

5-1-2014

China's Anti-Dumping Regime and Compliance with Anti-Dumping Principles: An Analysis Using Agricultural Dumping Case Studies

Adam Soliman

Follow this and additional works at: <https://repository.law.miami.edu/umiclr>



Part of the [Comparative and Foreign Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

Adam Soliman, *China's Anti-Dumping Regime and Compliance with Anti-Dumping Principles: An Analysis Using Agricultural Dumping Case Studies*, 21 U. Miami Int'l & Comp. L. Rev. 241 (2014)

Available at: <https://repository.law.miami.edu/umiclr/vol21/iss2/5>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

CHINA'S ANTI-DUMPING REGIME AND COMPLIANCE WITH
ANTI-DUMPING PRINCIPLES: AN ANALYSIS USING
AGRICULTURAL DUMPING CASE STUDIES

*Adam Soliman**

| | | |
|------|---|-----|
| I. | INTRODUCTION | 242 |
| II. | ANTI-DUMPING LAW AND ECONOMICS..... | 244 |
| | A. DUMPING, AS DEFINED BY ECONOMISTS | 244 |
| | B. CHINA'S ANTI-DUMPING LEGISLATION | 248 |
| | 1. CHINA'S ANTI-DUMPING REGULATIONS | 248 |
| | 2. CHINA'S ANTI-DUMPING REGULATIONS APPLIED..... | 249 |
| | C. AMERICAN ANTI-DUMPING LEGISLATION..... | 250 |
| | 1. AMERICA'S ANTI-DUMPING REGULATIONS..... | 250 |
| | 2. AMERICA'S ANTI-DUMPING REGULATIONS APPLIED .. | 252 |
| III. | ANTI-DUMPING IN PRACTICE..... | 254 |
| | A. STATISTICAL INFORMATION..... | 255 |
| | B. ALLEGED DUMPING OF FROZEN OR CANNED WARMWATER SHRIMP AND PRAWNS BY CHINA | 255 |
| | C. ALLEGED DUMPING OF NON-FROZEN CONCENTRATED APPLE JUICE BY CHINA | 257 |
| | D. ALLEGED DUMPING OF HONEY BY CHINA | 258 |
| | E. ALLEGED DUMPING OF DISTILLER'S DRIED GRAINS WITH OR WITHOUT SOLUBES BY THE U.S..... | 260 |
| | F. ALLEGED DUMPING OF IMPORTED POTATO STARCH BY THE E.U. | 261 |
| IV. | CONCLUSION | 262 |

Abstract

The paper assesses China's anti-dumping regime, one of the important structures implemented by China in order to become a full member of the World Trade Organization (WTO). Section One sets forth the WTO's anti-dumping principles as well as analyzes the differences between the WTO principles and the definition of "dumping" as understood by economists. In significant respects, the WTO principles allow situations that do not actually constitute dumping—in an economic sense—to be treated as "dumping," leading to the imposition of duties and sanctions. Next, the paper evaluates the degree to which the separate anti-dumping regimes of China and the U.S. conform to the WTO's anti-dumping guidelines, both as the legislation is written and as it is applied in practice. Finally, several case studies of anti-dumping actions in the agriculture sector are analyzed, identifying the instrumental use by both countries of anti-dumping law, and the frequent absence of true economic justification for the accusations or findings of dumping.

I. INTRODUCTION

Beginning in the 1970s, China instituted significant economic reforms. Such reforms shifted China from a government owned and operated economy to privatization and relaxed protectionist policies. China continues to open its market and improve its trade relations with international players.

One of the central issues to market development is anti-dumping. "Dumping" is defined by the General Agreement on Tariffs and Trade ("GATT") as the trade practice by which "products of one country are introduced into the commerce of another country at less than the normal value of the products."¹ Under the GATT, if a country is found to have exported products at less than the average compar-

¹ General Agreement on Tariffs and Trade ("GATT"), Oct. 30, 1947, Article VI (1), 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194. The Smoot-Hawley Tariff Act provides a more concise definition of dumping: "the sale or likely sale of goods at less than fair value." 19 U.S.C. § 1677(34) (2014).

able price, the importing country will have grounds to levy a "counter-vailing duty" to offset the profits gained via dumping.² Creating a marketplace in which countries can fairly trade products and services is of utmost important, but the anti-dumping measures are now wielded as a tool to enforce protectionism.³

After fifteen years of observer status to the GATT, China acceded to the WTO in September 2001, thereby becoming subject to the terms of the GATT, including the anti-dumping provision.⁴ China also acceded to the Agreement on Implementation of Article VI, better known as the Anti-Dumping Agreement ("AD Agreement"), which clarifies the process for applying anti-dumping measures. Accession has leveled the playing field, allowing countries that import from China to bring actions against China for unfair trade and enabling China to do the same.

While China's accession demonstrates its commitment to reducing unfair trade practices, the question becomes: do the anti-dumping measures in the GATT and the AD Agreement effectively differentiate between predatory dumping versus fair, competitive trade? The AD Agreement does not account for differences between predatory dumping and "good-natured" competitiveness between countries. Therefore, adherence to the AD Agreement does not necessarily demonstrate the degree to which countries are preventing or engaging in "dumping" according to economists' definition.

This paper first sets forth economists' definition of dumping and analyzes the similarities and differences between China's domestic laws and U.S. anti-dumping implementing legislation to the AD Agreement. The second section will discuss a variety of anti-dumping

² GATT Article VI (3).

