions listed in subparagraph (c).

Subparagraph (c) illustrates five cumulative criteria for granting ME status to the Chinese or Russian companies under investigation for dumping, and puts the burden of proof on these companies. These accused companies need to prove they meet the following:

- (1) Decisions of firms are taken without significant State interference and are made in response to market signals;
- (2) Accounts must be independently audited in line with international accounting standards;
- (3) Production costs and the financial situation of the company are not affected by distortions carried over from the former State-led economic system, barter trade or compensation of debts;
- (4) Companies are subject to bankruptcy and property law; and
- (5) Exchange rate conversions are carried out at market rates.<sup>64</sup>

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62. *Id.*

63. *Id.*

64. Commission Proposal for a Council Regulation Amending Regulation 384/96 on Protection Against Dumped Imports from Countries Not Members of the European Community, COM(00)363 final at 6, *available at* [http://europa.eu.int/eur-lex/en/com/pdf/2000/com2000\\_0363en01.pdf](http://europa.eu.int/eur-lex/en/com/pdf/2000/com2000_0363en01.pdf) (last visited Feb. 24, 2002) [hereinafter Commission Proposal].

With the New Anti-dumping Rule in force, Article 9(5) of the Basic Regulation is consequently altered. A more flexible case-by-case approach has replaced the one country, one duty rule. The accused Chinese exporters/producers will be assessed an individual anti-dumping duty other than a country-wide duty as long as they meet the criteria provided in the New Anti-dumping Rule.

### III. EU ANTI-DUMPING PRACTICE IN RELATION TO CHINA

#### *A. Historical Overview*

Europe has been an export market for Chinese goods for many years.<sup>65</sup> In the early years, the anti-dumping duty was employed to block Chinese light industrial products, including shoes, suitcases and bags from entering the European market. Later, the target shifted to mechanical and electronic products.<sup>66</sup>

The first EU anti-dumping matter against China was its investigation of "saccharin," initiated in 1979.<sup>67</sup> But the brunt of the campaign against China began in 1988 when China carried out its open policy and commenced national economic reform, which succeeded in bringing about an increase in China-EU trade interactions.<sup>68</sup> Between 1990 and 1994, the EU initiated 166 anti-dumping investigations against imports from thirty-two non-Member States, among which twenty-five were against China, with thirty-one products (involving the chemical, electronic, and iron and steel sectors, and other light industries) subject to EU measures.<sup>69</sup> Later, during the five-year period from 1995 to 1999, 218 investigations were initiated on imports from thirty-nine non-Member States.<sup>70</sup> China was one of two

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65. See Europa I, *supra* note 1.

66. *Boob Tube Ballyhoo: China TV Makers Unite to Challenge EU Anti-Dumping Charges*, CHINA ONLINE (July 6, 2000), at <http://www.chinaonline.com> [hereinafter *Boob Tube*].

67. Notice of Initiation of Anti-Dumping/Anti-Subsidy Procedure Concerning Saccharin and its Salts Originating in China, Japan and the USA, 1979 O.J. (C 207) 4.

68. See Fu, *supra* note 5, at 73-74.

69. *Id.* at 74-75.

70. Eighteenth Annual Report, *supra* note 7, at 20.

main countries concerned, with twenty-nine investigations against her.<sup>71</sup> The other was India, with twenty-five cases.<sup>72</sup>

A rapid growth of the EU anti-dumping campaign against China is reflected in the SCTVs matter.<sup>73</sup> Chinese color televisions first entered the European market in the 1980's. Currently, annual exports of Xiamen Overseas Chinese Electronic Co. Ltd. ("XOCECO") sets alone are between 400,000 and 500,000 units.<sup>74</sup> In 1988, the EU began to investigate anti-dumping charges brought against color televisions made in China and South Korea. The result of that investigation came out against the manufacturers, and an anti-dumping duty of 15.3% was levied on Chinese televisions beginning in 1991.<sup>75</sup>

In 1992, the EU launched another investigation of imported televisions, which resulted in an anti-dumping tariff of 25.6% being imposed by the Council on Chinese sets beginning in March 1995.<sup>76</sup> Three years later, following the promulgation of the New Anti-dumping Rule, the EU decided that the existing tariff rate on imported sets would remain unchanged for most nations, but rise to 44.6% for those made in China.<sup>77</sup> Thus, for all intents and purposes, Chinese color televisions were expelled from the European market.<sup>78</sup>

### *B. The Current Problematic Situation*

In July 1998, the New Anti-dumping Rule entered into force, making significant legislative progress in the EU anti-dumping

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71. *Id.* at 127.

72. *Id.*

73. See Commission Regulation 129/91, *supra* note 59; Council Regulation 2093/91, *supra* note 59.

74. See *Boob Tube*, *supra* note 66.

75. Council Regulation 2094/91, *supra* note 59, art. 2.

76. Council Regulation 710/95 Imposing a Definitive Anti-Dumping Duty on Imports of Colour Television Receivers Originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand and Collecting Definitively the Provisional Duty Imposed, art. 1(2), 1995 O.J. (L 73) 3, 11.

77. Council Regulation 2584/98 Amending Regulation 710/95 Imposing a Definitive Anti-Dumping Duty on Imports of Colour Television Receivers Originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand and Collecting Definitively the Provisional Duty Imposed, art. 1, 1998 O.J. (L 324) 1, 12.

78. See *Boob Tube*, *supra* note 66.

regime.<sup>79</sup> However, this has not been followed by the significant progress that many observers may have expected. The EU campaign against China has not been restrained, nor have the accused Chinese exporters/producers been afforded more beneficial treatment (ME status) in anti-dumping proceedings due to the 1998 amendments.

