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# CONFLICTING POSITIONS BUT COMMON INTERESTS: AN ANALYSIS OF THE UNITED STATES ANTIDUMPING POLICY TOWARD CHINA

*Qinglan Long*<sup>1</sup>

## I. INTRODUCTION

According to the Tariff Act of 1930, “dumping” is the sale of goods imported from a foreign county at less than their “fair value” on the domestic market.<sup>2</sup> Thus, a good produced and sold in China for twenty dollars, but sold in the United States for only fifteen dollars, may be considered “dumped” on the U.S. market. The lower price may be explained by the exporter’s desire to gain market share or to monopolize the receiving market by selling its merchandise at a lower price.<sup>3</sup> After domestic manufacturers are driven out of the market, the dumping manufacturer will recoup its initial losses by charging a higher price. Dumping practices result in injured domestic industries. To counteract its negative effects, countries have devised rules against dumping.<sup>4</sup> These rules, intended to nullify the impact of dumped merchandise on the domestic market, vary depending on the country from which the product originated and consider the various production factors and costs of the merchandise.<sup>5</sup>

## II. U.S ANTIDUMPING DUTY LAW

The International Finance Daily reported that, in the past decade, World Trade Organization (WTO) member countries launched 246 antidumping investigations of China’s exports, and that affirmative results were found in approximately 60 percent of these investiga-

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<sup>2</sup> 19 U.S.C. § 1673.

<sup>3</sup> Robert H. Lantz, *The Search for Consistency: Treatment of Nonmarket Economies in Transition Under United States Antidumping and Countervailing Duty Law*, 10 AM. U. J. INT’L L. & POL’Y 993, 997 (1995).

<sup>4</sup> Terence P. Steward, *U.S.-Japan Economic Disputes: The Role of Antidumping and Countervailing Duty Laws*, 16 ARIZ. J. INT’L & COMP. L. 689, 696 (1999).

<sup>5</sup> Patricia H. Piskorski, *A Dangerous Discretionary “Duty”: U.S. Antidumping Policy toward China*, 34 HOFSTRA L. REV. 595, 603 (2005).

tions.<sup>6</sup> The United States claims that dumping by Chinese producers results in a number of economically injurious effects on its market. The most substantial effect produced by dumping is the harm inflicted upon competing U.S. domestic producers. The United States asserts that these producers will lose their respective market shares and will be forced to close.<sup>7</sup>

In addition to monopolistic effects, dumping also distorts resource allocation.<sup>8</sup> The United States complains that Chinese dumping injures the industries in its domestic market that use the dumped products in the production process or as a component in the final products. For example, a car industry in the United States unaware of the dumping of brakeage from China, may undertake expansion programs in reliance on a continued supply of brakeage at the dumped price. When the dumping is terminated, injury arises because the increased inventory of other components would become idle, and the investment in expansion becomes economically unsound.<sup>9</sup>

United States antidumping duty law provides relief to American industries from dumping practices where: (1) the U.S. Department of Commerce (DOC) determines that a class or kind of foreign merchandise is being sold in the United States at less than its fair value, and (2) the International Trade Commission (ITC) determines that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reasons of sales of the merchandise for the importation.<sup>10</sup> If all the elements are met, an antidumping duty would be imposed on the imported goods.<sup>11</sup> There are two ways antidumping cases are initiated. The first occurs when the DOC determines that, on the basis of available information, the elements of an antidumping duty exist.<sup>12</sup> The other occurs when a domestic industry proposes that the United States government initiate a dumping investigation against a foreign firm whose low priced imports are injuring it.<sup>13</sup> The ITC investigation

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<sup>6</sup> See Dongshen Zang, *Seeking Transparency in Antidumping Actions through Procedural Review: The GATT/WTO Jurisprudence and Its Implications for China*, PERSPECTIVES, April 30, 2001, [http://www.oycf.org/Perspectives/11\\_043001/seeking\\_transparency\\_in\\_antidump.htm](http://www.oycf.org/Perspectives/11_043001/seeking_transparency_in_antidump.htm).

<sup>7</sup> Christopher F. Corr, *Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures*, 18 Nw. J. INT'L L. & BUS. 49, 98 (1997).

<sup>8</sup> Michael Kabik, *The Dilemma of "Dumping" from Nonmarket Economy Country*, 6 EMORY INT'L L. REV. 339, 349 (1992).

<sup>9</sup> *Id.*, at 350.

<sup>10</sup> 19 U.S.C. § 1673b.

<sup>11</sup> *Id.*

<sup>12</sup> 19 U.S.C. § 1673a(a)(1).