³ Reid M. Bolton, *Anti-Dumping and Distrust: Reducing Anti-Dumping Duties under the W.T.O. through Heightened Scrutiny*, 29 *Berkeley J. Int'l L.* 66 (2011). *Available at*: <http://scholarship.law.berkeley.edu/bjil/vol29/iss1/2>.

⁴ China made a number commitments when acceding to the WTO, including the elimination of "dual pricing practices," price controls and agricultural export subsidies as well as promulgate domestic legislation implementing the terms of the GATT. When joining the WTO, China agreed to comply with several other trade-related treaties including the TRIPS (Trade-related Aspects of Intellectual Property Rights) Agreement. September 17, 2001, "WTO Successfully Concludes Negotiations on China's Entry," *accessible at* http://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

actions initiated by the United States and China to assess whether predatory dumping actually occurred.

II. ANTI-DUMPING LAW AND ECONOMICS

A. *Dumping, as Defined by Economists*

Several WTO members had adopted anti-dumping measures long before the GATT (1947) was drafted, the WTO was created and GATT Article XI was clarified in the 1994 AD Agreement.⁵ Therefore, the countries with experience in drafting and implementing anti-dumping provisions significantly influenced the negotiation of the terms of the AD Agreement.⁶ Consequently, the terms of the AD Agreement share many similarities to the terms of the negotiating countries' domestic legislation, despite their flaws. Arguably the way the U.S. law is written allows a finding of dumping in a wide range of circumstances, therefore allowing politics and protectionism to become a factor in these determinations rather than only being based on economic determinations of anti-competitiveness and protectionism.⁷ In fact, these measures may hurt countries' economies calling into question how and when countervailing duties are being actually being implemented as a punishment for predatory dumping. In a 1995 study, the International Trade Commission ("ITC") determined that American anti-dumping and countervailing duties had cost the U.S. economy \$1.59 billion in 1991.⁸ These findings suggest that anti-dumping laws

⁵ Canada adopted its first anti-dumping law in 1904, followed by Australia in 1906 and the United States in 1921. United States Tariff Commission, "Information Concerning Dumping and Unfair Foreign Competition in the United States and Canada's Anti-Dumping Laws," p. 21 (1919).

⁶ K.D. RAJU, WORLD TRADE ORGANIZATION AGREEMENT ON ANTI-DUMPING, Wolters Kluwer (2008), p. 22.

⁷ The United States adopted the Anti-Dumping Act of 1921 which authorized the imposition on imports sold below their fair market price. Thomas E. Johnson, *The Retroactive Application of the Antidumping Act of 1921*, 1 Nw. J. Int'l L. & Bus. 262 (1979). Available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1051&context=njilb>. In his article *Id* at 263.

⁸ U.S. International Trade Commission, "The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Orders," June 1995. Available at <http://www.usitc.gov/publications/332/pub2900.pdf>.

have become a weapon for protectionism rather than a tool for combating anti-competitiveness and predatory trade practices.

Young (2001), agreeing with a European Commission report⁹ on dumping, proposed that true dumping exists only if *all* of the following four conditions are present:

- (1) The exporting market must be segregated and the importing market must be open.
- (2) The fact that they operate within a segregated domestic market can give exporters an advantage which is not due to higher efficiency and which cannot be matched by competitors in the importing country.
- (3) Because of the first two conditions, the dumper is able to maximize profits or minimize losses.
- (4) The dumper's actions can be highly injurious to the dumper's competitors in the importing country.¹⁰

Young points out that the injurious effects of dumping on the competitors in the importing country (i.e., lower profits, reduced work force, and reduced investment in capital and/or R&D) can just as easily result from normal competition as it can from predatory dumping. For true dumping to occur, it is essential that the dumper be able to use the excess profits from the predatory export to a protected market to cause material injury to the domestic competitors, including driving them out of business. Should the exporter simply be more competitive in the market to which they have exported based on more efficient operations and lower costs as a result of that efficiency, than these competitive advantages do not amount to predatory dumping. Competitive advantages are an expected part of a competitive, free market. In fact, competition within industries stimulates constant review of trade practices to ensure that businesses operating within that industry retain or achieve

⁹ The Eleventh Annual Report From the Commission to the European Parliament on the Community's Anti-Dumping and Anti-Subsidy Activities (1992), published October 26, 2003, gives three reasons why the GATT considers injuries dumping unfair. These three reasons are the first four conditions presented by Young. EC Commission (1992). *Available at* <http://aei.pitt.edu/915/>.

¹⁰ DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES AND MATERIALS 644 (2008).

a competitive advantage. These competitive advantages are an expected and desired part of the normal operation of any market-based economy. In fact, the free-market economy is based on the principle that certain suppliers will be able to achieve those advantages and others will be pushed out. Being able to achieve more efficient operations resulting in lower pricing is not predatory dumping, and being able to punish such activity corrupts the benefits of anti-dumping regulations.

