Unfair Play: Examining the U.S. Anti-Dumping 'War' Against China

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The accession of China to the World Trade Organization has marked an apparent increase in tensions concerning trade relations between China and the United States. This dynamic is particularly noteworthy considering that the US is China's largest export market and, currently, the US' trade deficit with China is larger than ever. As one of the largest exporters of low-cost labor-intensive goods, China presents somewhat of a predicament to the US in terms of its potential for causing material injury to US domestic markets. As a response, the US has appealed to trade remedy measures such as the imposition of anti-dumping duties, which are designed to offset 'unfair' trade practices. Currently, China has the largest number of anti-dumping investigations initiated against it of any of the US' trading partners. Yet, the methodology that the US uses for determining dumping margins for 'non-market economies' like China differs from market economies and is significantly unfavorable towards Chinese firms. This paper examines how the US has been responding to some Chinese imports utilizing trade defense/remedy measures by looking at US anti-dumping procedure and anti-dumping case law. It also considers the forces of US domestic industries and constituents in the process, looks at questionable practices by the US and addresses the future of US anti-dumping measures towards China.

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Introduction: Examining the US Anti-Dumping "War" Against China

Since the People's Republic of China's accession to the World Trade Organization (WTO) in 2001, there has been a notable increase in tensions concerning trade relations between China and the United States. China's enormous economy presents a predicament for many members of the WTO but it especially gives rise to feelings of unease for China's largest trade market: the US. China is one of the world's largest low-cost producers of goods in labor-intensive sectors such as textiles, food (agriculture), chemicals and electronics. The problem is that, when a country like China, floods a foreign market (like the US) with low-price goods, this may present an unfair advantage for the exporter. Such 'dumping' of goods is essentially, therefore, exporting at a price either below the cost of production, below the home-market price or sometimes, as will be shown in China's case, below a third country price.[1] The result can bring about less-than-fair-value goods and these have the potential to threaten or injure a domestic industry.

Due to the large volume of its exports, it is of little surprise that China has been the primary target of anti-dumping measures. The sheer number of anti-dumping cases against China has made it apparent that China is perceived as a threat to many other WTO members: over the past two decades or so, more than 30 countries have opened about 600 anti-dumping cases in the WTO against 4000 different types of Chinese products.[2] Over this same two-decade period, the US had made 110 petitions and 68 orders against Chinese goods topping the list among the US's trading partners for such measures.[3] Currently, 25 percent of all WTO anti-dumping investigations are directed at China. Although the WTO has reported an

[1] "*Below*" refers to: below the comparable market price in exporter's home market, if ascertainable, and, if not, then below the cost of production.

[2] John Shijian Mo, Address at McGill University: Legal Developments in China Since Its Accession to the WTO in 2001 (Feb. 10, 2006), *available at* http://lsa.mcgill.ca/aplam/China%20and%20the%20WTO.pdf.

[3] Government Accessibility Office, 109th Cong., Report on U.S. Chinese Relations: Eliminating Non-Market Methodology Would Lower Anti-Dumping Duties for Some Chinese Companies (January 2006).

overall decrease in anti-dumping investigations and measures, China remains the most frequent subject of new investigations.[4] But what are the underlying reasons for all of these actions taken against China?

This paper considers how and why the US has been using anti-dumping measures in response to Chinese imports. In order to effectively show the nature of this US-China trading relationship, it is necessary to focus on a few trade sectors in particular. Trade in food and agriculture is especially notable because it incorporates the farming and growing constituents in the US, who often launch petitions for investigations. Agriculture products also make up about 10 percent of US anti-dumping cases against China. In general, trade between the US and China is enormously important; the countries have a trade volume of well over $200 billion. Moreover, the US trade deficit with China is larger than ever. To shed some light on why there is so much tension, it is important to examine anti-dumping procedure in the US and the case law and, at the same time, to examine the modus operandi of stakeholders in US domestic industries. In particular, it is necessary to consider why the US still treats China as a non-market economy, the advantages and disadvantages of such a practice, and what the future holds for China in terms of being recognized as a market economy.

I. Appealing to Unfair Competition

Trade practices that involve dumping are considered "unfair" because they interfere with or distort free market economy principles. It is often considered very difficult to apply trading rules to non-market economies (NMEs), which supposedly do not adhere to such principles. According to the Sino-American Agreement of 1999, the US will continue to consider China as a non-market economy until 2016. Such status means a stricter interpretation of US trade remedy laws and the methodology by which they are applied to China. This type of methodology is commonly believed to result in much higher duty rates.[5] However, the US is not the only country that has taken the defensive and increased its anti-dumping measures against China. In fact, in 2006, one-third of the European Commission's investigations were directed against Chinese goods.[6] Still, the measures by the US have been the most numerous.