<sup>13</sup> 19 U.S.C. § 1673a(b).

seeks to determine whether the dumping caused material injury to the U.S. industry.<sup>14</sup> If the product is sold below normal value and such sales caused injury to a domestic industry, the DOC fixes an antidumping duty on the imported product.<sup>15</sup> The DOC establishes the duty based on the dumping margin by calculating the average amount by which the fair market value of the product exceeds the price of the product in the United States.<sup>16</sup>

When determining the dumping margin, the fair market value of the product must first be calculated.<sup>17</sup> The calculation of the fair market value of the product depends on the categorization of the country from which the product is exported.<sup>18</sup> The exporting countries are categorized as having either a market economy or a non-market economy (NME).<sup>19</sup> In cases involving the products originating from a market economy, the DOC employs a standard method. The fair market value is equal to the price at which the product is sold in the domestic market.<sup>20</sup> For an NME country, the process of calculating the fair market value becomes much more complicated. NMEs impose unique problems because, by definition, they do not allocate resources according to market concepts of supply and demand. The price at which the product sells is based on some other criteria set by the government. The DOC assumes that government intervention may lead to wholesale subsidization in an NME. As a result, price of goods are subject to discrepancies that distort their value.<sup>21</sup> Therefore, the normal value is not based on the home market prices but on the market values of a surrogate country.

Briefly, the core criticism of antidumping law has focused on computations to determine whether a country's products are being dumped. According to one commentator, "dumping often occurs as a result of American bureaucrats' manipulation of numbers, rather than actual foreign business practices."<sup>22</sup> The main issue is that the U.S. administration sometimes finds that dumping has occurred when comparing dissimilar products. However, additional inherent inaccuracies

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<sup>14</sup> *Id.*

<sup>15</sup> 19 U.S.C. § 1673.

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> 19 U.S.C. § 1673a(c).

<sup>19</sup> Piskorski, *supra* note 5.

<sup>20</sup> 19 U.S.C. § 1677b(a)(1)(A)-(B).

<sup>21</sup> Piskorski, *supra* note 5, at 604.

<sup>22</sup> *See generally* JAMES BOVARD, *THE FAIR TRADE FRAUD: HOW CONGRESS PILLAGES THE CONSUMER AND DECIMATES AMERICAN COMPETITIVENESS* (St. Martin's Press 1991).

are present in determining “non-market economy products.”<sup>23</sup> These additional factors arise from the method by which “fair value” is calculated when dealing with a product in a non-market economy. A fair value determination with respect to the non-market economy countries is conducted by using the “factors of production” methodology as codified at 19 U.S.C. § 1677(b). The “factors of production” include hours of labor, quantities of raw materials used, energy and other utilities consumed, and the capital costs.<sup>24</sup> The DOC assesses a value of the factors of production by using surrogate market countries as models. Under the “surrogate country” approach, a producer of comparable goods in a market economy country of similar economic development would have its actual price substituted in the determination of the foreign market value for the non-market economy country.<sup>25</sup>

China has been protesting the use of the “surrogate country” approach as an unfair and inaccurate practice. Developed countries such as Norway, Austria and France have been chosen as surrogates, resulting in great miscalculation.

### III. CHINA’S COMPLAINT

Although the American anti-dumping methods used in relation to China may represent an improvement over the historical trade tensions on this issue, the use of market-based analysis denies Chinese producers any comparative cost advantage which may otherwise exist. The Chinese assert that the current antidumping law of the United States does not provide a greater market orientation for China’s economic transition from a non-market economy into a market economy country.<sup>26</sup> China’s opposition to United States anti-dumping practices was one of the last and most serious disagreements in the WTO accession negotiations.<sup>27</sup> China claims that several problems are caused by the anti-dumping duty laws.

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<sup>23</sup> A “non-market economy country”, according to American perspective “is any foreign country that the Department of Commerce determines it does not operate on market principles of cost or pricing structures, so that sales of merchandise in such a country do not reflect the fair value of merchandise. See Lantz, *supra* note 3.

<sup>24</sup> 19 U.S.C. § 1677(b).

<sup>25</sup> Sanhan Wang, *U.S. Trade Laws Concerning Nonmarket Economies Revised for Fairness and Consistency*, 10 EMORY INT’L L. REV. 593, 616 (1996).

<sup>26</sup> See Lei Yu, *Rule of Law or Rule of Protectionism: Anti-Dumping Practices Toward China and the WTO Dispute Settlement System*, 15 COLUM. J. ASIAN L. 293, 301 (2002).