Ideally, the WTO AD Agreement should capture a more complex understanding of dumping that is able to recognize the difference between healthy competition and predatory dumping. Unfortunately, the AD Agreement does not embody Young's first two conditions: 1) the segregation of the exporter's domestic market; and 2) the presence of an advantage for the exporter which is not linked to efficiency, and which competitors in the importing country cannot duplicate. Instead the AD Agreement simplistically defines "dumping" as selling a product below its market price in the exporting country. Article 2.1 of the Agreement states:

"[f]or the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

It is important to recognize that selling a product below its "normal" price can be a competitive tactic for sellers expanding into a new market, even within the same country. Pricing variations do not rise to the level of predatory damage unless Young's first two conditions are met. The WTO's definition of dumping allows normal competitive marketing tactics to be characterized as "dumping."

However, the AD Agreement does address Young's fourth condition: to find that dumping has occurred, the importing country

must identify an "injury" (defined as a "material injury"¹¹) to the affected industry within the importing country. In assessing the injury to the importing country the authorities are instructed to look at the following factors:

all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.¹²

Yet, this list is "not exhaustive" nor is any factor designated as being more demonstrative of dumping than another factor.¹³ The AD Agreement is adaptable to various factual circumstances, but in being adaptable gives countries significant leeway in manipulating the analysis to their favor.

Similarly, with respect to procedure, the Agreement gives a broad description of important procedural requirements allowing for countries to provide as much or as little evidentiary support and analysis as they want. For example, Article 12.2 requires that notices of preliminary or final determinations "shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities."¹⁴ "Sufficient detail," like many of the

¹¹ Agreement of Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994, GATT B.I.S.D. n. 9, ("Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article."), available at http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm.

¹² AD Agreement, Art. 3.4.

¹³ *Id.*

¹⁴ *Id.* art. 12.2.1

other terms used in the AD Agreement is too broad or vague to ensure that predatory dumping is being targeted rather than mere competitiveness.

B. *China's Anti-Dumping Legislation*

1. China's Ant-Dumping Regulations

China's domestic anti-dumping legislation tracks closely with the WTO AD Agreement, therein sharing many of the same flaws as the AD Agreement.¹⁵ The legislation is composed of fifty-nine Articles and is divided into five Chapters: General Provisions (Chapter I), Dumping and Injury (Chapter II), Anti-dumping Investigation (Chapter III), Anti-dumping Measures (Chapter IV), Terms and Review of Anti-dumping duties and price undertakings (Chapter V).¹⁶ In many instances the language is the same as the AD Agreement. For example, Chapter 2, Article 3 defines "dumping" as when: "a product is imported to the market of the People's Republic of China at the export price less than its normal value during the course of normal trade."¹⁷ Both this definition and the AD Agreement's definition center on the "normal value" of the product. Additionally, the Chinese regulations and the AD Agreement list three of the same factors to be considered when assessing whether there is a threat of material injury: a significant increase in the quantity of product being imported, whether the importation has the effect of depressing product costs domestically, and the extent of the exporting country's inventory.¹⁸ Similarly, both the AD Agreement and the Chinese AD Regulations determine the "normal value" by looking at the comparable price of the same or similar product in the importing country.¹⁹

Although China's legislation, like the WTO agreement, does not address the important economic conditions identified by Young, it

¹⁵ Olivier Prost & Song Li Wei, *Essay: China's Accession to the WTO: How Will This Benefit European Undertakings?*, 24 *Fordham Int'l L.J.* 554, 567.

¹⁶ *Anti-dumping Regulations of the People's Republic of China*, THE FOREIGN AFFAIRS OFFICE OF THE PEOPLE'S GOVERNMENT OF YUNNAN PROVINCE (hereinafter referred to as "Chinese AD Regulations"). Available at www.yfao.gov.cn/Enshow2.aspx?id=165 (last visited Nov. 26, 2011).

¹⁷ *Id.* at Art. 3.

¹⁸ *Id.* at Art. 3 and AD Agreement at Art. 3.7.

¹⁹ Chinese AD Regulations at Art. 4, AD Agreement at Art. 2.1.

does include some elements that capture the difference between natural competitiveness versus predatory dumping. An example is a "public interest" clause, which allows for the broader public interest within China to prevail over the interest of a small or specific industry.²⁰ This is a pro-trade rather than a protectionist measure, as it focuses on overall market-efficiency rather than the impact on a specific industry interest. Many of China's trading partners have no such provision in their respective AD statutes.²¹ Another noteworthy provision allows for imposition of a "lesser duty" than the margin of dumping, if the lesser penalty would suffice to remedy the injury caused. Again, many of China's counterparts, including the U.S., have not adopted this provision. Apparently, China has allowed pro-trade considerations to prevail over protectionism to a greater extent than many other nations.²²

While the Chinese regulations made small improvements to the management of dumping, they fail to require the type of analysis that would draw out the differences between predatory dumping the free market at work. By not incorporating an analysis of Young's first two criteria into the definition of dumping, China's AD Regulations allow industries to file and argue "dumping" claims in cases where the fundamental economic conditions of true "dumping" may not exist.

2. China's Anti-Dumping Regulations Applied

Countries and analysts have raised concerns about the transparency of China's anti-dumping regulations and the procedural fairness under the regime.²³ Analysts have also alleged inconsistent application of the rules.²⁴ However, any inconsistencies are well within the discretion allowed by the WTO Anti-dumping Agreement.

²⁰ *Id.* art. 33. ("If the Ministry of Commerce deems that the price undertakings made by export managers are acceptable and conform to the public interests, it may decide to suspend or terminate the anti-dumping investigation without taking temporary anti-dumping measures or imposing anti-dumping duties.")

²¹ Harpaz, *supra* note 1, at 35.