[4] Press Release,WTO Secretariat Reports Renewed Declines in New Anti-dumping Investigations and New Final Anti-dumping Measures, WTO Press/497 (Oct. 30, 2007), *available at* http://www.wto.org/english/news_e/pres07_e/pr497_e.htm.

[5] *Id.* at 6.

[6] Report Indicate Intense Anti-Dumping Activity in 2006, Particularly Regarding Chinese Products, Business Alert Hong Kong Trade and Development Council (Hong Kong Trade and Development Commission, Hong Kong, China) Sept. 2007 *available at* http://www.tdctrade.com/alert/eu0718b.htm.

In its accession to the WTO, China agreed in advance to commit to certain safeguard measures and to achieving market economy principles. In particular, Article X.1 of the General Agreement on Tariffs and Trade (GATT), the governing rules for the WTO, provides that members should 'promptly' publish all information relating to trade regulation within their country so as to "enable governments and traders to become acquainted with them."[7] While the word 'transparency' is not mentioned in this article of GATT, one of the main issues among members is for China to become more transparent and accountable in its trade practices.[8] From the United States' perspective, even though China is now a member of the WTO, it still has a long way to go in terms of achieving the principles that govern open market economies. It is mainly for this reason that the US Commerce Department does not classify China in the market economy category.

II. WTO Rules vs. US Antidumping Law

According to Article VI of GATT, countries are allowed to act against dumped imports when they cause or threaten to cause "material injury."[9] In Article VI, injurious dumping is considered to be unfair for several reasons: the export market is segregated while the import market is open; segregated markets confer an advantage on exporters; and dumpers have the opportunity to maximize profits, which is often injurious to an importing countries industry. On the other hand, it is important to note that the GATT does not forbid dumping but, rather, allows for the imposition of anti-dumping duties to offset its negative effects. However, Article VI does not outline the procedures on imposing antidumping duties.[10] The WTO Antidumping (AD) Agreement was adopted following the Tokyo Round of international trade negotiations to expand on GATT Article VI. Following the Uruguay Round, the agreement was made more detailed so as to avoid confusion on key issues.

In order to have standing to initiate an investigation, there is a two level requirement that must be met. First, the degree of support from the domestic industry must reach a minimum level to account for 25% of the total production. The application however, is only considered to be filed on behalf of an industry if there is support amounting to more than 50% of the total production.[11] In determining injury, the revised AD Agreement sets out the rules for comparing normal values to

[7] John H. Jackson, et al., Legal Problems of International Economic Relations 28 (Supp. 2002).
[8] *See also* Agreement on Technical Barriers to Trade, Jan. 1, 1995, Art. II, III, X.
[9] General Agreement on Tariffs and Trade, Oct. 30, 1947, 1994, Article VI, ¶ 11.
[10] John H. Jackson, et al., Legal Problems of International Economic Relations 697 (4th ed. 2002).
[11] *See also* US Tariff Act of 1930, sec. 732 § (c) (4) (1930).

export prices so as not to cause inflated or unwarranted dumping margins.[12] Article 3 (more specifically, 3.5 and 3.6) of the Agreement also makes clear the requirement of establishing a causal relationship between dumped imports and injury to the domestic industry.

While dumping and anti-dumping measures are outlined in GATT Article VI and WTO AD Agreement, in US domestic proceedings, the Tariff Act of 1930 is the primary source for making such determinations. Section 771(7)(A) of the Act defines *material injury* as "harm which is not inconsequential, immaterial or unimportant."[13] Furthermore, the same section enumerates three considerations for such material injury: the volume of imports, the effect of imports on prices of US domestic like products and the impact of imports on domestic producers of domestic like products. The determination of domestic-like products (or the identical/comparable product in the domestic market) and domestic industry are of special importance in antidumping cases.

Anti-dumping procedure in US law can be characterized by three different stages.[14] First is the initial investigations stage which is commenced by the filing of a petition. The International Trade Commission (USITC) makes the determination of whether or not a US industry has suffered material injury. Then the International Trade Administration (ITA; Commerce Department; DOC) determines the extent of the dumping (as well as initiating the investigation. Lastly, the ITC makes the final injury determination.[15] The second stage concerns the implementation of administrative reviews by the ITA to determine the necessary adjustments on the anti-dumping duties from year to year. The third stage, revocation of the duty, is relatively rare and does not occur unless there is no opposition from the domestic industry. Nevertheless, as a general rule, Article 11.3 of the WTO AD Agreement provides that orders should be revoked after five years unless there is a "continuation or reoccurrence of dumping and injury."[16]

III. U.S. Procedure Regarding Non-Market Economies and China

Since the US does not treat China as a market economy, it has to determine a fair value price for Chinese goods in order to determine the amount of the duty needed. Under US law, a dumping margin represents the percentage by which the

[12] "margin" here refers to the difference between the import price and the normal value of the product in the exporting country

[13] Jackson, *supra* note 7, 895.