<sup>27</sup> *Id.*

First, because each nation has a comparative advantage in some factor of production, the “surrogate country” method fails to take into consideration the possibility that the NME producer possesses significant advantages in production that the surrogate producer does not necessarily possess.<sup>28</sup> For example, the Chinese government asserts that the low prices of Chinese export commodities are the result of relatively cheap labor and low production costs in China.<sup>29</sup> India and Pakistan, two countries often chosen as surrogates, have more expensive raw materials than China.<sup>30</sup> As stated by Robert Lantz, “[m]anufacturers tend to use more of the factors of production they have in abundance, with a relatively lower cost, and less of the scarce factors carrying relatively higher cost.”<sup>31</sup> Thus, the factors of production used by a manufacturer from an NME country, combined with the costs and factors of production in a surrogate market country with a different cost structure, produce higher dumping margins than would be assessed for a manufacturer from a market economy country.<sup>32</sup> Further disparity exists because NME exchange rates prevent the conversion of prices to a meaningful dollar value.<sup>33</sup>

Secondly, performance under various criteria might be mixed. For example, products may be produced exclusively for consumption under the Chinese state plan at set prices or they may be produced partly for consumption under the Chinese state plan at set prices and partly for consumption outside the state plan at state guided prices. They may also be produced for consumption completely outside the state plan and sold at a free market price. In the last few decades, more products from China have been manufactured completely outside the state plan and sold at free market prices. After the change in the Chinese Constitution, private entities and enterprises obtained legitimate status to compete in the market.<sup>34</sup> While these factors account for the substantial amount of Chinese exports, America’s current “surrogate country” anti-dumping policy fails to take these variables into consideration.

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<sup>28</sup> Edwin A. Vermulst, *The Anti-Dumping Systems of Australia, Canada, the EEC and the United States of America: Have Anti-Dumping Laws Become a Problem in International Trade?*, 10 MICH. J. INT’L L. 765, 789 (1989).

<sup>29</sup> See William P. Alford, *When is China Paraguay? An Examination of the Application of the Antidumping and Countervailing Duty Laws of the United States to China and Other “Nonmarket Economy” Nations*, 61 S. CAL. L. REV. 79, 90 (1987).

<sup>30</sup> Yu, *supra* note 26, at 328.

<sup>31</sup> See Lantz, *supra* note 3, at 1007.

<sup>32</sup> *Id.* at 1008.

<sup>33</sup> Robert Franklin Hoyt, *Implementation and Policy: Problems in the Application of Countervailing Duty Laws to Nonmarket Economy Countries*, 136 U. PA. L. REV. 1647, 1658 (1988).

<sup>34</sup> XIAN FA art.11 (1996) (P.R.C).

Finally, the outcome of United States antidumping investigations is unpredictable because China has no advance knowledge of which surrogate will be used to determine its prices.<sup>35</sup> The DOC decides on a case-by-case basis which countries will be considered state-controlled economies and which surrogate countries will be selected.<sup>36</sup> Accordingly, a Chinese producer cannot know “before an export is made whether the question of fair value will be determined on the basis of the Chinese home market price or data from an as yet unidentified surrogate.”<sup>37</sup> Thus, such producers are unable to plan ahead and set their prices to comply with the United States anti-dumping laws.

#### IV. FOCUS ON INTEREST, NOT POSITIONS

In the well-renowned book, *GETTING TO YES*, Fisher and Ury noted that because “parties problems often appear to be a conflict of positions, and since their goal is to agree on a position, they naturally tend to think and talk about positions and in the process often reach an impasse.”<sup>38</sup> However, if the parties focus on interests instead of positions, this would change. Interests motivate people and are the silent movers behind positions.<sup>39</sup> A position is a stance upon which a party has decided, while an interest is the underlining reason that causes a party to adopt such a decision.<sup>40</sup> If two parties focus on their opposite positions, they may be unable to identify compatible interests. However, focusing on interests rather than positions enables the parties to reconcile their differences and to begin developing solutions.

In the negotiation context, there are two principle negotiating perspectives, namely adversarial (competitive or positional) and collaborative (problem solving).<sup>41</sup> Negotiation involves one-on-one direct discussions between parties with a goal to narrowing any differences. Successful negotiation leads to a common understanding or agreement on previously uncommon positions.

In November 1999, American and Chinese negotiators concluded a bilateral agreement concerning China’s accession to the WTO.<sup>42</sup> The provisions of the agreement were included in the Final

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<sup>35</sup> See Alford, *supra* note 29, at 92.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> ROGER FISHER & WILLIAM URY, *GETTING TO YES* 40 (Bruce Patton ed., Penguin Books 2d ed. 1991).

<sup>39</sup> *Id.* at 41.

<sup>40</sup> *Id.*

<sup>41</sup> See generally *id.*

<sup>42</sup> See SEAN LEONARD, *THE DRAGON AWAKENS: CHINA’S LONG MARCH TO GENEVA* 160-75 (London: Cameron 1999).