²² *Id.* at 3.

²³ Jiang Yi Wang, *Rule of Law and Rule of Officials: Shareholder Litigation and Anti-Dumping Investigation in China*, RULE OF LAW IN CHINA SERIES POLICY BRIEF NO. 4 (2008).

²⁴ *Id.* at 5.

An AD investigation can be initiated in several ways. Domestic industries or natural persons, legal persons or relevant organizations on behalf of domestic industries can make a written application to the Ministry of Commerce People's Republic of China ("MOFCOM") to request investigations.²⁵ "Domestic industry" is defined as:

"all producers of [the People's Republic of China] "PRC" who produce domestic products of the same kind, or the producers whose total output makes up a major part of total output of domestic like products, excluding domestic producers who have relationships with export or import managers or who are import managers who dump imported products."²⁶

There is one important restriction: No AD investigation shall be initiated if the output of the supporters makes up less than 25% of domestic products.²⁷ But an application from an industry is not the only way to initiate an action; MOFCOM may initiate AD investigations, *sua sponte*, if sufficient evidence of dumping, injury, and a causal relationship between the two exists.²⁸

C. American Anti-Dumping Legislation

1. America's Anti-Dumping Legislation

Like the WTO Agreement and China's legislation, U.S. anti-dumping law defines "dumping" as selling "foreign merchandise ... at less than its fair value."²⁹ While the definition at first glance seems different given the use of the term "fair" value, a closer look shows that the analysis depends on the same comparison to the normal value. An anti-dumping duty can be imposed if:

the Commission determines that (A) an industry in the United States (i) is materially injured, or (ii) is threatened

²⁵ *Anti-dumping Regulations*, *supra* note 8, art. 13.

²⁶ *Id.* art. 11.

²⁷ *Id.* art. 17.

²⁸ *Id.* art. 18.

²⁹ Tariff Act of 1930, 19 U.S.C.S. §1673(1).

with material injury, or (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise, or by reason of sales (or the likelihood of sales) of that merchandise for importation then there shall be imposed upon such merchandise an antidumping duty ... in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.³⁰

Therefore, the U.S. law sets forth the same analysis as the WTO AD Agreement: identify whether a material injury to a domestic industry has resulted from the importation and/or pricing of imported foreign merchandise based on the "normal" value of these products. Furthermore, similarly to the WTO AD Agreement, initiating a formal investigation takes little more than a petition stating that a material injury has resulted from the importation of under-priced foreign merchandise.³¹ It is also possible for interested parties to file a petition alleging that the elements necessary for imposition of the duty imposed by section 731 have been fulfilled.³² Much as in China, the USITC will consider whether the producers or workers that support the petition account for at least 25% of the total production of the domestic like product, and the domestic producers or workers who support the petition account for more than 50% of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.³³ This aligns with the WTO AD agreement.

However, U.S. law more directly allows for politicized decision-making. U.S. law also includes a provision that enables an American industry to accuse some exporters of dumping even if the exporter's selling price in the U.S. is *not* lower than the selling price in the exporter's home country. This is possible whenever the US trade regulator determines that the exporting country is a "non-market economy," which is defined as "[a]ny foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country

³⁰ 19 U.S.C.S §1673.

³¹ 19 U.S.C.S. §1673(a)(c).

³² *Id.* at § 1673a(b)(1).

³³ *Id.* at § 1673a(c)(4)(A).

do not reflect the fair value of the merchandise.”³⁴ China’s Protocol of Accession authorizes WTO members to treat China as a “non-market economy” (NME) for fifteen years from the date of accession.³⁵ Arguably, this provision does more to protect the interests of domestic industries rather than prevent predatory dumping.

2. America’s Anti-Dumping Legislation Applied

China’s Protocol of Accession allows WTO members to treat China different than other countries when investigating claims of dumping because China is a Non-Market Economy (“NME”). According to Article 15(a)(iii) of the Protocol of Accession;

The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.³⁶

In anticipation of China acceding to the WTO, the United States and China signed the Agreement on Market Access Between the People’s Republic of China and the United States of America authorizing the U.S. to use nonmarket criteria in determining whether China is exporting products below normal costs.³⁷ Consequently, if Chinese producers cannot prove that market economy conditions prevail in their industry, the Chinese producers are in a sense presumptively guilty of dumping.³⁸ In determining whether the price of the imported product reflects the normal value of the same or similar products, the U.S. can disregard Chinese prices and instead base their analysis on surrogate countries’ pricing. The AD Agreement states:

³⁴ 19 U.S.C. §1677(18) (2012).

³⁵ Protocol of Accession (China), WT/L/432, November 23, 2001. *Available at* http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm.

³⁶ Protocol of Accession (China), Article 15(a)(iii).

³⁷ Agreement on Market Access Between the People’s Republic of China and the United States of America (hereinafter referred to as “1999 U.S.-China Market Access Agreement”). *Available at* <https://archive.org/details/AgreementOnMarketAccess>.