[14] *See also* US Tariff Act of 1930, Section 731 "imposition of anti-dumping duties"; Sections 732, 733, 735 and 736 for procedure pertaining to anti-dumping.

[15] Jackson, *supra* note 10, 700-705.

[16] Jackson, *supra* note 7, 190.

fair-value price exceeds the export price. The WTO AD Agreement specifies three ways to calculate the product's normal price in order to determine the dumping margin. Usually, it is based on the price in the exporter's domestic market. When this cannot be used, two alternatives are available: the price charged by the exporter in another country, or a calculation based on the combination of the exporter's production costs, other expenses and normal profit margins (WTO AD Agreement Article 2.2).[17] In US law, Section 771(18) of the Tariff Act of 1930 describes non-market economies as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that the sales of merchandise…do not reflect the fair value."[18] The Commerce Department has full authority of the determination of China as a non-market economy based on this definition.

There are two major differences in US anti-dumping procedure between market economies and non-market economies (NMEs) like that of China. The first difference is that, since prices in NMEs do not represent a fair value, a separate rate has to be calculated using a surrogate or third country market price. For example, US authorities may look to the Indian market to set a fair value in order to determine an accurate duty rate.[19] The second difference is that the Commerce Department requires NMEs to show that their prices are not imposed centrally by the government. This is done in order to allow for the creation of an individual duty-rate rather than a "country-wide" rate. Companies that fail the necessary tests or do not participate in investigations are the ones that receive the more unfavorable country-wide rate. Section 776 of the Tariff Act of 1930 (19 USC 1667e) states that if "an interested party has failed to cooperate…to comply with a request for information…the administering authority…may use an inference adverse to the interests of that party." In fact, many times, Chinese exporters are afraid to respond or get involved (earlier it was a result of unfamiliarity with US law) and are, therefore, subject to adverse inferences.

IV. Factors Considered in Anti-Dumping Cases

As mentioned earlier, the determination of domestic-like products and the domestic industry are significantly important in anti-dumping cases. Most of the information on which the Commerce Department and the ITC base their findings comes from questionnaires submitted by the interested parties. *Certain Frozen or Canned Warmwater Shrimp and Prawns from China* serves as an example of how

[17] *Id.* at 175.
[18] *Id.* at 903.
[19] Government Accessibility Office, *supra* note 3, 7-15.

the U.S. makes such determinations.[20] In 2005, the USITC voted to implement anti-dumping duties on imports of non-canned, warm-water shrimp and prawns from six countries (Brazil, China, Ecuador, India, Thailand and Vietnam) after it had been determined that they were being sold at less-than-fair-value in the US market and causing material injury to the domestic industry. The original petition was made by US shrimp producers from eight different states demanding duties on Chinese imports be imposed of up to 267 percent.[21]

The Commission first set out to define the "domestic like product" and the "industry". Section 771(4)(A) of the Tariff Act of 1930 defines the relevant domestic industry as the "producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." The Act defines "domestic like product" as "a product which is like, or in the absence of like, most similar in *characteristics and uses* with, the article subject to an investigation." Special attention must be given to the phrase *characteristics and uses*; Section 771(10).

In the *Shrimp and Prawn* Case, the ITC considered canned and non-canned shrimp to be two separate groups of like products because of differences in their characteristics and end uses regardless of what was in the Harmonized Tariff Schedule (HTS). There were also other considerations taken into account in terms of product interchangeability, channels of distribution, production processes and facilities, and producer and consumer conceptions. As a result of this analysis and despite some overlap, the Commission perceived a "clear dividing line" between the frozen non-canned shrimp and the canned shrimp.[22] For example, canned shrimp was always cooked and peeled and significantly smaller than fresh or frozen shrimp. Interestingly enough, the Commission also noted that in terms of consumer and producer conceptions, the two products were displayed in the different parts of the grocery store.

The major question in terms of domestic industry is who to include and who to exclude from being part of the industry (for the purposes of determining the materially injured industry). To the Commission, whether or not fisherman should be included in the domestic industry was relatively straightforward when using the guidelines outlined in Section 771(4)(E) of the Tariff Act. This section provides that "the producers or growers of the raw agricultural product may be considered as

[20] Imports of Shrimp and Prawns also included imports from not only China but other countries such as Brazil, Equador, India, Thailand, and Vietnam.

[21] Andrzej Zwaniecki, Dumping Case On Shrimp Imports Moves Closer to Vote on Duties (Dec. 01, 2004), *available at* http://www.america.gov/st/washfile-english/2004/December/20041201133553SAikceinawz0.5665399.html.

[22] US International Trade Commission Investigation Report, Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam, Investigations Nos. 731-TA-1063—1068 (Final), Jan. 2005, 8-10 , *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/pub3748.PDF.

part of the industry producing the processed product." Therefore, in addition to the processors, fisherman and shrimp farmers were included in the domestic industry.