In 1999, the new anti-dumping initiations within the EU reached eighty-six, involving imports from twenty-nine non-Member States and covering thirty-two products.<sup>80</sup> Historically, this is the largest number of new initiations in comparison with any prior year, such as twenty-nine in 1998 or forty-five in 1997.<sup>81</sup> Among those eighty-six anti-dumping initiations, twelve involved Chinese products, accounting for 13.95% of all new investigations in that year.<sup>82</sup>

One important reason for such an increase of anti-dumping actions is related to the Asian financial crisis.<sup>83</sup> The crisis led to a decline in domestic consumption in South East Asia, and affected trade with countries traditionally exporting to this region. In turn, countries such as China were compelled to redirect exports into other available markets, mainly towards the U.S. and the EU.<sup>84</sup> In this context, reference is made to the increase in new investigations opened by the EU concerning China and Taiwan.

However, the Asian financial crisis is essentially an occasional circumstance that may not explain the whole story of the ongoing severe EU anti-dumping practices against China, and a continuous trend of such practices appears inevitable for the near future. Meanwhile, the introduction of the New Anti-dumping Rule to this field has not yet brought about a situation that would inspire optimism about prospects for less discrimination and greater fairness in EU policy and practice toward Chinese business.

From July 1998 to June 2000, there have been nine anti-dumping investigations concerning the implementation of the New Anti-dumping Rule with China, where twenty-seven ac-

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79. Council Regulation 905/98, *supra* note 38, art. 2.

80. Eighteenth Annual Report, *supra* note 7, at 122.

81. *Id.* at 20.

82. *Id.* at 124-26.

83. *See id.* at 21.

84. *Id.*

cused Chinese companies claimed ME treatment. In the end, only three of them were granted ME status, representing just over 10% of all companies making the ME petitions.<sup>85</sup>

The low success level of ME claims is not in line with the original expectations from both the EU and China. A main reason for such a significant failure is related to the ability of the claiming Chinese companies to meet the five criteria set forth in the New Anti-dumping Rule.<sup>86</sup> For the twenty-four companies who were refused ME treatment, the EU decided that they had failed to meet the five criteria due to the following facts: (1) "restrictions on selling on the domestic market;" (2) "significant state interference in decision-making;" (3) "absence of properly audited accounts;" (4) "significant distortions in costs as a result of previous state involvement in the company;" and (5) that "barter trade commonly exists."<sup>87</sup>

At this point, we can see that the Chinese steel industry has been a typical case. In May 1999, the Commission initiated an investigation within the EU regarding "hot rolled . . . non-alloy" steel imported into the European market by China, Romania and India, resulting in an imposition of anti-dumping duties.<sup>88</sup> The case was remarkable at the time, for it was the first large-scale test case of the New Anti-dumping Rule which recognized China's gradual transition to a market economy. To challenge the EU's orthodox dumping formulae, Brussels-based lawyers representing Chinese exporters invoked the right granted to Beijing and Moscow two years earlier by submitting price data from the Chinese domestic market rather than from a comparable reference country which exports the same product as was always the case before the New Anti-dumping Rule was introduced.<sup>89</sup>

Though the Commission's anti-dumping officials declared that they would never "take a soft or a tough line with the Chi-

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85. See Commission Proposal, *supra* note 64, at 6.

86. See *id.* at 6-7.

87. *Id.*

88. Commission Decision 307/2000 Imposing a Provisional Anti-Dumping Duty on Imports of Certain Hot-Rolled Flat Products of Non-Alloy Steel Originating in the People's Republic of China, India and Romania, art. 1, 2000 O.J. (L 36) 4, 18. See also Peter Chapman, *Chinese Steel Probe Will be Key Test of New Anti-Dumping Rules*, EUR. VOICE, May 1999, at 20, 26.

89. See Chapman, *supra* note 88, at 26.

nese" since they were "technocrats," and would "take everything on a case-by-case basis,"<sup>90</sup> the result was rather frustration. All six Chinese companies claiming ME treatment in this case were refused, as the Commission decided that none of those companies met the criteria on an individual basis, although as a group the six together demonstrated that all the criteria were in fact met.<sup>91</sup> The Commission listed the reasons for its refusal as: (1) all companies were fully or partially owned by the state; (2) agreements existed to purchase raw materials from state owned suppliers; and (3) only nominal fees were paid for land-use rights under barter trade practices.<sup>92</sup>

In May 2000, the Commission initiated another investigation against Chinese "fluorescent" lighting products, involving several hundred Chinese manufacturers.<sup>93</sup> Of the Chinese manufactures investigated through random sampling, only two were finally entitled to ME status and able to take advantage of their preferential tariff treatment.<sup>94</sup> Seven other Chinese companies were not so fortunate in receiving NME status, meaning their products would be subject to the high average tariffs.<sup>95</sup>

### C. Future Trends

From all that has been reviewed above, with rapid growth of China-EU trade relations, a continuous trend of the EU anti-dumping campaign against Chinese products is foreseeable in the next five to ten years (or even longer).<sup>96</sup> The improvement of the EU instrument, to adhere to the changing reality of China's economy,<sup>97</sup> may provide the accused Chinese industries more or less legal opportunity to defend against, and challenge

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90. *Id.*

91. Commission Decision 307/2000, *supra* note 88, at 8. *See also* Commission Proposal, *supra* note 64, at 7.

92. *See* Commission Proposal, *supra* note 64, at 7-8.

93. Commission Regulation 255/2001 Imposing a Provisional Anti-Dumping Duty on Imports of Integrated Electronic Compact Fluorescent Lamps Originating in the People's Republic of China, 2001 O.J. (L 38) 8. *See also EU Targets Chinese Light-Fixture Producers in Anti-Dumping Probe*, CHINA ONLINE (Aug. 16, 2000), at <http://www.chinaonline.com> [hereinafter *EU Targets*].

94. Commission Regulation 255/2001, *supra* note 93, at 10.

95. *Id.* at 10-12.

96. *See Boob Tube*, *supra* note 66.

97. *See* Council Regulation 905/98, *supra* note 38, at 18.

this ongoing campaign, but not stop it. In addition, the entry of China into the World Trade Organization ("WTO")<sup>98</sup> may help her gain international judicial remedies to the EU anti-dumping campaign under the international trade regime.<sup>99</sup> Realistically, however, China will never be able to wipe out the campaign.

