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Olivier Prost*

Song Li Wei†

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Olivier Prost and Song Li Wei

Abstract

China's accession to the World Trade Organization ("WTO") will help open up the Chinese market for European undertakings and will boost China's role as a major partner of the European Community. Accordingly, China's accession primarily can be seen as a factor in liberalizing Sino-European trade relations. China's accession to the WTO also will cause this country to lose progressively its "exception" status. As a result, Europe, on the one hand, will treat China just like its other trading partners, while China, on the other hand, will benefit fully from its WTO membership, not only with regard to its WTO obligations, but also to its WTO rights. Therefore, China's accession to the WTO can also be seen as a means of normalizing Sino-European trade relations. The case of anti-dumping is particularly illustrative.

CHINA'S ACCESSION TO THE WTO: HOW WILL THIS BENEFIT EUROPEAN UNDERTAKINGS?

*Olivier Prost
Song Li Wei**

INTRODUCTION

China's accession to the World Trade Organization¹ ("WTO") will help open up the Chinese market for European undertakings and will boost China's role as a major partner of the European Community. Accordingly, China's accession primarily can be seen as a factor in liberalizing Sino-European trade relations.

China's accession to the WTO also will cause this country to lose progressively its "exception" status. As a result, Europe, on the one hand, will treat China just like its other trading partners, while China, on the other hand, will benefit fully from its WTO membership, not only with regard to its WTO obligations, but also to its WTO rights. Therefore, China's accession to the WTO can also be seen as a means of normalizing Sino-European trade relations. The case of anti-dumping is particularly illustrative.

I. CHINA'S ACCESSION TO THE WTO AS A FACTOR IN LIBERALIZING SINO-EUROPEAN TRADE RELATIONS

A. A New Framework for Liberalizing Trade

The negotiations on China's accession already have led to a substantial reduction in tariff barriers for numerous products. China made a wide range of commitments in its November 1999 agreement with the United States.² The European Community has been able to build on this position through the Sino-EU Agreement on China's Accession to the WTO³ ("Sino-EU Agree-

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1. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

2. Agreement on Market Access, Nov. 15, 1999, P.R.C.-U.S., reprinted in INSIDE U.S. TRADE, Mar. 15, 2000 [hereinafter U.S.-PRC Market Access Agreement].

3. See Clay Chandler, *China Signs Accord with EU to Speed WTO Entry: Beijing Makes Concessions to Clear Final Major Hurdle*, INT'L HERALD TRIB., May 20, 2000, at 1.

ment”), obtaining further commitments on 150 products of specific interest to European exporters.

This reduction includes the abolition of tariff peaks that block or severely restrict access to the Chinese market for certain European products (e.g., automobiles, chemicals, agricultural foodstuffs, and alcoholic drinks). Other spectacular reductions were applied to other products. European exporters, therefore, can expect real benefits with respect to these products. All spirits will be subject to a duty of 10% (the current rate is 65%), electrical goods will be “0” rated by 2005, and a tariff of 25% will apply to automobiles by July 1, 2006 (the current rate is between 80% and 100%). For numerous other products, including agricultural products, exporters will see a direct benefit due to the tariff commitments made by China.

China also has committed itself to a progressive abolition of quotas limiting imports of certain products. This process already will be achieved prior to accession for a small number of products (e.g., optical fibers and fertilizers) for the majority of products by 2002, and the remainder by 2005. During this short period, the existing quotas will be increased year by year.

Other important improvements in trade liberalization must be noted. After accession to the WTO, China cannot use import or export licenses to control purchase volumes or, for exports, to organize the sale of strategic products by controlling price levels. A timetable for their withdrawal over three to five years has been prepared based on negotiations with the various WTO Members. In addition, China also has agreed to relax its State monopolies channeling all Chinese imports and exports. For European exporters, this means that they will no longer have to deal exclusively through Chinese State importers. They will be able to sell directly to other Chinese importers. For example, the Sino-EU Agreement deregulates oil and fertilizers. These markets will be progressively opened up to private traders. The deregulation of certain exports (e.g., silk) will allow European companies to buy directly from Chinese producers. European manufacturers will be entitled to choose between different producers, instead of paying the Chinese State export price.