³⁸ Protocol of Accession (China), Article 15(a)(iii).

when, because of the particular market situation ... such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.³⁹

The AD Agreement and China Protocol of Accession essentially bless US protectionism, at least until 2016.⁴⁰

Allowing the U.S. to compare Chinese prices to prices in countries with workplace protections and other regulations on production which typically raise costs distorts the dumping analysis. Hypothetically, let's set Germany as the surrogate country. Wages, cost of living and production costs in Germany are much higher; therefore, the price of the product, which is a reflection of these factors, will be higher. If the German production cost is used as the basis of the "normal value," then when compared to the price of the Chinese, there will be a larger difference between the two prices. This would allow the U.S. (as the importing country) to impose a greater duty against China. While Germany would not qualify as a surrogate country for China this hypothetical shows the impact the choice of surrogate country can have on the determination of a "comparable price" as well as the anti-dumping duty imposed.

For NMEs the U.S. can look to one or more surrogate countries, or "market economy countries that are at a level of economic development comparable to that of the nonmarket economy country," to establish the "normal value."⁴¹ This means that NMEs are compared to countries with a comparable per capita GDP.⁴² Once the surrogate country is selected, the nonmarket economy producers' factors of

³⁹ AD Agreement, Art. 2.2.

⁴⁰ Jialin Zhang, "U.S.-China Trade Issues After the WTO and the PNTR Deal: A Chinese Perspective," August 1, 2000. Available at <http://www.hoover.org/publications/monographs/27197>.

⁴¹ 19 U.S.C.S. § 1677b(c)(1). Typically the factors of production will be valued in *one* surrogate country. 19 CFR §351.408(c)(2).

⁴² 19 C.F.R. §351.408(b).

production will be evaluated in that surrogate country in order to establish the "normal value." The factors of production to be considered include, but are not limited to "(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation."⁴³ Because these NMEs are economies in transition, critics have suggested that the dumping margin is distorted by basing the normal value determination on market economy factors rather than economies in transition factors.⁴⁴ Others reveal that the use of developed countries as surrogates leads to "great miscalculation" and that the surrogate selection process "allows the [U.S.] to reach whatever result it chooses."⁴⁵

III. ANTI-DUMPING IN PRACTICE

Section One outlined the legal framework for anti-dumping in China and the U.S. Section Two examines how these laws and administrative structures are applied in practice.. First, I will examine the difference in how industries in the U.S. and China use anti-dumping regulations to correct economic distortions. Next, I will determine how often, if ever, there is some degree of actual economic justification for an anti-dumping action launched by either country. These issues will be addressed using both aggregate statistics and case studies: three cases initiated by the U.S., and two by China.

⁴³ 19 U.S.C.S. § 1677b(c)(3).

⁴⁴ Robert H. Lantz, *The Search for Consistency: Treatment of Nonmarket Economies in Transition under United States Antidumping and Countervailing Duty Laws*, 10 Am. U. J. Int'l L. & Pol'y 993, 1070 (1995).

⁴⁵ Garrett E. Lynam, *Using WTO Countervailing Duty Law to Combat Illegally Subsidized Chinese Enterprises Operating in a Nonmarket Economy: Deciphering the Writing on the Wall*, 42 Case W. Res. J. Int'l L. 739, n. 41 (2010). Qianlan Long, *Conflicting Positions But Common Interests: An Analysis of the United States Antidumping Policy Toward China*, 7 Rich. J. Global L. & Bus. 133, 136 (2008). Sanghan Wan, *U.S. Trade Laws Concerning Nonmarket Economies Revisited for Fairness and Consistency*, 10 Emory Int'l L. Rev. 593, 621 (1996).

A. *Statistical Information*

China has initiated few anti-dumping actions in comparison to other countries that have experienced rapid economic growth.⁴⁶ When China files a complaint, China does not seem to discriminate between countries; it applies similar duties on imports from different countries. Finally, the alleged foreign “dumpers” have won a large number of the Chinese anti-dumping cases.⁴⁷

However, China has been the most frequent target of anti-dumping proceedings, primarily initiated by the European Union, India and the United States.⁴⁸ About 25% of all anti-dumping investigations are directed against China.⁴⁹ As a WTO member, China continues to be the target of frequent anti-dumping complaints. Moreover, data suggests that developed and developing WTO members alike are discriminating against China relative to other exporting countries, and that the discrimination has only intensified since China joined the WTO.⁵⁰ China is likely to remain a target for anti-dumping actions given the types of products it exports and the size of its market.

The statistics do not shed light on whether cases are actually remedying predatory dumping. However, they do suggest that Chinese industries are not as adept at using their anti-dumping regulations as a protectionist tool like their U.S. and WTO member counterparts.

B. *Alleged Dumping of Frozen or Canned Warmwater Shrimp and Prawns by China*

The facts from the *Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China* case suggest that predatory dumping

⁴⁶ In 2002, China initiated nine AD cases, followed by six in 2003, eight in 2004, seven in 2005, five in 2006, seven in 2007, six in 2009, and eight in 2009.

⁴⁷ Harpaz, *supra* note 1, at 30–31.

⁴⁸ Minsoo Lee, Donghyun Park, and Aibo Cui, “Invisible Trade Barriers: Trade Effects of US Antidumping Actions Against the People's Republic of China,” October 2013. Available at <http://www.adb.org/publications/invisible-trade-barriers-trade-effects-us-antidumping-actions-against-prc>.

⁴⁹ Francis Tanczos, *Unfair Play: Examining the U.S. U.S. Anti-Dumping 'War' Against China*, 2 WASHINGTON UNDERGRADUATE L. REV. 77, 78 (2008).