#### IV. IMPACT OF THE EU ANTI-DUMPING CAMPAIGN ON CHINESE INDUSTRIES

The ongoing EU campaign against imports from China has invited growing concern from both Chinese export industries and the government in Beijing.<sup>100</sup> Since the full campaign began in 1988, it has created substantial, serious impacts on many aspects of the China's economy.<sup>101</sup>

##### *A. A Most Visible and Direct Impact: Monetary Losses of Chinese Industries*

Usually, the value of an anti-dumping case is so high that each percentage point of an anti-dumping margin can represent a significant annual cost to the company.<sup>102</sup> In the case of Chinese industries involved, from 1990 to 1997, the import value of Chinese products subject to EU investigations amounted to roughly 100-200 million euros per year, corresponding to 1% of the total value of annual imports from

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98. On November 10, 2001, the WTO's Ministerial Conference approved China's entry into the WTO. See Press Release, World Trade Organization, WTO Ministerial Conference Approves China's Accession (Nov. 10, 2001), available at [http://www.wto.org/english/news\\_e/pres01\\_e/pr252\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr252_e.htm) [hereinafter Press Release].

99. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1226 (1994), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm) (last visited Feb. 24, 2002) [hereinafter DSU].

100. Yiwei Wang, *Philips De Yuandong Yinmo* [Philips' Far-Eastern Conspiracy], GUANGZHOU DAILY ONLINE (Sept. 22, 2000), at <http://dailynews.sina.com>.

101. *Id.*

102. See Christopher F. Corr, *Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures*, 18 NW. J. INT'L L. & BUS. 49, 103 (1997).

China.<sup>103</sup> In 1994, the import value of Chinese products subject to EU investigations or measures corresponded to roughly 1 billion euros, or more than 4% of the total import value (23 billion euros) of Chinese products that year.<sup>104</sup>

*B. Another Visible and Direct Impact: Inferior Position of Chinese Exporters/Producers Within the European Market*

An anti-dumping case may result in imposition of prohibitive company-specific import duties, thus placing the exporting company concerned at a competitive disadvantage (relative to domestic companies, as well as exporters from non-targeted countries). If the dumping duties are high enough, exporters can be excluded from the market entirely.<sup>105</sup>

Suffering the EU anti-dumping campaign for more than ten years, quite a few Chinese industries, especially those who have strong competitive capability in the world market, have been severely damaged in their business, either losing significant market share or being expelled from the European market.<sup>106</sup> Among these victims, the Chinese television industry is a significant example.<sup>107</sup>

Before 1993, the export of a single Chinese television manufacturer, XOCOCO, to the EU had reached 300,000 sets a year.<sup>108</sup> Until 1999, after experiencing a twelve-year EU anti-dumping campaign, the total export of the Chinese television industry to the EU market was just 30,000 sets.<sup>109</sup> By now, the Chinese television industry has almost been excluded from the European market.<sup>110</sup> An even earlier example is the Chinese bicycle industry. In 1991, China's export level reached 2,000,000 bicycles.<sup>111</sup> After being hit with an anti-dumping

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103. Fu, *supra* note 5, at 76.

104. *See id.* at 76-77.

105. *See* Corr, *supra* note 102, at 74.

106. *See* Yiwei Wang, *supra* note 100.

107. *See* Ma, *supra* note 3.

108. *Id.*

109. *Id.*

110. *Id.*

111. Xuezhong Wan, *Zhongguo Chengwei Guoji Fan Qingxiao Zui Da Shouhaizhe* [China has Become the Most Distinctive Victim in the International Anti-Dumping Practice], CHINA LEGAL DAILY (Aug. 8, 2000), at [http://www.legaldaily.com.cn/gb/contents/2000-08/08/content\\_2886.htm](http://www.legaldaily.com.cn/gb/contents/2000-08/08/content_2886.htm).

duty of 30.6% in 1993, this industry was effectively expelled from the European market.<sup>112</sup> China's fluorescent lights industry presents a more recent case. Shenzhen Zhongdian Lighting Co. ("Shenzhen Zhongdian"), China's leading enterprise in this industry, exported lighting products worth almost USD \$40 million in 1999, with half of these products being exported to EU Member States.<sup>113</sup> However, since May 17, 2000, when the EU initiated its investigation against this industry, Shenzhen Zhongdian's export orders have fallen daily, with the company's current daily export volume plummeting more than 60%.<sup>114</sup>

What is more painful to the Chinese is that in numerous cases where their products were excluded from the European market as a result of the imposition of anti-dumping measures, the market shares previously held by Chinese exporters were simply replaced by the exports from other developing countries.<sup>115</sup>

### *C. The Longstanding, Profound Impact on Chinese Emerging Industries*

In the EU anti-dumping practice, many targeted Chinese industries are emerging industries such as electronics and steel production, both vital to China's economic development.<sup>116</sup> Due to current EU law and practice, the conclusion of a single anti-dumping case against one or more individual Chinese companies may become a quasi-precedent for later cases against others in the same industry. Therefore, with respect to the European market, one conclusion in favor of the European complainant may threaten the exportation of the whole Chinese industry concerned. Also, the more such conclusions come out, the more European companies will be encouraged to abuse their anti-dumping rights against their Chinese counterparts.<sup>117</sup> This creates an even more unfair and discriminatory circum-

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112. See Council Regulation 2474/93, *supra* note 60, art. 1.

113. See *EU Targets*, *supra* note 93.

114. See Commission Regulation 255/2001, *supra* note 93; *EU Targets*, *supra* note 93.

115. See Fu, *supra* note 5, at 104-105.

116. See *Boob Tube*, *supra* note 66.

117. See Fu, *supra* note 5, at 104.

stance in regard to Chinese products exported into the European market. As a result, not only will the emerging Chinese industries be damaged, but long-term China-EU trade relations will be undermined.