In terms of determining material injury (usually the final phase of the investigation), the Commission makes its determination based on the criteria outlined in Section 771(7)(C) of the Tariff Act.[23] The volume, price and impact on the domestic industry of the imports all have to be considered. In this case, the ITC determined that the large volume of shrimp imports from China in 2004 (compared to 2003) displaced the domestic industry because domestic fishermen were forced to fish less (due to lack of profitability) by the very low prices of the Chinese shrimp. The arguments made by China that the imports "created a new market" and were a response to the increased demand of shrimp in the US were dismissed by the ITC. In terms of the prices, the Commission determined that there was a "causal nexus" between Chinese imports and a 30 percent decrease in prices.[24] According to the Commission, China's arguments were not supported by factual data presented in the questionnaires. Furthermore, the large volume of Chinese imports led to a decline in U.S. prices which, in turn, led to a decline in operating revenues for fishermen and processors and also a decline in employment. Thus, the material injury in this case was quite clear and the very high duty rates of 118 to 267 percent were ultimately imposed.

Another noteworthy issue that arises in China Shrimp case concerns "critical circumstances." The Commerce Department determines whether there are critical circumstances present based on three criteria: (1) if there is a history of dumping or material injury concerning the product; (2) whomever imported the goods knew that they were being sold at less-than-fair-value; (3) there have been massive imports of the item in short time periods.[25] Although rare, critical circumstances require respondents to pay fines retroactively. In this case, it was determined that there was not enough information to conclude critical circumstances.

While the *Shrimp and Prawns from China* is a rather straightforward anti-dumping case, there are several US anti-dumping cases in the past that have proved to be much weaker. Yet, more often than not, the reason that such high duties are still imposed is because there is little to no opposition from the respondent. In other words, in the past, Chinese companies had been hesitant to respond to such cases because of their lack of familiarity with the US legal system. However, Chinese companies are beginning to feel significant losses due to US anti-dumping duties and they are becoming more and more willing to respond. Such a trend is expected to alter the power the domestic industries in the near future.

[23] Jackson, *supra* note 7, 887-888.
[24] US International Trade Commission Investigation Report, *supra* note 22, 30-35.
[25] *Id.* at 119-120.

V. China's Response

Certain Non-Frozen Concentrated Apple Juice from China was the first instance where Chinese firms won a case by responding to anti-dumping investigations. The original finding by the International Trade Commission in this case was that Chinese Non-Frozen Concentrated Apple Juice (NFCAJ) imports caused material injury to US industry. First, in determining "like products", the ITC found that NFCAJ constituted a single like product. "Retail apple juice" including single strength apple juice and frozen concentrated apple juice were not like products. In the determination of the domestic industry, the ITC questioned whether apple growers could be included in the domestic industry. Despite Section 771(4)(E) of the Act allowing growers of raw agricultural material to be included in the domestic industry (such as in the case of fishermen and the shrimp industry), the ITC found that growers should be excluded because only 20 percent of apple production is actually processed into apple juice.[26] This failed meet the criteria outlined in Article 5.4 of the WTO Agreement as well.

One of the principle issues to consider in the NFCAJ case is the selection of the surrogate country in order to determine the dumping margin for Chinese imports. As it had done many times, the DOC used prices in India to determine the normal value of Chinese imports. In fact, India is the country most often used in examined Chinese imports because of its comparability in certain areas. Section 773(c)(4) of the Tariff Act provides that the *Valuation of factors of production* should be based on two criteria: that the surrogate market be: (a) at a level of economic development comparable to the non-market economy; and (b) that the country should be a significant producer of the product being examined. It was, in fact, this second criterion to which China later objected.

In a review of the case, the ITC also concluded that revoking the anti-dumping measures in place against China would "lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time."[27] Most of the Chinese NFCAJ exporters had a 52% rate imposed on them. This reduced exports to the US by 70 percent and generated $49 million more in revenue from the previous year (1998).[28] However, Chinese firms brought the case to the

[26] US International Trade Commission Investigation Report, Certain Non-Frozen Concentrated Apple Juice From China, Investigations Nos. No. 731-TA-841 (Final), May 2000, 5-6, *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/PUB3303.PDF.

[27] US International Trade Commission Investigation Report Review of Certain Non-Frozen Concentrated Apple Juice From China, Investigations Nos731-TA-841 (Review), Sept. 2005, 3 , *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/pub3799.PDF.

[28] China Dumping Case, Grower Assistance Top Agenda, Apple News, Jan. 2001, at 1, *available at* http://www.usapple.org/media/publications/applenews/2001/january.pdf.

US Court International of Trade (CIT) on the basis that the surrogate country use, India, was an inadequate source for determining the cost of production.[29] According to China, India was not a significant producer of apple juice and, therefore, not comparable to China[30] .