Finally, it must be noted that China has offered commitments in several service sectors that are important to European undertakings. In the telecommunications sector, the Chinese

commitments entitle foreign operators to acquire up to a 25% interest in telephone service companies from the date of accession. The permitted holding will increase to 35% one year later and to 49% three years after that. The Chinese authorities now allow inter-city telecommunications, which means that telecommunications are no longer restricted to city-limits, which represent 75% of current telephone calls. Both sides in the negotiations also succeeded in reaching a bilaterally acceptable agreement for European investment in mobile telephone services. Indeed, some European operators (France Telecom, Siemens/Deutsche Telecom, and Telecom Italia) already had created mixed telecommunications companies (China-China-Foreign) with subsidiaries of China Unicom and made significant investments. These companies, however, were obliged suddenly to cease their activities, because they were considered illegal by the Chinese authorities. The negotiations resulted in a satisfactory compensation package for these investments.

In the banking sector, the Chinese authorities have embarked upon a full reform. Consequently, the competition between Chinese and foreign banks, which currently represent only 2% of the established financial institutions in China, is likely to be improved. There are still difficulties in foreign banks trading in Chinese currency. This situation should improve slightly based on China's commitments under the Sino-EU Agreement, which allow European financial undertakings in the city of Zhuhai to transact in the local currency.

In the insurance sector, the Sino-EU Agreement grants seven new licenses (two for damage insurance and five for life insurance) to European companies. This should strengthen the European position in China considerably. Currently, only four European firms operate in the insurance sector. The new European undertakings concerned are still waiting for the licenses to be attributed. Interpretation of China's commitment is uncertain. The sticking point is whether these licenses are intended only to extend the geographical scope of existing businesses or whether they should be treated as totally independent. In any case, the licenses should be attributed before China's accession to the WTO. According to the new Sino-EU Agreement, European insurance companies also will be allowed progressively to sell the same products as their Chinese competitors. Two years after China's accession, the scope of these companies' businesses

will be extended to health insurance, pensions, group life insurance, and other insurance other than statutory insurance. China also has committed itself to guaranteeing effective management control for outside investors in life insurance joint ventures by allowing them a 50% equity share and free choice of joint venture partners. From the date of accession, China has agreed to allow the establishment of branches and 51% owned joint ventures for non-life insurance. The establishment of wholly foreign-owned subsidiaries will be allowed two years following China's accession. The reinsurance sector also will be opened up fully to non-Chinese service providers from the date of accession.

Finally, in the distribution sector, China has committed itself to lifting the specific restriction on joint ventures that applies to large international retail stores greater than 20,000 square meters in size and to retail traders with more than thirty outlets in China. Until now, the 50-50 "equity limit" that applied to these categories of traders represented a significant restriction on foreign investment in the distribution sector in China. China also has granted the right for undertakings, backed by foreign investment, to sell goods other than their own on the retail market and to offer other services connected to distribution, such as transportation, maintenance, repairs, and after sales services.

China, however, cannot comply fully with all of its WTO obligations from the very first day of its accession. The various tiers of government in China, both at national and regional levels, are likely to raise further difficulties regarding compliance with the country's WTO obligations. It is clear, therefore, that the very important commitments made by China during its accession negotiations alone will not be sufficient to open up the Chinese market. Compliance also will have to be secured by way of other separate instruments providing market access.

In this regard, European companies will have to play an active role in ensuring that the expectations raised by China's accession to the multilateral trade system become tangible realities and that these European companies obtain access to the enormous potential of the Chinese market. This should be true particularly in the sanitary and phytosanitary sector ("SPS"), governed by the Agreement on the Application of Sanitary and

Phytosanitary Measures⁴ (“SPS Agreement”), and in terms of technical trade restrictions, which fall within the scope of the Agreement on Technical Barriers to Trade⁵ (“TBT Agreement”).