*D. The Long-Term, Negative Impact on China's Foreign Direct Investment*

Since the 1980's, when China enacted its open policy and commenced economic reform, it has established an export-oriented economy and attracted tremendous foreign direct investment ("FDI"). Most of the Chinese exporters are foreign-investment enterprises.<sup>118</sup> As the EU anti-dumping campaign becomes more and more severe concerning imports from China, there is a sharp decrease of exports and profits by these enterprises, which may discourage the foreign investors from continuing to invest in Chinese industries affected by the EU campaign.<sup>119</sup>

No doubt, the ongoing EU campaign has led to serious negative effects at all levels of China's economy. As this campaign evidences a continuous trend, it is increasingly urgent and necessary for the Chinese industries concerned and China itself to develop a set of adequate and effective legal strategies of defense and challenge.<sup>120</sup>

V. LEGAL STRATEGIES FOR CHINA TO CHALLENGE THE EU ANTI-DUMPING CAMPAIGN

As previously mentioned, the ongoing EU anti-dumping campaign against imports from China has not only resulted in serious negative impacts on the Chinese industries concerned, but has also become a large obstacle to the development of China-EU trade relations. To deal with that difficult situation,

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118. SHAUN BRESLIN, "MADE IN CHINA": THE GROWTH OF CHINESE TRADE 9-10 (Cent. for the Study of Globalization and Regionalisation, Working Paper No. 19/98, 1998), available at <http://www.warwick.ac.uk/fac/soc/GSGR/wpapers/wp1998.pdf> (last visited Feb. 24, 2002).

119. See Wan, *supra* note 111.

120. See *Yingjie Guojihua Tiaozhan - Yingdui Oumeng Fan Qingxiao Yantaohui Lianhe Shengming* [Joint-Declaration Upon the Seminar on Meeting International Challenges in Dealing with the EU Anti-Dumping Campaign], GUANGZHOU DAILY ONLINE (Sept. 22, 2000), at <http://dailynews.sina.com> [hereinafter *Joint Declaration*].

China and its enterprises need to develop adequate, effective legal strategies to defend and challenge where appropriate.<sup>121</sup> In this context, efforts made by both business and government are equally important, and both should work in tandem to accomplish their common goals.

*A. Strategies for the Chinese Enterprises Concerned to Diminish or Avoid Anti-Dumping Liability*

As direct victims of the EU anti-dumping campaign, targeted Chinese exporters/producers tangibly suffer the consequences of each EU investigation. So, it must be in their best interests to conduct a strong and effective defense against the dumping claims, to diminish or avoid liability. For this purpose, the Chinese enterprises concerned may want to consider the following strategies.

**1. The Prompt and Effective Response to the EU Anti-Dumping Actions**

When receiving an EU anti-dumping allegation, the Chinese enterprises involved should take a positive or even aggressive attitude, promptly and effectively responding to these actions. Many lessons learned through the experiences of Chinese industries repeatedly shows the correctness of this strategy.<sup>122</sup>

In the past twelve years, most of the Chinese enterprises involved in the EU anti-dumping practice have taken a passive attitude on their own role. They either ignored or just remained silent concerning the anti-dumping initiations targeting them, considering the costly defense procedures, protection of operational secrets of the enterprises, or even a traditional idea that said "[s]helf it when it is none of my business."<sup>123</sup> But it truly is their business.

The consequences of inaction have been tragic. With the lack of answers from the accused Chinese companies, in most cases, the EU directly imposed severe anti-dumping measures on Chinese products merely based on the available facts provided

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121. *See id.*

122. *See* Xiao Yu, *China's TV Industry Answers EU Anti-Dumping Suit*, CHINA ECON. WEEKLY (Aug. 25, 2000), at <http://www.ultrachina.com>.

123. *Id.*

by the European companies. Gradually, many Chinese industries concerned were kicked out of the European market.<sup>124</sup>

For instance, until 1999, during ten years of EU investigations and reviews into SCTVs and the Chinese television dumping matters, all accused Chinese enterprises in the television sector retreated into obscurity, no one standing up to answer the claims.<sup>125</sup> During the television anti-dumping proceeding in 1998, in one of a series of consequences, the Council boldly raised the Chinese anti-dumping tax rate to 44%, and in effect excluded Chinese enterprises from the European market.<sup>126</sup> In sharp contrast, Samsung Electronics Co., Ltd. and LG TeleCom of South Korea formed a strategic alliance during the case review, provided complete data for responding, lobbied through different channels, and defeated the claims they faced. With a 15.1% anti-dumping tax rate, South Korean firms easily occupied the market share previously enjoyed by the Chinese.<sup>127</sup>

This example should persuade Chinese enterprises to take a positive (or even aggressive) attitude toward the role they play in EU anti-dumping investigations. Answering such allegations may be costly, but it will definitely cost more if they default in the case and do nothing. Every targeted Chinese exporter/producer should take the EU proceedings for what they are: efforts by EU producers to make foreign producers less competitive or shut them out of the European market altogether.<sup>128</sup> A prompt and effective response to those actions would always be a good start for the Chinese exporters/producers to win the cases and discourage their European counterparts from further abuse of the anti-dumping instrument.

## 2. A Strong and Sound Defense

Of course, a good start does not mean ultimate success. Chinese enterprises should further conduct a strong and sound

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124. See *Boob Tube*, *supra* note 66.

125. Yu, *supra* note 122.

126. See Council Regulation 2584/98, *supra* note 77, art. 1.

127. See Yu, *supra* note 122.

128. See Edward A. Vermulst & Folkert Graafsma, *A Decade of European Community Anti-Dumping Law and Practice Application to Imports from China*, 26 J. WORLD TRADE 5, 42 (1992).

defense in line with the current EU anti-dumping instrument. After all, any EU anti-dumping proceeding would be subject to the jurisdiction of the Member State where the applicable law is the EU anti-dumping law.

For this defensive purpose, Chinese companies concerned need to take full advantage of the current EU anti-dumping instrument for their own interest. First of all, they should develop a complete, accurate working knowledge of the EU rules, in the sense of both substance and procedure. Then, with the knowledge acquired, they may strategically apply the EU anti-dumping rules in favor of Chinese interests to build up an effective, strong defense. Below are presented several aspects of how to carry out this strategy.