On appeal at the Court of International Trade, the Chinese companies questioned the Commerce Department's selection of a surrogate country and also the ministerial errors made by the Commerce Department in its preliminary determination. The court remanded the case back to the DOC for reconsideration. The DOC, in turn, decided to reverse its earlier use of India as a surrogate country and instead used Turkey (as originally suggested by China).[31] The reason that the DOC accepted this alternative is that India was found to be a net *importer* of apple juice while Turkey exported a similar amount of apple juice as China, also belonging to the top ten apple juice exporters. In addition, Turkey had a per capita gross domestic product that was similar to China's.[32] The re-determination eventually yielded a new anti-dumping duty rate of zero for most of the petitioning Chinese firms. As a result, this case is seen as a relative success for China in dealing with anti-dumping measures imposed by the US. It is also important because it set a new precedent whereby the US methodology for dealing with China's non-market economy could be questioned.

The force behind many anti-dumping measures comes from the domestic industries themselves. While anti-dumping measures do not benefit the consumers (since they do not receive the best available price on their goods), the producers are the ones that stand to benefit. In the NFCAJ case, even though "apple growers" were not found to be part of the industry, the USApple Association was one of the main petitioners and lobbyers against Chinese apple juice imports. Interestingly enough, the US apple juice producers originally petitioned for a 91.84% antidumping rate but, after they learned that some Chinese producers were prepared to fight, they lowered the petitioning rate to only a 51.74% rate.[33] USApple spent millions of dollars lobbying and urging Congress to approve crop loss assistance ($138 million), surplus commodity relief ($200 million) and low-interest loan programs to apple growers ($99 million) – all of which they received.[34] Such industry lobbyists have

[29] *See also* Yantai Oriental Juice Co. et al v. US and Coloma Frozen Foods, Inc. et al. Slip Opinion. US Court of International Trade Case No. 00-07-00309 decided June 18, 2002, p. 35.

[30] *See* Slip Opinion, p.9

[31] China, as the petitioner, had originally suggested that either Poland or Turkey be used as the surrogate country.

[32] *Redetermination of Yantai Oriental Juice Co., et al., v. United States and Coloma Frozen Foods, Inc., et al.,* International Trade Administration (DOC), Court No. 00-07-00309, November 2002, p. 7-9, available at: http://ia.ita.doc.gov/remands/02-56.pdf

[33] Lianlian Lin, *"Appropriate Selection of Surrogate Country in Anti-Dumping Case Against Non-market Economy,"* International Trade and Finance Association 15th International Conference, Paper 20, 2005, p. 9-10., available at: http://services.bepress.com/cgi/viewcontent.cgi?article=1040&context=itfa

[34] Apple News, *supra* note 28, at 1.

a significant presence in US politics and continue to support defensive measures against cheaper Chinese imports.

To understand the reasoning behind a large number of anti-dumping cases against China, it is indeed important to recognize the major role of the domestic industries in the United States and to understand that US anti-dumping measures are not always justified. Even the Government Accountability Office (GAO) of the United States Congress has recognized this dynamic in a recent report stating that China often receives adverse rulings because of lack of information and, in addition, the methodology for NMEs is set up in such a way that ensures much higher duty rates than market economies.[35] In China's case, the result is an average of 20 percentage points higher than anti-dumping duties imposed on market economies. Nevertheless, the GAO also recognizes that the elimination of this methodology (fair or not) would lead to mixed results. One of the main concerns, of course, is that abandoning such a practice might mean significant losses for domestic industries (at least in the beginning and the actual effects would probably vary by industry).[36] Yet, it is believed that these effects would eventually be balanced out with China increasing its prices as a result of its reforms in becoming a market economy. On the other hand, many US industries would probably vehemently oppose giving China market economy status anytime before the 2016 agreement (as per China's accession in 2001).

In addition to apple juice, honey is another product that is being staunchly protected in the US as a result of petitions by the domestic industry. In fact, the US is the largest producer and second largest consumer of honey in the world.[37] Imports of honey from China have been ongoing issue resulting in anti-dumping measures by the US for the past 15 years. Originally (in 1994), two organizations representing the domestic honey industry, the American Beekeeping Foundation (ABF) and the American Honey Producers Association (AHPA), petitioned Chinese imports of honey on the basis that imports were being sold at less-than-fair-value and injuring the domestic industry. Dumping margins of 128 to 157 percent were calculated but China agreed to a five year agreement with the US that would eventually reduce Chinese imports of honey to the US by 30 percent.[38] The investigation was suspended until 2000.

Since US prices were again being affected, petitioners from the US domestic industry filed petitions in 2000 with the DOC and ITC. What is interesting to note in this case is that the US petitioners waited for the suspension agreement to

[35] Government Accessibility Office, *supra* note 3, 5-8.

[36] *Id.* at 30-32.