⁵⁰ *Supra* n. 55, at 3.

may have occurred.⁵¹ The U.S. Department of Commerce (“DOC”) issued its final determination on December 8, 2004 finding that the PRC was illegally selling frozen and canned Warmwater shrimp at less than fair value.⁵² The DOC found dumping margins ranging from 27.89 to 112.81 percent.⁵³ This means that depending on the product being imported U.S. Customs and Border Protection (“USCBP”) can collect between a 27.89 and 112.81 percent duty.

The International Trade Commission (“ITC”) instituted a review of this determination in January 2010.⁵⁴ In its review of whether subject imports are likely to have no discernible adverse impact on the domestic industry the ITC finds that the quantity of subject imports from China has decreased since the imposition of duties.⁵⁵ While other factors may have had a hand in this decline, there is no question that the high duty imposed against Chinese subject imports certainly has had the greatest impact.

Based on Young’s criterion, a finding of dumping was justified in this case. First, China’s domestic markets are closed while the importing markets are open. While China is moving away from practices which discriminate against foreign products getting to market in China the transition is not yet complete.⁵⁶ However, it is unclear whether the material injury resulted from China’s discriminatory treatment of foreign merchandise or production tactics harmful to the environment. The Southern Shrimp Alliance, a group of states in the southern U.S. claimed that the 50% reduction in shrimp production was the result of Chinese producers’ “slash and burn” style aquacul-

⁵¹ 69 F.R. 70997 (December 4, 2004). An amended final determination and order was issued on February 1, 2005. 70 F.R. 5,149 (Feb. 1, 2005).

⁵² *Id.*

⁵³ 70 F.R. 5149, 5151. The dumping margin found for Zhanjiang Guolian Aquatic Products Co., Ltd. was .07 percent, which is a *de minimis* finding.

⁵⁴ 75 F.R. 1078 (Jan. 8, 2010).

⁵⁵ U.S. International Trade Commission, Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam, Publication 4221, p. 13 (Mar. 2011). Available at http://www.usitc.gov/publications/701_731/pub4221.pdf.

⁵⁶ Helga Josupeit, GLOBEFISH, Presentation at World Shrimp Markets 2004: *An Overview of the World Shrimp Market* 26 (Madrid, Spain, Oct. 26–27, 2004).

ture.⁵⁷ Arguably if the Chinese resist implementing environmental protections in certain industries with the specific purpose of giving China the competitive edge, there may be an argument that such behavior is a way to keep the Chinese market closed. The facts suggest that predatory dumping may have occurred, but it is difficult Young's criteria have been met.

C. *Alleged Dumping of Non-Frozen Concentrated Apple Juice by China*

On June 7, 1999 Tree Top, Inc., Knouse Foods Cooperative, Inc., Green Valley Packers, Mason County Fruit Packers, and Coloma Frozen Foods, Inc. and filed a petition with the DOC alleging that imports of non-frozen concentrated apple juice ("NFCAJ") from China were being sold at less than fair value.⁵⁸ The DOC is authorized to treat China as a NME; therefore, "normal value" is based on the factors of production valued in India, the designated surrogate country.⁵⁹ Initially, dumping margins were sets between 51.69 and 65.64.⁶⁰ Following the preliminary investigation the dumping margin was set between 0 and 54.55%.⁶¹ The final determination set the dumping margin at no greater than 51.74.⁶²

China is again not the victor. Where China is the exporting country alleged to be dumping, India is typically selected to be the surrogate country to determine the fair value. However, in this case the respondents argue that Turkey should be the surrogate country.⁶³ According to the respondents "Turkey is the country closest to the PRC in terms of GNP per capita that is also a significant producer of

⁵⁷ John Tabari, *US Frozen Warm-Water Shrimp: Anti-Dumping Gone to the Extreme*, Cuts Center for International Trade, Economics & Environment, Brief Paper (2005).

⁵⁸ 64 F.R. 36330 (July 6, 1999).

⁵⁹ *Id.* at 36331.

⁶⁰ *Id.* at 36332.

⁶¹ 64 F.R. 65675, 65680 (Nov. 23, 1999).

⁶² 65 F.R. 19873, 19876 (Apr. 13, 2000).

⁶³ 64 F.R. 65675, 65679.

AJC.”⁶⁴ The Commission concludes that Turkey is not a better surrogate because India is a significant producer of apples.⁶⁵

To meet Young’s criteria the exporting market must be closed and the export must be materially injurious to the importing country’s competitors. Evidence suggests that Chinese companies were selling their juice within American markets below production costs, but it is difficult to establish whether the price of the product is low as a competitive tactic or to discriminate against U.S. product.⁶⁶ Therefore, while ensuring that dumping analysis targets predatory dumping rather than normal competition, it is difficult to differentiate between competitiveness and predatory behavior.

D. Alleged Dumping of Honey by China

Following the submission of a petition by the American Honey Producers Association (“AHPA”) and preliminary investigations, the ITC held that the US has been materially injured by the importation of Chinese honey.⁶⁷ On October 4, 2001 the ITC issued its final determination, stating that honey from China was being sold at less than fair value in the United States and calculated the PRC-entity dumping margin to be 183.80%.⁶⁸ In December 2001 the ITC issued an amended final determination.⁶⁹ The duties imposed in 2001 remain in effect today.

China presented and continues to present a threat to the U.S. industry. Before the 2001 duties were implemented, the U.S. imported

⁶⁴ 65 F.R. 19873, 19876.