Due to the nature of anti-dumping proceedings, accused Chinese enterprises should pay attention to the calculation of dumping margin (by which the existence of dumping and the anti-dumping rate are determined),<sup>129</sup> and try to minimize this margin in their respective cases. A calculation in favor of the Chinese companies can be conducted through a number of steps. First, the Chinese enterprises should seek full ME status by convincing the EU they fulfill the five criteria provided in the New Anti-dumping Rule.<sup>130</sup> Succeeding in doing so, the Chinese enterprises will be entitled to a normal methodology in the determination of dumping margin, which may minimize the margin the most.

When failing to obtain full ME status, Chinese enterprises may shift their efforts to pursuing a traditional individual treatment which is occasionally available to the accused companies under the EU regime.<sup>131</sup> Individual treatment can contribute to minimizing the dumping margin of targeted Chinese enterprises, for their individual domestic export price will be taken into account, and their own comparative advantages in the European market (low labor cost, low material cost) will possibly be accepted for purpose of adjusting the margin as well.<sup>132</sup>

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129. See Council Regulation 384/96, *supra* note 11, art. 2(11)-(12).

130. See Council Regulation 905/98, *supra* note 38, art. 1.

131. See Fu, *supra* note 5, at 81.

132. See Wang, *supra* note 14, at 145.

However, the individual treatment does not exclude the application of an undesirable analogue country methodology in the determination of normal value.<sup>133</sup> The accused Chinese enterprises may still risk a high dumping margin. In light of this, how to choose an appropriate analogue country will still be a big concern.

As for those who neither obtain full ME status nor receive individual treatment, they may risk the highest dumping margin, since the EU can be expected to apply the most unfair and discriminatory anti-dumping policy to their cases, as it has done in the past to most of the accused Chinese companies.<sup>134</sup> For these unfortunate enterprises, the only strategy available, in respect to dumping margin calculations, is to make certain that an appropriate analogue country is selected for determining normal value. It should be noted that calculation of dumping margin is merely one of the technical aspects of an anti-dumping proceeding. Though a vital part, it can never replace the functioning of the entire proceeding. So, if a Chinese enterprise fails to get credits in this part, it does not mean all is lost.

According to current EU law, anti-dumping measures shall not be imposed until the dumping causes material injury to EU products, such that the latter cannot compete on an equal footing with the foreign importers.<sup>135</sup> This provides the accused a solid legal ground upon which there have been quiet a few Chinese companies released from the specter of adverse findings to avoid the anti-dumping liability.<sup>136</sup>

During a twelve-year EU anti-dumping campaign against imports from China, there were quite a few accused Chinese exporters/producers released from liability for such reasons. In 1992, eight cases were initiated against Chinese products.<sup>137</sup> Four of them, namely unwrought manganese, refined antimony trioxide, gum-rosin and paint brushes were terminated due to a

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133. See Fu, *supra* note 5, at 81-82. In the case of SCTVs, "The individual dumping margin was, in this case, determined as a comparison between the weighted-average normal value established in an analogue country and the individual export price charged by each Sino-Foreign joint-venture." *Id.*

134. *Id.*

135. See Council Regulation 384/96, *supra* note 11, art. 3.

136. See Fu, *supra* note 5, at 104.

137. *Id.*

lack of injury findings or because of lack of support by a majority of Member States.<sup>138</sup>

However, chances to avoid anti-dumping liability through the injury analysis are generally slim. First, the injury analysis involves the examination of all relevant factors, such as: (1) increase of dumped import volumes; (2) sale price of the EU industries undercut; (3) decrease of production volumes of the EU industries; (4) market share loss; and (5) forced cutbacks of employees.<sup>139</sup> Second, the Basic Regulation apparently favors the European complainants in this regard, by providing that dumped imports do not have to be the only cause of the injury to justify imposition of anti-dumping measures.<sup>140</sup> Accordingly, burden of proof based on this analysis can often be overwhelming and prevent the accused from making a successful innocent argument.

According to Article 9(1) of the Basic Regulation, "Where the complaint is withdrawn, the proceeding may be terminated unless such termination would not be in the Community interest."<sup>141</sup> This provision gives another legal ground for waiving the possible liability of the accused Chinese enterprises. A strategy designed on this ground should focus on how to persuade or push the European complainants to withdraw their complaints.<sup>142</sup> An answer may lie in the advancing China-EU economic relations.

With economic ties growing rapidly, more and more European industries seek access to the broad and potentially lucrative Chinese market by exporting to China or establishing joint-venture companies with local Chinese enterprises. The more successful their businesses are in China, the more interests they will have linked to local Chinese industries. Interestingly, many European adventurers happen to be the major complainants in the EU anti-dumping proceedings against their present or potential Chinese partners.<sup>143</sup> A feasible ap-

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138. *Id.*

139. Eighteenth Annual Report, *supra* note 7, at 13.

140. *Id.* See also Council Regulation 384/96, *supra* note 11, art. 3(5)-(7).

141. Council Regulation 384/96, *supra* note 11, art. 9(1).

142. See Ma, *supra* note 3.

143. See, e.g., *Hooked on A Feeling: Philips to Examine EU's Anti-Dumping Policy on Chinese Color TVs*, CHINA ONLINE (Sept. 6, 2000), at <http://www.chinaonline.com> [hereinafter *Hooked on a Feeling*].

proach for the accused Chinese companies is to take advantage of their European counterparts' consideration of the balance of interests, and push the latter to withdraw their complaints.