[37] Kara M. Reynolds and Yan Su, "Dumping on Agriculture: Case Studies in Anti-Dumping," American University Department of Economics, October 2005, p. 72, available at: http://nw08.american.edu/~reynolds/casestudies.pdf

[38] *Id.* at 74-75.

expire without participating in the five year 'sunset' review.[39] Rather, the domestic industry was prepared to hit harder with a new anti-dumping petition. The second time around, US honey producers raised nearly one million dollars to continue the 'fight' against Chinese imports of honey. In fact, even politicians will rally to show support as did then-South Dakota Governor Bill Janklow by pledging $50,000 to "help the AHPA fight against unfair trade practices by…China."[40] In this case, the US domestic industry was able to come together and cohesively contribute to this collective fight. The fact that the domestic industry operated in such a way, gave US beekeepers a distinct advantage. India was again chosen as the surrogate country for China, in order to determine the cost of honey production for Chinese goods.

The ITC noted that there was a significant increase in the volume Chinese imports of honey both in absolute terms and compared relatively to US consumption. In determining the domestic product, the commission reasoned that "Whether raw or bottled, honey is a sweet, viscous fluid that is an invert sugar that may also be classified by floral source, color, or season."[41] As a result, all types of honey were included to constitute one domestic like product. Additionally, the industry was found to include all producers of honey both raw and processed. Interestingly enough, the Commission went as far as to include "packers of honey" in the domestic industry because of their sufficient production-related activities.[42] This very broad interpretation of the like product and the domestic industry seems to indicate that there was an overwhelming influence to protect the US industry and considerably weaken Chinese honey importation.

There is little doubt that the outcome of this investigation was a tremendous blow to China's honey exporters. For the second time, Chinese exports had significantly decreased by a total of 33 percent. The anti-dumping duty rates of up to 183 percent were the primary cause of this decrease. Yet, to the US honey producers like the AHPA, this result was perceived as a clear 'victory' over China. According the President of the AHPA, Lyle Johnston, the decision by the ITC "resurrected the US honey industry."[43] Even though such measures are not without warrant, the *Honey from China* case clearly shows the power of US industries and, moreover, their ability to come together and to lobby against foreign imports. This

[39] Colin A. Carter and Caroline Gunning-Trant, *"China's Food Exports Face Dumping Laws,"* University of California Davis, Department of Agriculture and Resource Economics, Jul. 2006, 11, *available at* http://cooperatives.ucdavis.edu/events/proceeds_dired/china/Carter_Gunning_July.pdf

[40] Julio J. Nogués, *"US Contingent Protection Against Honey Imports: Development Aspects and the Doha Round,"* The World Bank Group, Jun. 2003, p. 23, available at: http://www-wds.worldbank.org/external/default/ WDSContentServer/IW3P/IB/2003/07/26/000094946_0307170424310/Rendered/PDF/multi0page.pdf

[41] *Honey From Argentina and China*, US International Trade Commission, Investigation Nos. 701-TA-402 and 731-TA-892-893 (Final), Nov. 2001, 5, *available at* http://hotdocs.usitc.gov/pubs/701_731/PUB3470.PDF

[42] *Id.* at 7.

[43] Reynolds and Su, *supra* note 37, 78.

is especially apparent when dealing with imports from China.

The underlying dynamics in the *Honey from China* case were also very similar to an earlier case against imports of *Crawfish from China* (1996). In this case, another domestic industry advocate organization, the Crawfish Processors Alliance filed a petition against Chinese exporters claiming that crawfish tailmeat was being sold at below normal value. What is most interesting to note about this case is that, unlike in the *Honey from China* case (where petitioners from many different states petitioned together), over 90 percent of US consumption and production occurs in a single state: Louisiana.[44] Moreover, the majority of the processors were very small sized. Originally filing a petition requesting protection from a surge in imports relating to a safeguard (or a Section 201 petition), the Alliance instead wanted to pursue a stronger anti-dumping measure. This time, the Commerce Department chose to use Spain (not India) as a surrogate country to calculate the cost of production in China since Spain was one of the few countries that produced crawfish. Again, the ITC found that the low prices of Chinese crawfish forced US producers to lower their prices, thus, decreasing the volume of sales and causing material injury to the US domestic industry. Interestingly, despite these measures by the US, the China crawfish industry continued to grow (albeit at a slower rate) while US producers saw decreased production and revenues in the next few years.[45] The *Crawfish from China* case should be noted because it shows that the successful lobbying for anti-dumping measures in the US does not necessarily have to be carried out by large or significant domestic industries. On the contrary, even a few small producers from a single US state may be able have an impact on China's economy.