⁶⁵ *Id.*

⁶⁶ van Voorthuizen et al., *supra* note 32, at 188.

⁶⁷ Honey From Argentina and China [Investigations Nos. 701-TA-402 and 731-TA-892-893 (Preliminary)], 65 F.R. 69573 (Nov. 17, 2000).

⁶⁸ Notice of Final Determination of Sales at Less Than Fair Value; Honey from the People’s Republic of China, 66 F.R. 50608 (Oct. 4, 2001). The preliminary determination was issued in May 2001. “Notice of Preliminary Determination of Sales at Less Than Fair Value: Honey From the People’s Republic of China,” 66 F.R. 24101, 24108 (May 11, 2001). Because the ITC found that the importer had been materially injured, knowledge of the dumping can be imputed to all producers/exporters in China. 66 F.R. 24101 at 24107.

⁶⁹ “Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order; Honey From the People’s Republic of China”, 66 F.R. 63670, Dec. 10, 2001).

58.7 million pounds of honey from China.⁷⁰ As of 2010, the U.S. only imports 1.75 million pounds from China.⁷¹ While the average price of honey being sold in the U.S. in 2010 was calculated at \$1.45 per pound, transshipped Chinese honey was sold at 75 cents per pound.⁷² Therefore, while the duties have significantly reduced the number of Chinese honey imports into the U.S., the Chinese have still found ways to get their products into the U.S. market by selling the honey through a "middle" country. Executive Secretary of the AHPA Jerry Brown said, "Chinese producers have also become more sophisticated in the ways in the ways they attempt to skirt U.S. duties on their products ... honey is being made in China is often times relabeled and transshipped through other countries that aren't subject to the stiff tariffs."⁷³ In addition to being able to avoid paying the anti-dumping tariffs, the Chinese have also been found to be selling honey with high fructose corn syrup, antibiotics and heavy metals.⁷⁴ Consequently the European Union banned imports of Chinese honey.⁷⁵ In 2013 the ITC implemented a \$2.63/kilogram duty on Chinese honey exports.⁷⁶ The anti-dumping duty, by treating natural honey, flavored honey and artificial honey the same, has significantly impacts China's honey exports.⁷⁷

This case is harder to analyze under Young's criteria than the proceeding cases. The reason for the difficulty is that the U.S. is the largest producer and second largest consumer of honey.⁷⁸ This has led to significant distortions in the facts surrounding the honey industry in the U.S., which in turn makes it difficult to determine the actual impact

⁷⁰ Statement of American Honey Producers Association (hereinafter referred to as "AHPA Statement"), Hearing on "Enforcing America's Trade Laws in the Face of Customs Fraud and Duty Evasion," May 5, 2011 at p. 3. *Available at* <http://www.finance.senate.gov/imo/media/doc/050511ratest.pdf>.

⁷¹ *Id.*

⁷² *Id.* at p. 4.

⁷³ Jonathan Randles, "ITC Keeps Duties on Honey from China," November 19, 2012. *Available at* <http://www.law360.com/articles/395296/itc-keeps-duties-on-honey-from-china>.

⁷⁴ AHPA Statement at p. 3.

⁷⁵ *Id.*

⁷⁶ 78 F.R. 56860 (Sept. 16, 2013). Jonathan Randles, "Commerce Sets Dumping Rate on Chinese Honey Imports" (June 27, 2013). *Available at* <http://www.law360.com/articles/453772/commerce-sets-dumping-rate-on-chinese-honey-imports>.

⁷⁷ *Id.*

⁷⁸ *Id.*

on the industry. It is clear, however, that proof of injury was lacking. The U.S. industry did not appear to have experienced any material injury at the time of the ruling, and so the anti-dumping action was actually a precaution against harm that probably had not yet occurred. Furthermore, there was no definitive evidence that such an injury would have occurred absent the anti-dumping measures. Thus, the action against Chinese honey probably would not qualify as anti-dumping in economic terms, because the fourth criterion does not appear to exist.

E. Alleged Dumping of Distiller's Dried Grains With or Without Solubles by the U.S.

On Dec. 28, 2010, the Chinese Ministry of Commerce ("MOFCOM") initiated an anti-dumping investigation into the import of distiller's dried grains with or without solubles (DDG) from the U.S. Four Chinese DDG producers initiated the case, representing a total of 50% of China's domestic industry. The Chinese DDG industry claimed they lost significant sales due to a surge in sales of U.S. origin DDG at lower than market prices.⁷⁹

The measure was highly criticized in the U.S. and the response was strong. The U.S. Grains Council immediately gathered seventy U.S. companies to register as interested parties in the proceedings. The U.S. argued that demand for DDG from China had increased greatly in a relatively short time, and that the substantial increase of purchases had led to a reduction of the price under an economies of scale argument. The case is still pending but has already created trade tensions between the Chinese and U.S. grain industries.⁸⁰

It is unlikely that this situation qualifies as dumping in the economic sense. There is little or no evidence that the alleged dumper enjoys a cost advantage which competitors in the importing country cannot match, and which derives from a protected domestic market. The U.S. industry representatives argued that they could sell these

⁷⁹ U.S. Grains Council, "Why Buy U.S. Grains?" (Jan. 7, 2011). Available at <http://www.grains.org/index.php/buying-selling?id=2829:usgc-facilitates-industry-wide-response-to-chinas-anti-dumping-case&catid=72>.