Protocol.<sup>43</sup> Section 15 of Part I deals with anti-dumping issues.<sup>44</sup> This agreement provides that, for purposes of applying anti-dumping duty laws, the United States may treat China as an NME during the fifteen years subsequent to China becoming a WTO member nation. However, since this agreement, the United States has launched numerous anti-dumping claims against China with the WTO Dispute Settlement Body (DSB) and, accordingly, China ranks first in the world for the number of anti-dumping suits lodged against it.<sup>45</sup>

By the end of 2001, over 450 anti-dumping cases involving more than \$280 million USD were initiated regarding 4,000 categories of Chinese products within the WTO system.<sup>46</sup> Nearly half of these anti-dumping suits were brought by the United States.<sup>47</sup> The rise in antidumping cases has led to the criticism that the rule-based WTO Dispute Settlement Body has increased the adversarial nature of the proceedings.<sup>48</sup> "The result of the increase in litigation is that parties become entrenched and polarized in their positions."<sup>49</sup> Many countries argue that the negotiated settlement system would be strengthened, which shows good faith to resolve the dispute before resorting to litigation.<sup>50</sup> Statistics show that less than one-half of the antidumping complaints actually go through the panel process, while the other one-half are settled by negotiations.<sup>51</sup>

As discussed above, within five years of joining the WTO, China ranked first as the nation with the highest number of anti-dumping suits initiated against it, with the United States bringing more cases than any other nation.<sup>52</sup> It seems it is time for China and the United States to reopen negotiations toward narrowing down differences and reaching a common goal. In order to resolve their differences, the problem-solving approach would be the best choice because it would avoid the emphasis on positional bargaining, while seeking to meet the underlying needs of both parties. If the United States and

<sup>43</sup> *See id.*

<sup>44</sup> *Sino-U.S. Accession Agreement*, available at [www.USA-China.org](http://www.USA-China.org).

<sup>45</sup> *See* Editorial, *Anti-dumping Lawsuits Rankle*, S. CHINA MORNING POST, Oct. 29, 2001, at Business Post 3 [hereinafter *Anti-dumping Lawsuits Rankle*].

<sup>46</sup> Yu, *supra* note 26, at 299.

<sup>47</sup> *Id.*

<sup>48</sup> Alic Aranda, *Sugar Wars; Dispute Settlement under NAFTA and WTO*, 12 TEX. HISP. J. L. & POL'Y 121, 138 (2006).

<sup>49</sup> *Id.*

<sup>50</sup> *See generally* PETER SUTHERLAND ET. AL., CONSULTATIVE BOARD OF THE WTO, THE FUTURE OF THE WTO: REPORT TO SUPACHAI PANITCHPAKDI, CH. VI: THE WTO DISPUTE SETTLEMENT SYSTEM 49-60 (2005), available at [http://www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.pdf](http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf).

<sup>51</sup> *Id.* at 50.

<sup>52</sup> *See Anti-dumping Lawsuits Rankle*, *supra* note 45.



China applied the problem-solving approach to their anti-dumping negotiations, they could launch great dialogues concerning anti-dumping issues and develop a method for dealing with their differences.

Because the problem-solving negotiation does not take place in a vacuum, a variety of conditions must be met. The current relationship between the United States and China is surrounded by factors necessary to make anti-dumping negotiations successful.

(A) *Interdependence*

To ensure productive negotiation, the parties must be dependent upon one another to satisfy their interests.<sup>53</sup> If one party can have their needs met without the cooperation of the other, that party will have little incentive to negotiate.<sup>54</sup> Through its transition from a centrally planned economy toward a market oriented economy, especially after its accession to the WTO, China's economic growth has increased, contributing almost one-third of global GDP growth.<sup>55</sup> Together, China and the United States accounted for nearly half of all global growth in 2004.<sup>56</sup> In light of China's achievements, United States industries fear that China will "tilt global trade and technology balances in its favor, ultimately becoming an economic, technological and military threat to the United States."<sup>57</sup> Such industries have had an increasing incentive to adopt protectionist policies towards Chinese imports.

Despite differing positions regarding anti-dumping policy and speculation about the threat that China poses to U.S. companies, the United States wants China to undertake economic reform, comply with its obligations as a WTO member, and participate in the global economy.<sup>58</sup> The United States hopes that the WTO could play a role in accelerating China's market reform, while providing an impetus to further liberalize its trade activities.<sup>59</sup>

There are obvious reasons why China pushes for economic reform and access to WTO. "China benefits from the recognition and

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<sup>53</sup> Christopher W. Moore, *Negotiation*, <http://www.au.af.mil/au/awc/awcgate/army/usace/negotiation.htm>.