The SPS Agreement establishes the rules that apply to members wishing to impose national measures restricting trade for reasons of health or the protection of human, animal, or plant life. The SPS Agreement will bind China and will prevent the Chinese authorities from misusing the grounds of health protection if it introduces national measures to restrict trade. It should be noted that the use of scientific-based SPS standards by China is a major concern for the European undertakings in the food-stuff sector, particularly in the areas including meat, citrus, apples, potatoes, tomatoes, peppers, eggplant, cucumbers, and growing media. For this reason, a specific agreement was reached which applies the provisions of the SPS Agreement to EU-China relations prior to China’s accession to the WTO.

The other WTO agreement that will be of particular relevance to European businesses is the TBT Agreement. The TBT Agreement deals with national regulations involving technical restrictions that might obstruct international trade. The TBT Agreement sets forth the conditions whereby a member may adopt technical regulations and standards, including packaging, marking, or labeling requirements. Such regulations may not be prepared, adopted, or applied with the aim or the effect of creating unnecessary obstacles to international trade and should not be more trade-restrictive than necessary to fulfill a legitimate objective, such as public health or consumer or environmental protection. Examples of Chinese technical regulations constituting obstacles to trade for European undertakings are numerous. For instance, there is an administrative registration in sectors such as chemicals and cosmetics, and a certain number of imported products, such as car parts, boilers, and pressure vessels, are submitted to safety inspections. Moreover, imports from European countries are submitted to an “in loco inspection” in the European factory, with the European undertaking responsible for the traveling expenses. Another sector at the origin of com-

4. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

5. Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

plaints from European producers is textiles and leather. European producers have to face quality and conformity controls, requirements regarding the certification and the mutual recognition of products or marking, and labeling and packaging requirements.

To ensure that European undertakings benefit in real terms from China's accession to the WTO, there are several legal enforcement mechanisms available. These apply at both the European and the WTO level and require close cooperation between European operators and public authorities. One of these mechanisms is the so-called "EC Trade Barrier Regulation."⁶ This complaint-driven instrument provides a mechanism whereby community firms, groups of firms, or industry associations may take action against trade barriers obstructing their access to third country markets or affecting their position in violation of WTO provisions.

The role of the European Commission in the context of the EC Trade Barrier Regulation is to investigate the case. It has a prescribed time period (usually five months) to do so. The European Commission will then seek redress. An investigation is undertaken after consulting the fifteen Member States. Unless there is strong opposition from various Member States, the European Commission is free to begin a proceeding. Following the investigation, and in the absence of an amicable settlement, the European Community is entitled to take action at the international level, referring the case for resolution by a WTO dispute settlement proceeding in Geneva. The main objective of the TBT Agreement, however, is to reach a negotiated settlement of the dispute through consultation before moving on to the panel stage.

B. *A New Policy to Encourage Foreign Investment*

With regards to foreign investment and in the perspective of its accession to the WTO, China is cleaning up its existing laws and regulations governing foreign investment in order to comply with the WTO requirements, especially the Agreement on Trade-Related Investment Measures⁷ ("TRIMs"). According to

6. Council Regulation No. 3286/94, O.J. L 349/71 (1995).

7. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC"), there are currently six foreign-related economic and trade laws (two concerning foreign trade and four concerning foreign investment), forty-four regulations promulgated or approved by the Chinese State Council, and 666 regulatory rules issued by ministries or other central governmental administrations in China. All of these laws and regulations must be amended or abolished.

The workload, therefore, is enormous. Up to now, only two new laws governing foreign-invested enterprises have been amended. They are the Wholly Foreign-Owned Enterprise Law of the PRC⁸ and the Cooperative Joint Venture Law of the PRC,⁹ both of which were adopted October 31, 2000. Others are being amended and are expected to be promulgated in the near future. From an examination of the above-mentioned two laws, it is clear that China is making an effort to comply with the requirements of the WTO. Moreover, a series of new policies aimed at encouraging foreign investment has recently been published and will change significantly China's legislation on foreign investment.