⁸⁰ See Elise Schafer, *Trade Tension: China Launches Anti-Dumping Case Against U.S.*, Feed & Grain (Apr. 18, 2011), www.feedandgrain.com/article/10241874/trade-tension-china-launches-anti-dumping-case-against-united-states.

dried grains to China at lower prices because of the quantity of grain per order. This is possible due to the economies of scale argument, which sets forth that the per-unit cost of processing the grains may decrease significantly as the quantity increases. This case has not yet been adjudicated so it remains to be seen what the legal resolution will be.

F. Alleged Dumping of Imported Potato Starch by the E.U.

The Chinese first imposed anti-dumping duties against European Union potato starch imports in February 2007.⁸¹ The instituted 12.6% duties against the Dutch starch manufacturer and a 56.7% French starch byproducts manufacturer.⁸² In September 2001 China imposed additional duties of 7.5%–12.4% on potato starch, when MOFCOM found that EU subsidized potato starch products negatively affected domestic producers claiming to have been harmed by the subsidies the E.U. provides to its producers.⁸³ China has been more aggressive about initiating anti-dumping actions against the European Union in response to the European Union's and United States' increasing number of actions against China.⁸⁴ It is likely that this has driven China to initiate counter-measures, such as the duties on E.U. potato starch.⁸⁵

Little information is available regarding the investigation of China's anti-dumping claims, making it difficult to assess whether this determination targeted predatory dumping rather than normal competition. The Chinese Ministry of Commerce has stated that the investigation has resulted in the determination that E.U.-produced imports of potato starch have injured the Chinese domestic potato starch

⁸¹ Aaron Taube, "China Keeps Anti-Dumping Duties On EU Potato Starch," Feb. 6, 2013. Available at <http://www.law360.com/articles/413229/china-keeps-anti-dumping-duties-on-eu-potato-starch>.

⁸² *Id.*

⁸³ USDA Foreign Agricultural Service, "Gain Report: People's Republic of China, Potatoes and Potato Products Annual" (Dec. 20, 2012). Available at <http://goo.gl/YhYxAr>.

⁸⁴ *Supra* fn 99.

⁸⁵ *Id.*; see also Prepared Foods' Daily News, *Potato Starch Dragged into China, EU Battle* (May 17, 2011), www.preparedfoods.com/articles/potato-starch-dragged-into-china-eu-battle.

producers.⁸⁶ The WTO's investigation and results are the only available information. Apparently, the WTO's definition of dumping has been satisfied. The WTO found that dumping has occurred, and has clearly stated that Chinese domestic producers have been injured. In order to determine whether dumping has occurred under the economic definition, however, it would be necessary to determine whether the other three criteria have been met, particularly the first two. With the limited facts provided in the WTO investigation, a conclusion cannot be drawn regarding these criteria.

IV. CONCLUSION

The analysis leads to a number of interesting conclusions. With regard to cases lodged against China, three points are important. First, the well-structured and organized U.S. agriculture organizations representing domestic producers are in a strong (and politically popular) position to lobby with the U.S. government, which causes anti-dumping actions to be brought against China.⁸⁷ Second, the lack of organization among Chinese producers as well as asymmetric information (i.e. lack of familiarity with U.S. and foreign law) contributed to the lack of proper response by China in some of these AD cases, especially in early years. Third, the treatment of China as an NME often leads to adverse rulings; complainants can use tactics such as the choice of a surrogate country, or the definition of a product to place China at a disadvantage.

A stronger organization among Chinese producers and a willingness to fight back would contribute to a lower level of abuse of process by U.S. producers, who may be supported to some extent by the U.S. government, and may leave room for genuine AD cases. Furthermore, China's continued effort to be recognized as a market

⁸⁶ *Supra* fn. 100.

⁸⁷ U.S. Trade Rep., *Report to Congress on China's WTO Compliance* at 34 (2010), available at http://www.ustr.gov/webfm_send/2596. Such actions appear to have been welcomed by the U.S. Government. In its 2010 *Report to Congress on China's WTO Compliance*, the USTR reported that: 'Throughout 2010, the U.S. continued to work closely with U.S. companies affected by Chinese AD investigations in an effort to help them better understand the Chinese system. The U.S. also advocated on their behalf in connection with ongoing AD investigations, with the goal of obtaining fair and objective treatment for them, consistent with the AD Agreement'.

economy may reduce the severity or frequency of rulings against Chinese producers. With regard to cases lodged by China, it is interesting to note the fierce responses from the E.U. and U.S. as a result of these procedures. Both trading partners strongly oppose the procedures and often accuse China of protectionism.

As a result of the discretion left by the WTO Anti-dumping Agreement to its members, many countries, including both China and the U.S., make instrumental use of the Agreement and only selectively target AD investigations. The U.S. has often been alleged of protecting its own market by aggressively imposing AD duties.⁸⁸ China's legal system has been criticized for its lack of transparency and procedural fairness. Though this does not necessarily imply that China is attempting to protect its own industries, it does give China considerable leeway to interpret and apply its laws as it sees fit. The trade relationship between China and the United States could be strengthened if the U.S. removed its protectionist measures and China improved the transparency of their legal system.

⁸⁸ See, e.g., Brink Lindsey, *The U.S. Antidumping Law: Rhetoric versus Reality*, Center for Trade Policy Studies, Trade Policy Analysis No. 7 (Aug. 16, 1999).