Here, the Netherlands' Philips Electronics Co. ("Philips") is a typical example. It has been seventeen years since Philips established its first joint venture in China, in 1985.<sup>144</sup> Today, the European electronic giant owns more than thirty solely funded enterprises and joint ventures with investments topping USD \$1 billion in China.<sup>145</sup> It has taken a considerable share of the Chinese electronic home appliance and mobile phone markets with the slogan "Let's make it better."<sup>146</sup> Meanwhile, however, Philips has been a major complainant in a series of anti-dumping cases against Chinese electronic products in the past nine years.<sup>147</sup>

In August 2000, when Philips sought a partnership with China's Changhong Electronic Co. ("Changhong"), its attempts were hurt by revelations of its role in an EU anti-dumping campaign against Chinese manufacturers of color televisions, including Changhong. After Philips' role was disclosed in April 2000, its efforts to obtain a partnership with the Chinese company "disgusted" Chinese consumers – especially because Philips had been prospering in the Chinese market itself.<sup>148</sup> Not only did the Chinese television industry strongly resist further business cooperation, but it was also reported that the Chinese public severely criticized Philips' "immoral" behavior.<sup>149</sup>

Currently, some experts in the legal community suggest that Chinese television makers take advantage of Philips' desire to restore and improve its commercial image destroyed by this incident, and persuade the company to withdraw its complaints.<sup>150</sup> These experts regard the approach as the most practical for the accused Chinese manufacturers to settle the cases without loss, as it is estimated there would be only a 10%

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144. *Id.*

145. *Id.*

146. Yu, *supra* note 122.

147. *See Hooked on a Feeling*, *supra* note 143.

148. *EU Lawsuit Making Philips' China Color TV Partnership Difficult*, CHINA ONLINE (Aug. 14, 2000), at <http://www.chinaonline.com>.

149. *Id.*

150. Yu, *supra* note 122.

chance that the enterprises would win the cases once both sides go before the Commission.<sup>151</sup>

As for Philips, it has been previously unwilling to negotiate. However, between May and June 2000, it actively conducted long negotiations with Chinese parties.<sup>152</sup> A Philips top executive told the Chinese public that his company was already aware of the problem, and would be taking measures to solve it as soon as possible.<sup>153</sup>

### 3. The Capacity to Handle Anti-Dumping Proceedings

Above, the author has listed a few legal undertakings to enable Chinese enterprises to win EU anti-dumping cases. Accomplishment of these legal goals depends on the good performance of trade lawyers hired by the investigated companies. However, by no means can the accused companies disregard their own substantive role in the cases.<sup>154</sup> Without showing a good capacity for handling these issues, the accused will still encounter many difficulties with their cases.

Take the instance of an ME status claim. In the EU proceedings against imports from China, when the accused Chinese company claims ME status, it is required to meet the burden of proof for the five criteria discussed previously.<sup>155</sup> To prove the fulfillment of these criteria, the company has to provide a great deal of information, from private managing and operating decisions, accounting records, production costs and financial situations to exchange rates and the public legal environment of its home country. Gathering and selecting this information requires tremendous daily work conducted by the company itself, in advance. Also, each submitted document requires a translation into English. This job alone can be very time consuming. In a word, one cannot expect all these preparations to be done overnight.<sup>156</sup>

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151. Ma, *supra* note 3.

152. Yu, *supra* note 122.

153. See *Hooked on a Feeling*, *supra* note 143.

154. See *Joint Declaration*, *supra* note 120.

155. See Council Regulation 905/98, *supra* note 38, art. 1.

156. See Overview of the Monitoring of Third Country Safeguard Cases and of the Implementation of the Trade Barriers Regulation: Seventeenth Annual Report from the Commission to the European Parliament on the Commu-

In addition, according to the Basic Regulation, deadlines for an anti-dumping investigation remain fixed, so that an ME status claim has to be dealt with extremely quickly in order to meet these deadlines.<sup>157</sup> A special claim form should be completed and returned to the Commission within three weeks of the initiation of a proceeding. In this form, a minimum amount of information is required, which is needed to decide whether or not a concerned Chinese company is operating in a market economy environment (five criteria).<sup>158</sup> Due to the tight deadlines, both the criteria and the timeframes are applied strictly. If any information is missing in the completed claim form, or if it is returned late, the claim is automatically rejected.<sup>159</sup>

For these reasons, accused Chinese companies should strengthen their capacity to perform the comprehensive work required by the EU proceedings. The key issue here is to create a corporate structure ready for any possible anti-dumping challenge. In this context, a company may want to establish the following structures: (1) "sales personnel, to enforce price guidelines and review sales and selling expense information;" (2) "accounting personnel, to collect and derive the necessary cost, expense and sales information from the corporate, divisional and factory levels;" (3) "computer personnel, to arrange and maintain necessary data, and to run the dumping margin analysis;" and (4) "adoption of the EU competition law."<sup>160</sup>

Like an old Chinese saying says: "Attack is the best defense." Thus the accused Chinese companies may also try another approach to make the anti-dumping initiations void – to invoke the EU competition law due to an inherent controversy between the anti-dumping law and competition law.<sup>161</sup>

This strategy seems very tricky, but is truly feasible! An interesting case may convince Chinese companies of this. In the

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nity's Anti-Dumping and Anti-Subsidies Activities, COM(99)411 final at 7–8 [hereinafter Seventeenth Annual Report].

157. *See id.* at 7.

158. *See id.*

159. *See id.* at 8.

160. *Corr, supra* note 102, at 106.

161. *See* Peter J. Koenig, Hot Topics in Dumping Law and Steel, Paper Presented to Metal Bulletin's Eastern European Steel Conference (May 27–29, 1998), at <http://ablondifoster.com/library/article.asp?pubid=94359792001&groupid=12>.

late 1990's, European stainless steel bar producers filed a dumping complaint against Indian counterparts, putting the latter under dumping investigation.<sup>162</sup> Soon after, Indian producers filed a complaint as well, asserting that the European bar producers had unlawfully fixed prices. As a result, the EU launched a price fixing investigation. Such a situation raised an important question as to the EU's anti-dumping practice: Whether imports should be found dumped and injurious on the basis of depressing EU prices when those prices had been unlawfully fixed?<sup>163</sup> Obviously the answer should be "no."

#### 4. Adoption of the Chinese Anti-Dumping Instrument

Anti-dumping is a traditional and commonly used weapon in worldwide trade wars. Industries of many nations often adopt their own domestic anti-dumping instruments to restrain the anti-dumping campaigns launched by foreign competitors.<sup>164</sup> However, to many Chinese companies that have suffered severely at the hands of foreign investigations, this weapon is too new to be handled freely.