<sup>54</sup> *Id.*

<sup>55</sup> *The Dragon and The Eagle: China's Economy is Larger Than It Looks*, THE ECONOMIST, Sept. 30, 2004, at 3.

<sup>56</sup> *Id.*

<sup>57</sup> George J. Gilboy, *The Myth Behind China's Miracle*, FOREIGN AFF., July/Aug., 2004, available at <http://www.foreignaffairs.org/20040701faessay83405/george-j-gilboy/the-myth-behind-china-s-miracle.html>.

<sup>58</sup> See Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1162, 1165 (1987).

<sup>59</sup> See Lawrence M. Reich, *Foreign Policy or Foreign Commerce?: WTO Accessions and the U.S. Separation of Powers*, 86 GEO. L.J. 751, 758 (1998).

prestige that WTO membership brings because WTO membership will deepen China's integration into the world economy and signal its status as a world economic power."<sup>60</sup> In addition, WTO membership allows China to create the legal framework necessary to support a market economy.<sup>61</sup>

In an era of flourishing globalization, nations become more economically interdependent. Both the United States and China can no longer rely on policies that focus only on domestic production. Instead, a new approach must be developed, acknowledging the importance of global interactions and recognizing that growing economic interdependence mandates the cooperation of foreign and domestic industries. The relationship between the United States and China is one of the most important bilateral relationships for both nations today.<sup>62</sup> The protectionist measures of U.S. anti-dumping rules would reverse recent improvements in trade relations between the United States and China. Not only are Chinese producers unsatisfied with the unfair antidumping duties and given an incentive to avoid marketing goods in the U.S., but U.S. consumers are affected by the unavailability of, or at least price increases in, certain goods.<sup>63</sup> These protectionist policies could alienate the United States from its trade allies and diminish U.S. influence in China. In addition to its adverse impact on relations between the United States and China, other nations' markets may be discouraged by decreased U.S. credibility and thus hesitate to commence trade relations with the United States, impeding the goal of a global economy.<sup>64</sup>

### (B) Common interests

Negotiation parties must be able to agree upon some common interests for a productive negotiation to occur.<sup>65</sup> In any negotiation, there are both opposed and compatible interests. "The number and importance of the common issues and interests influence whether negotiations occur and whether they terminate in agreement. Parties

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<sup>60</sup> Karen Halverson, *China's WTO Access: Economic, Legal and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 332 (2004).

<sup>61</sup> See *id.* at 333.

<sup>62</sup> Piskorski, *supra* note 5, at 628.

<sup>63</sup> *C.f.* Dorinda D. Bolander, *Survey of the Court of International Trade: Anti-Dumping Actions of 1992*, 56 ALB. L. REV. 1017, 1020 (1993) (discussing the legal procedure for determining if a U.S. industry has been damaged by anti-dumping laws).

<sup>64</sup> See Robert W. McGee, *An Economic Analysis of Protectionism in the United States with Implications for International Trade in Europe*, 26 GEO. WASH. J. INT'L. L. & ECON. 539, 564 (1993).

<sup>65</sup> Moore, *supra* note 53.

must have enough issues and interests in common to commit themselves to joint decision-making process.”<sup>66</sup>

1. *The common interest in encouraging Chinese private entities.*

In past decades, China’s economic reforms have resulted in the gravitation toward market orientation and, accordingly, China’s economy should not be interpreted to mean that Chinese government is involved in price setting. It is estimated that only twenty-five products in China are completely subject to state pricing, representing about 18 percent of the total sales value of production.<sup>67</sup> Prices for the vast majority of products are now subject to market forces.<sup>68</sup> Economic reforms have reduced the role of central government planning, decentralized economic management, and allowed the expansion of private and cooperative enterprises. Currently, the legitimate status of private entities has been promulgated by the Chinese Constitution.<sup>69</sup> A significant percentage of commodities exported from China are manufactured by these newly established private enterprises and joint ventures.<sup>70</sup>

Using the surrogate method, the DOC imposed excessively high duties, placing the Chinese exporting company at a comparative disadvantage in relation to U.S. companies.<sup>71</sup> Because unnaturally high duties are imposed on goods from China, the ability of Chinese private manufacturers to sell and export their products into the United States will eventually be decreased.<sup>72</sup> Reducing access of private manufacturers to the U.S. market will cause the Chinese private sectors to lose profits, as well as U.S. market share.<sup>73</sup> As a result, private Chinese firms will be unable to become significant global play-

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<sup>66</sup> *Id.*

<sup>67</sup> Lei Wang, *China and the WTO: A Negotiating History*, 2 INT. TRADE L. & REG. 167, 169 (1996) (U.K.).