China's new approach to foreign investment is to comply with the requirements of TRIMs. One of the requirements of TRIMs prohibits the use of all investment measures regarded as having a distorting and adverse effect on trade in goods. In China, this would include (i) measures requiring foreign-invested enterprises to give preference to domestic supply instead of international supply when purchasing raw materials, fuel, and other materials, (ii) measures requiring a wholly foreign-owned enterprise to utilize advanced technology and to export the majority of its annual production, (iii) measures requiring auto-balance in foreign currency, and (iv) measures controlling the production and operation activities of foreign-invested enterprises.

Recently, Chinese legislators have made significant improvements, as can be seen in the Wholly Foreign-Owned Enterprise Law of the PRC and the Cooperative Joint Venture Law of the PRC. In these two new laws, the measures that are inconsistent with TRIMs or that apply discriminatory investment standards

8. See *ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO* [GAZETTE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA], Jan. 30, 2001, at 11-12.

9. See *id.* at 7-9.

have been amended or deleted. The new Wholly Foreign-Owned Enterprise Law of the PRC, for example, has been amended as follows:

- Before the amendments, this law required that enterprises “must benefit the development of China’s national economy and utilize advanced technology and equipment or export all, or the majority of their products.” This provision has been amended to read that enterprises “must benefit the development of China’s national economy. The State encourages the founding of wholly foreign-owned enterprises whose products are export-oriented or involved in the high-tech field.”
- The provisions concerning the control of production and operational plans by relevant administrations have been deleted.
- Regarding the procurement of raw materials, the new Wholly Foreign-Owned Enterprise Law states that “[o]n the basis of fairness and reasonableness, the raw materials, fuel and other materials required by a wholly foreign-owned enterprise which come within its authorized business scope may be purchased within China or on the international market.” Before the law was amended, this provision stated that the raw materials shall be procured in the domestic market if the conditions are the same.
- The provisions regarding the balance in foreign currency have been deleted.

The amendments of the Cooperative Joint Venture Law of the PRC are similar to the Wholly Foreign-Owned Enterprise Law of the PRC. It is expected that relevant amendments also will be made to the new Equity Joint Venture Law. As mentioned above, China’s central governments recently have established a series of new policies aimed at encouraging foreign investment. These policies cover the approval procedure, regional incentive treatment, and the opening up of new sectors to foreign investors.

In accordance with the Opinion on further Encouraging Foreign Investment, jointly promulgated by nine ministries and central governmental administrations on August 20, 1999, the government at the provincial level will approve any foreign investment project that does not need State approval. The State

Development Planning Commission and the State Economic and Trade Commission also issued a circular on December 6, 1999, providing that all foreign investment projects in the defined encouraged sectors will be approved by the provincial governments. The old provisions that required MOFTEC approval for foreign investment projects over US\$30,000,000 have been revised. MOFTEC, however, will continue to supervise the approval procedure in so far as MOFTEC requires the local authorities to send several documents to them, and MOFTEC retains the power to disagree within one month after receipt of the relevant documents.

There are two other points of particular interest: special incentives and investments in the retail and wholesale markets. With regard to special incentives, China began its economic reform in the late 1970s; the Chinese coastal regions benefited from more favorable treatment and incentives to encourage foreign investment. The Chinese government now has published the incentive policies for the Central-Western Regions, which cover the administrative regions of nineteen provinces, autonomous regions, and municipalities directly controlled by the central government. The new policies include tax advantages given to foreign investment enterprises and the opening up of sectors. The new incentives include new methods that have never been used before in China, even in the coastal regions. For example, in accordance with the "Opinion on Further Encouraging Foreign Investment" promulgated on August 20, 1999, a foreign-invested enterprise (as well as a domestic enterprise) located in a coastal region may enter into a contract with an enterprise in the Central-Western Region.