Not until 1997 did China formulate her first anti-dumping legislation, the Anti-Dumping and Anti-Subsidies Regulations of the People's Republic of China ("Anti-Dumping and Anti-Subsidies Regulations").<sup>165</sup> Since then, there have been few Chinese industries adopting this domestic instrument to combat the anti-dumping campaigns from foreign economies, including the EU.<sup>166</sup>

Under the current situation, where an increasing number of leading European industries are seeking access to broad and

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162. *Id.*

163. *Id.*

164. Doreen Bekker, China and Antidumping Legislation, Paper Presented at the Economic Society of South Africa's Conference (Sept. 6-7, 1999) (on file with Journal).

165. Zhonghua Renmin Gongheguo Fanqingxiao He Funbutie Tiaoli (Anti-Dumping and Anti-Subsidy Regulations of the People's Republic of China), ch. I, *translated in* China L. for Foreign Bus. Reg. (CCH) ¶¶ 19-620-19-620(42) (Aug. 26, 1997).

166. See Kermit Almstedt & Patrick M. Norton, *China's Antidumping Laws and the WTO Antidumping Agreement*, 34 J. WORLD TRADE 75, 75-76 n.4-5 (2000). By 2000, among the five anti-dumping investigations undertaken by China on imports of newsprint, steel and chemical products, three received final rulings and one received a preliminary ruling. *Id.*

potentially lucrative Chinese markets, their business interests become increasingly linked to China. Any Chinese domestic anti-dumping initiation targeting European adventurers may constitute a heavy form of pressure on the latter.<sup>167</sup> So, there is no reason why suffering Chinese companies cannot take full advantage of new domestic instruments to restrain their European counterparts from abusing the rights under EU anti-dumping law. Of course, this strategy needs strong support from the Chinese government. Below, the author discusses in more detail the role of Beijing in fighting the EU campaign.

*B. Strategies for the Chinese Government to Challenge EU Anti-Dumping Law and Practice*

The Chinese government plays an independent and vital role in its discretion to challenge the EU anti-dumping campaign against imports from China. China's objective is to support, assist and guide domestic industries concerned with winning this legal contest. Generally, the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") is the main governmental organ in charge in this field.<sup>168</sup> In recent years, other quasi-governmental organizations have also played an active role on this front, such as the Import and Export Chamber and the Foreign Investment Society. They make it the emphasis of their work to systematically organize Chinese enterprises concerned with such an onslaught.<sup>169</sup> Currently, there are several strategies available to China in accomplishing its objective regarding the anti-dumping fight.

1. Imposing Political Pressures

The inflexibility of the EU anti-dumping legislation is a long-standing problem that contributes to the continuous trend of campaigns against China. Development of new law within the EU advances very slowly due to internal bureaucratic opera-

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167. See *Hooked on Feeling*, *supra* note 143.

168. For more information on MOFTEC, visit its official website at [http://www.moftec.gov.cn/moftec\\_en/index.html](http://www.moftec.gov.cn/moftec_en/index.html) (last visited Feb. 24, 2002).

169. See Yu, *supra* note 122.

tions.<sup>170</sup> Such legislative lethargy pays no heed to the fascinating changes happening in today's China.

Expecting a fundamental change in this field, China should urge the EU to adjust its anti-dumping instrument in light of the changing reality of China's economy, by amending the current regulations in a timely and efficient manner. External political pressure can be a good shortcut to that end. The New Anti-dumping Rule is a successful example where, under the political pressure from China, the EU was forced to update its rules on regulation of imports from NME countries, including China.<sup>171</sup> In sum, by gaining as many bids as possible from the rapid growth of China-EU trade relations, and the increasing interests attached to the Chinese market by European companies, Beijing may take a firm stance to impose more political pressure on the EU in bilateral negotiations. This can help push EU law and practice in a new direction that will diminish their discriminatory and unfair impacts on China.

## 2. Implementing Pragmatic Trade Policies

For many years, Western countries consistently criticized China for her "trade protectionism" practice.<sup>172</sup> However, facing a severe anti-dumping campaign from the EU, China may have to strengthen the implementation of its protective trade policy, launching appropriate trade retaliations to challenge this campaign. In particular, under the current situation where the EU rarely adjusts its anti-dumping instrument in favor of China, while European industries frequently adopt this instrument to strike at their Chinese competitors, the strategy of taking pragmatic trade retaliation is likely to appear reasonable and workable to the Chinese government.<sup>173</sup>

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170. See Sean C. Monaghan, Comment, *European Union Legal Personality Disorder: The Union's Legal Nature Through the Prism of the German Federal Constitutional Court's Maastricht Decision*, 12 EMORY INT'L L. REV. 1443, 1474-75 (1998).

171. See Eighteenth Annual Report, *supra* note 7, at 16-17.

172. U.S. TRADE REPRESENTATIVE, 2001 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 42 (2001), available at [http://www.ustr.gov/html/2001\\_contents.html](http://www.ustr.gov/html/2001_contents.html) (last visited Feb. 24, 2002).

173. See Eighteenth Annual Report, *supra* note 7, at 16-17; Seventeenth Annual Report, *supra* note 156, at 6-7.

The recent case of the China-Korea "garlic war" may have already convinced Beijing of the benefits of this strategy.<sup>174</sup> From 1998 to 1999, with a dramatic increase in China's exports of garlic to the Korean market from 3.4% to a whopping 35%, the Korean government simply increased the import tariff from 35% to an astronomical 315%.<sup>175</sup> Correspondingly, China retaliated and banned Korean imports of polyethylene and cellular phones – two of Korea's major export items. This garlic trade war ended in a compromise after two weeks of intense negotiations between the two countries, with Korea agreeing to set certain "quotable tariff" levies upon imported Chinese garlic.<sup>176</sup>

We may wonder if there is any significant difference between the EU and Korea regarding their importance in China's foreign trading. The big difference is that China's trade retaliation against the EU can invite a more severe revenge from the EU, and ultimately lead to more serious damage to the Chinese industries in the European market.<sup>177</sup> We must remember, however, that the health of China-EU trade relations can only be guaranteed on a reciprocal basis; a primary threshold for both sides to mutually benefit in their trade relations. It must be in the fundamental interests of China, and ultimately, the cause of free trade, for Beijing to adopt a trade policy instrument to challenge the unfair, discriminatory anti-dumping campaigns from abroad, including EU. Trade retaliations may be a worthwhile strategy for the Chinese under the present circumstances.