<sup>68</sup> *Id.*

<sup>69</sup> JIANFU CHEN, FROM ADMINISTRATIVE AUTHORISATION TO PRIVATE LAW: A COMPARATIVE PERSPECTIVE OF THE DEVELOPING CIVIL LAW IN THE PEOPLE’S REPUBLIC OF CHINA 111 (1995) (discussing the 1988 amendment to China’s constitution to permit private economic growth).

<sup>70</sup> Chinese’s joint venture law has provided foreign investors with greater flexibility and favorable tax treatment in the establishment of enterprises within China. See HONG KONG TRADE DEVELOPMENT COUNCIL, ANALYSIS OF THE DEMAND OF MAINLAND PRIVATE ENTERPRISES FOR HONG KONG SERVICES, Dec. 10, 2003, available at <http://www.tdctrade.com/econforum/tdc/tdc031205.htm>.

<sup>71</sup> Hongliu Gong, *Legal Strategies for Challenging the Current EU Anti-Dumping Campaign Against Imports from China: A Chinese Perspective*, 27 BROOK J. INT’L L. 575, 592 (2002).

<sup>72</sup> Lantz, *supra* note 3, at 1008.

<sup>73</sup> *Id.*

ers, causing the Chinese government to continue to support the state-owned sector and to disfavor the private sector.<sup>74</sup> It is in the best interest of the United States to encourage China to expand its private sectors and open its markets to trade and investment. If the Chinese private sector is substantially burdened by an unnecessary U.S. anti-dumping duty, China will lose its moving force to transform into a market economy. Then, U.S. foreign trade policy would lose credibility as an important trade player in an era of flourishing transitions from state controlled policies and economies to democratic governance.

## 2. *The common interest in foreign direct investment.*

Although China has maintained strong economic growth, U.S. fears of China's possible threat are unwarranted because China's economy depends on direct foreign investment.<sup>75</sup> "Foreign direct investment, exports and fixed-asset investment have been the important pillars of China's economic growth during the past decade."<sup>76</sup> Since 1978, China has taken in \$500 billion in foreign direct investment and the United States has directly invested more than \$40 billion in China.<sup>77</sup> A close look at China's exports reveals that most of China's exporters are foreign-investment enterprises. Foreign-funded enterprises accounted for 55 percent of China's exports in 2003.<sup>78</sup> In advanced industry exports, foreign investment enterprises increased their total share of high-tech exports from 74 percent to 85 percent between 1998 and 2002.<sup>79</sup> An example of such an industry is the computer equipment industry, in which foreign investment enterprises comprised 92 percent of all exports in 2003.<sup>80</sup> These data highlight China's dependence on foreign investment, as well as the dominance of foreign firms in China's exports. Even the domestic private sector cannot compete with these dominant foreign firms when it comes to exporting.<sup>81</sup> With antidumping actions against China increasing and profits decreasing, U.S. protectionist trade policies are hurting American investors and jeopardizing the type of economic relationship that the United States has long sought to create. This is adverse to the congressional intent of implanting NME antidumping duty law. The U.S. Congress is willing to see if China is able to establish a free-mar-

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<sup>74</sup> *Id.*

<sup>75</sup> See Gilboy, *supra* note 57.

<sup>76</sup> Phelim Kyne, *Foreign Investment in China Remains Strong*, WALL ST. J., Sept. 16, 2004, at A15.

<sup>77</sup> Gilboy, *supra* note 57.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See Gilboy, *supra* note 57 (indicating how the data demonstrates that China's private firms are not yet significant global players).

ket principle so that it could undergo substantial decentralization, allowing the rapid growth of private enterprises and increasing China's incentives to liberalize its trade practices.<sup>82</sup>

### 3. *The common interests in promoting Chinese transparency and uniformity in administration.*

By adopting the rules in China's protocol of accession, the United States hopes that the WTO framework will act as political leverage to bind China to make a broad market access commitment and to push its economic reform to the next stage.<sup>83</sup> In addition to trade liberalization, the United States expects that China's access to the WTO would afford China full participation as a WTO member and fulfill its international obligations by promoting its transparency and predictability and by executing uniform administration.<sup>84</sup> On the contrary, the United States antidumping duty laws toward China create "inaccurate margins, unpredictability and decreased cooperation in international norms."<sup>85</sup> U.S. antidumping calculations toward China have also been criticized as being "a result of American bureaucrats' manipulation of numbers, rather than actual foreign business practices."<sup>86</sup> "The low threshold requirement increases [the] chance of U.S. private petitioners to harass Chinese exporters by allowing them too easily instigate antidumping investigations."<sup>87</sup> Such policies can hardly promote transparency and uniformity in the Chinese administration. Moreover, China has started its own antidumping investigation and legislation in recent years. The Chinese Antidumping Regulations were enacted in 1997.<sup>88</sup> The Chinese government has carried out nineteen antidumping investigations through May, 2002.<sup>89</sup> The United States expects that China's antidumping regulation will serve as an external force to develop a positive model for independent