Considering the collective organization of US industries, one of the greatest disadvantages for China in anti-dumping cases is that Chinese industries have lacked this kind of cooperation. Of course, one could make the argument that these practices are not entirely fair but, when US interest are at stake (or China's, for that matter), measures are perceived as justified (at least to the country implementing those measures). On the other hand, the United States has also received considerable criticism for some of its practices relating to anti-dumping measures. Other countries have been quick to point out that the US often engages in questionable practices and, as a result, the US has been forced to cease or tone down such practices. But the US response has been in large part to the contrary of those demands.

VI. Questioning the Practices of the U.S. Towards Chinese Imports

While in theory anti-dumping practices are meant to offset unfair trade

[44] *Id.* at 50-55.
[45] *Id.*

practices, such measures have often been questioned as producing unfair results in themselves. In fact, one may argue that few trade practices encompass more bitterness and international ill-will than US anti-dumping law.[46] This is because anti-dumping measures are often the "weapon of choice" for US domestic producers. As explained in this paper, the non-market methodology by which the US treats Chinese goods is questionable as well. As seen in the NFCAJ case (and all three of the cases discussed), dumping margins are often grossly exaggerated by the United States. In particular, there are several specific practices that can be considered that result in such high duty rates.

In several instances, the US has been accused of implementing a so-called "zeroing" methodology. This is a practice that the Commerce Department sometimes uses whereby the calculation for negative trade margins are set to zero rather than included as a negative value. In other words, in such case, the export price is usually lower than the home market price.[47] When normal values are higher than the US price, the difference is treated as the dumping margin. However, when the US price is higher, the value is set to zero thus eliminating "negative dumping margins." According to WTO case law, the practice of zeroing has been shown to be against the WTO Anti-dumping Agreement. For example, a case brought by India against the European Union involving bed linen show this practice to be in violation of agreement. In fact, in *United States-Final Dumping Determination on Softwood Lumber from Canada,* the WTO Panel concluded that "the United States has violated Article 2.4.2 of the *AD Agreement* by not taking into account all comparable export transactions when DOC calculated the overall margin of dumping as Article 2.4.2 requires that the existence of margins of dumping has to be established for softwood lumber on the basis of a comparison of the weighted-average-normal value with the weighted average of prices of all comparable export transactions, that is, for all transactions involving all types of products under investigation."[48] In other words, by artificially setting the dumping margin to zero, the DOC has failed to consider all of the comparable export transactions.

Contributing to the growing list of adverse rulings by the WTO against the United States, in 2004, the European Union had requested the formation of a panel in the WTO to access 31 different US cases, in which a zeroing methodology was used. The US has countered this action by arguing that WTO indictments about

[46] Dan Ikenson, *"Zeroing In: Antidumping's Flawed Methodology under Fire,"* Cato Institute, Center for Trade Policy, No. 11, April 2004, available at: http://www.freetrade.org/node/105

[47] *"AD Measures Against China Decline as Methodologies Come Under Fire,"* Hong Kong Trade Development Council, 18 January 2007.

[48] Report of the Panel on *United States--Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264, April 13, 2004, 128.

anti-dumping procedures must be made on a case by case basis.[49] Nevertheless, considering the long list of adverse WTO ruling against the US, it is likely that its appeal of the *Canadian Softwood Lumber case* will also result in an agreement with the Panel. And so, the trend seems to continue, that US questionable practices continue despite ruling that would demand otherwise.

In fact, WTO rulings against the US are by no means limited to cases concerning anti-dumping measures but also include those relating to safeguards. It can be argued that it is virtually impossible for the United States to defend its safeguard measures at least within the WTO settlement system.[50] The fact is that the U.S. has never won a safeguard case at the Appellate Body level. Many of the legal problems come from differences between U.S. statutes (Trade Act of 1974) and the Agreement on Safeguards. In response to the U.S.'s refusal to remedy its safeguard measures, the Appellate Body has developed a tendency to contrive even more strict standards against the possibility for U.S. safeguards. Interestingly enough, the U.S. had delayed invoking the China safeguard (which is based on China's accession agreement and is valid until 2013), despite the fact that all five (sixth – in progress) of the USITC cases have shown market disruption by Chinese imports. However, in May of 2005, three safeguard case where approved against Chinese imports. This is a result of a "1000 percent plus" increase in textile imports.[51] These measures of course also have a significant effect on trade relations with China (much like but not to the extent of anti-dumping measures). In fact, as seen in the Crawfish from China case, domestic industries may often choose to petition for anti-dumping measures over safeguards. Regardless, the US does not have an excellent track record in the WTO dispute settlement system to say the least.

Another questionable practice of the US pertains to the Continued Dumping and Subsidy Offset Act. However, it is better known as the Byrd Amendment. For a period of time, the collected duties from anti-dumping measures would go directly to the petitioner companies (being part of the injured domestic industry) according to the provisions of the Byrd Amendment. However, due to several complaints by the European Commission, Canada, and others, this policy had been condemned by the WTO.[52] In fact, in 2002, the WTO panel ruled that the Byrd Amendment was in violation of several agreements (i.e. one of them being the WTO AD Agreement). In 2003, the WTO Appellate Body set a deadline of December 2003 for the US to

[49] Ikenson, *supra* note 46.