With regard to the retail and wholesale markets, the Chinese government has always limited investments in this sector. Foreign investment started to flow into the retail and wholesale markets in 1992 on a trial basis. Local governments approved many foreign investment projects, given that local authorities had approval rights for these projects. In 1997, the Chinese central government carried out an investigation, and many of the established enterprises failed to pass the inspection. Control of the retail and wholesale sectors has been passed to the Chinese central government since the inspection. The retail and wholesale sectors are two of the main concerns of the Sino-EU Agreement. In accordance with the Sino-EU Agreement, the restric-

tions will be gradually removed. On June 25, 1999, Measures on the Trial of Foreign Investment in Merchandising Enterprises¹⁰ ("Merchandising Measures") were promulgated. Strictly speaking, the Merchandising Measures regulate the activities of retail and wholesale businesses with foreign investment, but in practice foreign investment related to this sector will also be affected. This is particularly important for foreign investment enterprises, since it gives them the ability to import and sell products for a trial period in a new market. It will allow foreign producers to establish a production structure according to market forces. In order to engage in these activities, however, the foreign investors are still required to meet many conditions. For example, they can only take the form of either an equity joint venture or a cooperative joint venture. Wholly foreign-owned enterprises remain temporarily prohibited; the enterprises cannot be established in locations other than those determined by the Chinese government. In order to be eligible, foreign investors must meet certain requirements, which relate to economic capacity, management experience and sales techniques, the existence of an international sales network, business reputation, the promotion of Chinese exports, etc.

II. CHINA'S ACCESSION TO THE WTO AS A MEANS OF NORMALIZING SINO-EUROPEAN TRADE RELATIONS: THE CASE OF ANTI-DUMPING

A. *EC Anti-dumping and China: The End of the "Chinese Exception"*

Until recently, European anti-dumping legislation was designed to deal with the lack of transparency in state-controlled Chinese undertakings. As a result, the anti-dumping duty charged by the European Commission applies to a given category of Chinese products as a whole, according to the principle "one country, one duty." The justification for this treatment was the need to prevent the Chinese authorities from channeling the majority of exports through the undertaking charged with the lowest duty.

The Chinese transition and inherent reform of the public

10. ZHONGHUA RENMIN GONGHEGUO DUIWAI JINGJI MAOYI HEZUO BU WENGAO [GAZETTE OF THE MINISTRY OF FOREIGN TRADE AND ECONOMIC COOPERATION OF THE PEOPLE'S REPUBLIC OF CHINA], July 5, 1999, at 9-12.

sector and development of private undertakings, as well as the perspective of China's accession to the WTO, have led the European Community to implement new mechanisms giving Chinese undertakings the same rights under certain circumstances as those applied to market-economy undertakings. The evolution in the European anti-dumping policy towards China began in the early 1990s. Its aim in the long-term is to apply the "normal" anti-dumping rules to all Chinese products.

This evolution first began at an "external" level. The European Community offered Chinese undertakings the opportunity to demonstrate their independence from the Chinese State with respect to the implementation of their export policies and prices. Now, if an undertaking is able to prove that it is independent, its export prices are taken as the basis for calculating an individual anti-dumping duty. To ensure that the Chinese authorities have no influence over the undertaking, the European Commission asks producers/importers detailed questions regarding ownership, management, production control, and commercial policy. The European Commission applied the following criteria:

- Exporters are free to repatriate capital and profits (this criterion applies to foreign-owned firms or joint ventures).
- Export prices, quantities, and the terms and conditions of sale must be set freely, and genuinely private companies must own the majority of the shares. The number of Chinese State officials who have seats on the board or who are in key management positions should be in a clear minority. There is a presumption that a State controlled company cannot guarantee its independence from State intervention. It is up to the exporter to rebut this presumption.
- Exchange rate conversions must be at market rate.
- If exporters are allocated different rates of duty, State intervention will not enable companies to circumvent measures taken by the European Commission.