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<sup>82</sup> See Brad L. Bacon, *The People's Republic of China and the World Trade Organization: Anticipating a United States Congressional Dilemma*, 9 MINN. J. GLOBAL TRADE 369, 388-89 (2000). The United States Congress encouraged China's accession to WTO to open an enormous market to U.S. exporters, promote faster growth in the productivity of China's private entities, and provide the broad economic and institutional changes in China necessary for becoming an open, stable and, prosperous observer of global norms.

<sup>83</sup> Halverson, *supra* note 60, at 334.

<sup>84</sup> *Id.* at 335-336.

<sup>85</sup> Piskorski, *supra* note 5, at 621.

<sup>86</sup> Yu, *supra* note 26, at 327-328.

<sup>87</sup> Piskorski, *supra* note 5, at 621.

<sup>88</sup> See generally Shen Jianming, *A Critical Analysis of China's First Regulation on Foreign Dumping and Subsidies and Its Consistency with WTO Agreements*, 15 BERK. J. INT'L L. 295 (1997).

<sup>89</sup> *Id.*

and transparent judicial and administrative enforcement.<sup>90</sup> However, if the Chinese government conducts antidumping investigations against U.S. exporters as retaliation against United States antidumping policy, U.S. exporters would suffer unnecessary injury as the result of U.S. protectionist antidumping policy.

#### 4. *The common interests in changing Chinese human right policies.*

U.S. policies that treat China as an NME country in anti-dumping issues may also be instituted as an attempt by the United States to correct Chinese human rights policies that it views as inadequate. The U.S.-China WTO agreement was expected to strengthen the rule of law in China by promoting the basic rules of fairness, equality and justice, and legal and administrative independence, all of which are considered critical to fostering basic human rights.<sup>91</sup> Former U.S. Trade Representative Charlene Barshefsky declared that China “will join the community governed by the rule of [l]aw” after entering into the WTO.<sup>92</sup> However, the actual effect of protectionist anti-dumping rules is to reduce the number of available jobs of China, weaken newly-developed private sectors, slow economic growth, and lower the Chinese standard of living.<sup>93</sup> The overall effect of these anti-dumping measures is to eliminate economic individual rights in China.<sup>94</sup> By the same token, the protectionism of antidumping rules provides no impetus for the Chinese government to either improve its political human rights or to accelerate its process of legal reform.

#### (C) *Broadening the options*

People involved in negotiation rarely sense the value of having multiple options. Each side sees the situation as essentially black or white.<sup>95</sup> For negotiation parties to reach an agreement over issues about which they disagree, they must create a large number of options from which both parties can jointly choose. Inventing options involves creative thinking. Each party should abstain from looking for one “best” answer by threatening or inflicting pain upon the other side. To the contrary, both sides need to invent a substantial number of different ideas such as providing new policies, seeking the advice of different experts, asking thought-provoking questions, exercising legitimate

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<sup>90</sup> M. Ulric Killion, *Quest for Legal Safeguard for Foreign Exporter Under China's Anti-Dumping Regime*, 29 N.C. J. INT'L L. & COM. REG. 417, 417 (2004).

<sup>91</sup> Bill Nichols & James Cox, *Backers Hope China Pact Will Promote Reform*, USA TODAY, Sept. 20, 2000, at A10.

<sup>92</sup> *Id.*

<sup>93</sup> McGee, *supra* note 64, at 553.

<sup>94</sup> *Id.*

<sup>95</sup> FISHER & URY, *supra* note 38, at 59.

authority, and providing rewards. This could broaden the options for both parties and create a mutually advantageous relationship.<sup>96</sup>

China has long argued that it should not be treated as an NME in light of recent reforms in the market orientation of its economy.<sup>97</sup> Notwithstanding its position, the United States and other WTO members still treat China as a non-market economy for purposes of conducting antidumping investigations against Chinese companies in its protocol of accession to the WTO.<sup>98</sup> As discussed above, this antidumping duty is inherently restrictive since it only recognizes two specific types of economies, “market” and “non-market.”<sup>99</sup> There is no “gray area” for transitioning economies, such as China’s, that undertake tremendous economic reforms toward a more market-oriented economy.<sup>100</sup> Therefore, when investigating a specific case, the DOC is forced to categorize the country’s economy as either a market or a non-market economy despite the fact that, in reality, countries exist which may be neither.<sup>101</sup>