[50] Christy Ledet, *Causation of Injury in Safeguard Cases: Why the U.S. Can't Win*. 2005.

[51] What Do the New China Safeguards Mean? (National Textile Assoc. – May 2005).

[52] WTO Appellate Body Condemns the 'Byrd Amendment – The US Must Now Repeal It' (Jan. 2003), available at: http://www.eurunion.org/news/press/2003/2003003.htm

repeal the Amendment.[53] The U.S., however, has thus far refused to address this request and has therefore been the target of several retaliation measures imposed by certain other WTO members.

The key problem with the Byrd Amendment is that it gives an unfair advantage to US producers while, at the same time, 'penalizing' foreign producers two-fold (once, through the payment of duties and, twice, through the dispersing of revenue to US competitors). Article 5.4 of the WTO Anti-dumping Agreement provides that "the application [for a petition] shall be considered to have been made by or on behalf of the domestic industry" and such that it is supported by the domestic producers accounting for 50 percent of total production.[54] The Byrd Amendment undermines this principle in its entirety because it gives those producers who wouldn't otherwise petition an incentive to do so. While, to date, the average annual disbursements have been relatively small (about $200-$300 million), the number of claimants has been steadily rising such that a total of 894 companies have filed for a grand total of $1.2 trillion. This astounding number is case in point why the Byrd Amendment is considered so unfair (much less unfeasible).

There have certainly been other questionable practices relating to US anti-dumping procedure but the "zeroing" and the Byrd Amendment are the most notable. What is important to note, is that the US has not responded to these allegations effectively. Inevitably, the result of the US delinquency will be a loss of credibility in the WTO dispute settlement system. This is particularly hurtful to the US considering that it has been campaigning for the rest of the world to embrace trade liberalization reforms. This might also jeopardize continuing negotiations in the Doha Round.

Conclusion

By looking at US anti-dumping procedure and case law, it becomes fairly clear that anti-dumping measures place a significant burden on US-China trade relations. Through the examination of these three major cases in the past decade concerning food imports from China, it should be noted that, to date, all three of these anti-dumping measures are still in place. Granted that some Chinese firms were able to reduce their anti-dumping rates to zero, there are still a total of six products from China to which anti-dumping duties still apply: fresh garlic (1994), crawfish tailmeat (1997), preserved mushrooms (1998), non-frozen apple juice concentrate (1999), honey (2000), and frozen or canned warmwater shrimp and

[53] Dan Ikenson, *"'Byrdening' Relations: U.S. Trade Policies Continue to Flout the Rules,"* Cato Institute, Center for Trade Policy, No. 5, January 2004, available at: http://www.freetrade.org/node/99

[54] Jackson, *supra* note 7, 181.

prawns (2004).[55] Yet, the NFCAJ case shows that such measures by the United States are not entirely foolproof. The more that China challenges anti-dumping measures the more likely they will win more cases. Moreover, the more committed that China is in coming together as single industries, the more able it will be to challenge the powers of US industries.

For the time being, however, it seems that the US will continue to impose strict anti-dumping duties on Chinese goods. For the United States, a move by China from low-value to high-value goods could have a very sudden and detrimental affect on the US economy in the near future (especially if China is perceived as a market economy, in which case, anti-dumping measures have less of an effect). Unarguably, US industries have much to fear from such Chinese importation and, by some accounts, the US is justified in taking such measures. Presently, one could make an argument that the increased level of cooperation of US domestic industries has increased their success of winning anti-dumping cases. While this trend is apparent from the cases examined here, this does not necessarily mean that this will continue to be the case in the future.

It is impossible to overlook the fact that questionable practices exist on behalf of the United States in terms of anti-dumping trade remedies. When considering anti-dumping measures against China, the US is inevitably presented with a tradeoff: between jobs/profitability to US producers and low-cost goods to consumers. The ideal solution would be to balance the two but it is clearly easier said than done. The truth is that protectionist policies have always been present in international trade; currently both the US and China utilize anti-dumping measures. But these countries should note that the end effect of such practices may unnecessarily produce higher tensions. In some cases, the costs may exceed the intended benefits of such measures. US producers also need to consider the long-run and whether trade remedy measures offer a lasting solution. While competition with Chinese goods is challenging, domestic industries cannot rely on protective measures forever. Finally, as a last consideration, US non-compliance with the WTO dispute settlement rulings sets a dangerous precedent for international trade law. While the idea is to make trade as fair as possible (i.e. offsetting unfair dumping), just as important is the need to respect and maintain the efficacy of the international economic legal system.

[55] Carter and Gunning-Trant, *supra* note 39, 4.