In 1998, the European Community allowed Chinese undertakings to determine a product's "normal value," taking into ac-

count the price or cost of production/marketing in China.¹¹ Unless an undertaking proves that its production and marketing process takes place in a market-economy environment, analogy with a reference country is no longer used. In order for a Chinese undertaking to benefit from market-economy status, the European Commission also applies a set of criteria to verify whether the undertaking is operating in market-economy conditions. These criteria are as follows:

- the company's decisions are made without significant Chinese State intervention, according to market signals;
- its accounts must be independently audited in line with international accounting standards;
- the company's production costs and financial position must not be affected by distortions left over from the former Chinese State-controlled economy, by barter trade, or by offsetting debt;
- the company is subject to bankruptcy and property law; and
- exchange rate conversions are at market rates.

Until now it has been very difficult for Chinese undertakings to get granted market-economy status. Until April 2000, only three out of twenty-seven Chinese applicants were allowed to benefit from this treatment. These undertakings were wholly-owned foreign subsidiaries of companies established outside China. For example, last December, the European Community granted market-economy status to a compact disk box producer. In this case, the European Commission recognized that the Chinese undertaking indeed did operate under market-economy conditions, particularly because the controlling Hong Kong-based company made all of its decisions concerning prices, components, technology, sales, and investments without any intervention by the Chinese authorities.¹² In general, the European Commission principally refuses to grant market-economy status to Chinese undertakings because there is too much State intervention in decision-making, the companies' accounts are not au-

11. See Council Regulation No. 2402/98, O.J. L 298/1 (1998) (imposing a definitive anti-dumping duty on imports of unwrought unalloyed magnesium originating in the People's Republic of China and definitively collecting the provisional duty imposed).

12. See Commission Regulation No. 2563/1999, O.J. L310/1 (1999).

dited according to international standards, and the undertakings' financial positions are distorted due to inaccurate valuation of assets transferred to the company from the State and barter trade.

The new European anti-dumping policy is likely to have significant consequences for both Chinese and European producers who are competing with Chinese undertakings. The approach of the current European Commission will encourage European undertakings to pay more attention to anti-dumping proceedings. They should verify whether the Chinese undertakings comply with the criteria laid down by the European Commission. In particular, the European undertakings should take care to ensure that any significant distortion due to the previous Chinese State-controlled system is not affecting the commercial activities of the Chinese undertaking. Such examination eventually may lead to the initiation of an anti-subsidy action against China. The new European approach allows some Chinese undertakings involved in anti-dumping proceedings to obtain more favorable treatment from the European Commission with regard to their defense, which will no longer be collective but individual.

These improvements, however, are being implemented gradually (on a case-by-case basis depending on the undertaking's situation). Most Chinese undertakings still are subject to the traditional "no-market economy" treatment. Until now, the new measures implemented by the European Community have mainly profited undertakings with foreign-owned capital or joint ventures. It should be noted that the "full" market-economy anti-dumping procedure will only apply to all Chinese undertakings after the fifteen-year transition period. This is a provision of both the bilateral agreement between China and the European Community and the bilateral agreement between China and the United States.

B. *Anti-dumping: China's Turn?*

Anti-dumping practice in China is relatively new. In 1994, China promulgated the Foreign Trade Law of the People's Republic of China¹³ ("Foreign Trade Law"). Articles 29 and 30 of the Foreign Trade Law provide that the State may adopt neces-