Given the shared interests of China and the United States to promote China’s economic reform, combined with problems related to current antidumping duties, a favorable alternative to the “all or nothing” approach of determining a country’s market orientation in the antidumping duty law would be a sector-to-sector analysis of the non-market economy country where it exhibits “bubbles of capitalism.”<sup>102</sup> Under the promise of a sector-by-sector transition, a non-market economy country in transition could have some sectors operating under the market principle. In calculating the fair market value, the DOC should include the cost of production factors in these sectors as purchased under market conditions, while obtaining the cost of remaining sectors from the surrogate country.<sup>103</sup> This sector-by-sector analysis is a very case-specific approach that focuses on individual manufacturers rather than the entire industry.<sup>104</sup> Using market-driven costs will motivate these individual manufacturers to continue to operate under market principles. Moreover, by using this methodology, the market value of Chinese products would be more indicative of true costs without being overly influenced by particular aspects of any third-country economy.

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<sup>96</sup> *Id.* at 57-70.

<sup>97</sup> See Alford, *supra* note 29, at 97-98.

<sup>98</sup> Piskorski, *supra* note 5.

<sup>99</sup> *Id.*

<sup>100</sup> Michael Kabik, *The Dilemma of Dumping from Non-Market Economy Country*, 6 EMORY INT’L L. REV. 339, 379-380 (1992).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Lantz, *supra* note 3, at 1039.

<sup>104</sup> Alford, *supra* note 29, at 92.

Another method to adjust the threshold requirements of current antidumping duty laws is to modify the injury test. The current threshold is too low; where a sale is at less than foreign market value, there is an injury.<sup>105</sup> Private petitioners can easily manipulate the test by instigating antidumping investigations without adequate proof. The injury test should be modified so that a greater level of injury would be required or that actual, rather than potential, injury would be required.

Since the DOC has been given the wide range of discretion in the investigation and determination of dumping activities, another solution would be to give the Court of International Trade (CIT) a heightened standard of review. Currently, the CIT use the reasonableness standard to review DOC decisions.<sup>106</sup> The CIT must sustain each DOC determination, unless it is unsupported by substantial evidence on the record or is not in accordance with the law.<sup>107</sup> The reasonableness standard is highly deferential, entrusting the DOC with too much discretion in determining antidumping duties. In other words, each DOC decision is upheld provided its interpretation is reasonable, even if the CIT held a differing opinion.<sup>108</sup> Should the CIT review standard be stricter, the DOC would be forced to investigate antidumping cases more thoroughly so as to convince the CIT while “using a surrogate country to determine home market data for non-market economies.”<sup>109</sup> Such a heightened standard would ensure procedure adherence with U.S. antidumping law and help the United States maintain credibility with foreign countries.

Although these methods make it more difficult to reach an affirmative dumping determination, they may create greater incentives for China to negotiate with the United States. For example, under the sector-by-sector method, a Chinese manufacturer will know that the actual cost will be used to determine the market value of exports and will, therefore, be more willing to share information and participate in negotiations. Moreover, since China’s economy is not static, the United States must accept that China is a work-in-progress and cannot yet meet all the standards of a full-fledged market economy. The more constructive treatments under antidumping duty law may motivate China’s non-market economy sectors to make pricing and production decisions on a market basis. Over the past fifty years, the United States has long sought to see China establish a rules-based economy and integrate into global economic networks that would compel China

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<sup>105</sup> See 19 U.S.C. § 1673 (1998).

<sup>106</sup> 19 U.S.C. § 1516(a)(1)(C).

<sup>107</sup> *Id.*

<sup>108</sup> Piskorski, *supra* note 5, at 630-631.

<sup>109</sup> Bolander, *supra* note 63, at 1047.



to commence political reforms.<sup>110</sup> Thus, alternative methods of anti-dumping law would reinforce already existing U.S. strategic engagement with China and encourage greater ones.

## V. CONCLUSION

As the United States and China have become more intertwined with each other economically, their trade exchanges have expanded dramatically. Simultaneously, there is increasing tension between the two nations regarding the current U.S. anti-dumping policy. Conflicts between the two countries regarding antidumping policy call for more negotiations so that the problem can be resolved without reaching a point of crisis. Through problem solving negotiations, the United States and China could find common interests and merge their differences. Moreover, the problem-solving approach would lead the two nations to enter into agreements on the antidumping issue and further liberalize their trade activities.

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<sup>110</sup> See generally Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 348, 374 (2000).