### 3. Improving the Chinese Regime

As we may realize, with a reciprocal approach, other than a legitimate one that is recognized by the international trading forum (the WTO), trade retaliations are just a tentative technique to cope with the EU anti-dumping campaign.<sup>178</sup> A better

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174. Caroline Cooper, *End of Garlic War Brings Korea Potpourri of Good News*, CHINA ONLINE (Aug. 14, 2000), at <http://www.chinaonline.com>.

175. *Id.*

176. *Id.*

177. Ma, *supra* note 3.

178. It was not until May 1994, when the government promulgated the Foreign Trade Law of the People's Republic of China, that the country applied the reciprocity principle of the GATT to resolutions of Chinese trade

strategy may be for China to make efforts to improve its domestic regime, which is currently supported by a single statute, the Anti-Dumping and Anti-Subsidies Regulations. That law is just a copy of those that exist in certain Western countries, failing to reflect the reality of China's anti-dumping situation. As a source of law, the regulations are too abstract and general to be effective.

To improve the domestic regime, Beijing has been working on formulating a new law to address the abuse of anti-dumping by foreign enterprises, so as to impose sanctions in China's domestic market against those who, using unequal methods, hinder Chinese exports abroad.<sup>179</sup> Hopefully this law will successfully codify the balanced approach advocated here.

#### 4. Taking Advantage of the Recent WTO Membership

All three strategies mentioned above are either at the unilateral or bilateral level. Today, as China has recently entered the WTO,<sup>180</sup> the government may think about taking advantage of its membership to resolve the problem of the ongoing EU investigations.

In fact, the EU already takes into account China's WTO membership within its legislation. The Proposal for a Council Regulation Amending Regulation 384/946 suggested that "[o]n the basis that membership of the WTO indicates a certain level of economic reform and trade liberalization, it is proposed to extend the [ME] regime to those NME countries who are mem-

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disputes with other countries. See ZHONGHUA RENMIN GONGHEGUO DUIWAI MAOYI FA (Foreign Trade Law of the People's Republic of China) art. 7, *translated in* LEGISLATIVE AFFAIRS COMM'N OF THE STANDING COMM. OF THE NAT'L PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1994, at 29-37 (1996). According to Article 7, the government should undertake appropriate counter measures against any countries or territories that apply discriminatory trade bans or trade restrictions against China. *Id.*

179. Recently, the new Anti-Dumping Regulation of the People's Republic of China entered into force on January 1, 2002. See Zhonghua Renmin Gongheguo Fanqingxiao Tiaoli (Anti-Dumping Rules of the People's Republic of China), available at <http://www.cacs.gov.ch/new/wto/wto01.htm> (last visited Mar. 7, 2002).

180. See Press Release, *supra* note 98.

bers of the WTO, and to automatically extend it to others when they become WTO members in the future.”<sup>181</sup>

To apply the Basic Regulation to China's entry into the WTO, the Commission further suggested an amendment:

In antidumping investigations concerning . . . the People's Republic of China . . . which is a member of the WTO at the date of the initiation of the investigation, normal value will be determined in accordance with paragraphs 1 to 6, if it shown, on the basis of properly substantiated claims by one or more producers . . . and in accordance with the criteria and procedures set out in subparagraph (c) that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under subparagraph (a) shall apply.<sup>182</sup>

However, we may notice that this prospective amendment does not lead to any substantial change in current EU anti-dumping legislation concerning China. The case-by-case approach will remain the same as before, regardless of China's membership in the WTO, which will not necessarily mean China's coveted classification as an ME country. Therefore, it is predictable that WTO membership will not be very helpful for the accused Chinese enterprises aiming to gain full ME status in the EU proceedings.

For this reason, China should pay most of its attentions to another main aspect of the WTO – its dispute settlement mechanism.<sup>183</sup> With China's entry into the WTO, it is now able to invoke the Dispute Settlement Mechanism of the WTO to challenge EU anti-dumping legislation and practice not in her favor – just as the EU has long been doing against its trading partners.<sup>184</sup> In this way, China will be entitled to resolve the

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181. Commission Proposal, *supra* note 64, at 15.

182. *Id.* at 21.

183. See DSU, *supra* note 99, art. 1.

184. On August 28, 2000, the WTO Appellate Body upheld a Dispute Settlement Panel ruling against the United States Anti-dumping Act of 1916. As one of the parties to the case, the EU had been playing a very active role in challenging this legislation. See WTO Appellate Body Report on United States Anti-Dumping Act of 1916, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000), at <http://www.wto.org>.

problem of the anti-dumping campaign at a more advanced multilateral level.

It is notable that, whatever strategy China may use, it should embrace a strong awareness of serving domestic enterprise and industry, working closely with them to guide, support and assist their move to challenge the EU anti-dumping campaign.

## VI. CONCLUSION

Today, as China is increasingly integrating into the global economy and opens its doors to the world, China-EU trade relations may become strengthened and extended to a new level. When increasing numbers of Chinese enterprises begin seeking access to the European market, the ongoing EU anti-dumping campaign can constitute a huge obstacle. Frustrated by this campaign, not only will the international market exploration by Chinese industries become empty talk, but the health of China-EU trade relations will also be severely undermined. This consequence is good for neither China nor the EU. In particular, excessive anti-China trade restrictions by the EU tends to worsen the domestic dislocations and resultant human suffering in China, the country with the world's largest population.

The reality is that China has become one of the most significant targets, and also one of the most distinctive victims, of the EU anti-dumping campaign. This situation is manifest in a continuous trend, and will not be repaired in the short run. Facing such a truth, China and its industries should work closely to develop adequate and effective legal strategies to challenge this campaign. A positive attitude is important, while the right approaches are necessary. At this moment, the road ahead remains long and winding.