13. Foreign Trade Law of the People's Republic of China (1994).

sary safeguarding measures if the products or its domestic producers suffer serious injury or threat of injury due to an increase in the importation of products. Also, the State may institute any necessary counter-measures if the relevant domestic industry suffers substantial injury or threat of injury because products are being imported at a price that is less than the normal value. This is the first time that Chinese laws have mentioned provisions about anti-dumping. On March 25, 1997, Anti-dumping and Anti-subsidy Regulations of the People's Republic of China¹⁴ ("Anti-Dumping Regulations") were promulgated by the State Council and became effective. The Anti-Dumping Regulations introduced, for the first time, clear anti-dumping rules. The relevant provisions in the Anti-Dumping Regulations are Articles 3 to 35. The Anti-Dumping Regulations closely follow the principles of the WTO anti-dumping rules. The Foreign Trade Law and the Anti-Dumping Regulations constitute the major legal framework of Chinese anti-dumping legislation. Since their introduction, China's legislation on anti-dumping has developed. On October 27, 1999, the Chinese State Economic and Trade Commission ("SETC") promulgated Hearing Rules of the State Economic and Trade Commission Concerning Injury to Industry,¹⁵ and on June 2, 2000, MOFTEC promulgated Provisional Hearing Rules of the MOFTEC Concerning Anti-dumping Investigation.¹⁶

In accordance with the Anti-Dumping Regulations, Chinese producers and related organizations may initiate proceedings. In special circumstances, MOFTEC may initiate an anti-dumping proceeding after consultation with SETC if there is sufficient evidence to justify the existence of a causal link between the dumping and the injury suffered. In practice, Chinese producers, acting on behalf of a Chinese industry that considers itself injured or threatened by dumped imports, usually lodge the complaint.

The Chinese anti-dumping system is generally administered by two agencies: MOFTEC, which determines whether dumping has occurred, and SETC, which investigates whether a domestic

14. Anti-dumping and Anti-subsidy Regulations, Mar. 25, 1997 (P.R.C.), *translated in* 5 FOREIGN TRADE L. 800 (1997).

15. ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO [GAZETTE OF THE STAET COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA], Feb. 29, 2000, at 13-15.

16. ZHONGGUO WAISHANG TOUZI ZHENGCE KUAIXUN [EXPRESS OF FOREIGN INVESTMENT POLICY IN CHINA], Sept. 10, 2000, at 19.

industry is materially injured by alleged dumped imports. If the dumping and injury to the Chinese domestic industry is found to have occurred, a decision to impose anti-dumping duties will be made by the Customs Rules Committee of the State Council ("Customs Committee"). The Customs Committee makes its decisions on the recommendations of MOFTEC and SETC and the findings of the investigations carried out by the General Administration of Customs ("GAC"). All proceedings (including responses to questionnaires, hearings, etc.) are conducted in Chinese. Proceedings may last twelve to eighteen months.

Some of the principal issues in an anti-dumping proceeding are the determination of normal value, injury, and causation. In order to determine whether dumping has occurred, MOFTEC investigates whether the imports have been sold at "less than normal value." In accordance with the Anti-Dumping Regulations, the normal value will be determined according to a "comparable price" of the "same or similar" products on the domestic market of the export country. If there is not a comparable price on the domestic market of the export country, the normal value will be a "comparable price" of the "same or similar" products exported to a third country or the "cost of the same or similar product plus reasonable profit." In practice, normal value may be established on the basis of the domestic sales prices provided by exporters, as long as the data is reliable. In the investigation on the dumping of imported newsprint from the United States, Canada, and the Republic of Korea, some of the data supplied was not used by MOFTEC, because it was considered to be incomplete and insufficient. Instead, MOFTEC calculated the normal value on the basis of the "cost of the same or similar product plus reasonable profit." In the anti-dumping case against polyester fabric imported from South Korea, MOFTEC decided to use the sales information and cost in the domestic market supplied by one exporter to determine the normal value applicable. The normal value may also be established on the basis of the "best available facts" if an interested party fails to provide complete information, or if he cannot provide any evidence or supporting documents such as sale contract, invoice, or if he provides false information, etc.

In accordance with the Anti-Dumping Regulations, injury includes "material injury or the threat of material injury" caused by dumped imports to the established Chinese industry or a "ma-

terial impediment" to a Chinese industry not yet established. The following four items are examined when determining whether a dumped product has caused injury to a domestic industry: (i) the quantity of the dumped product, including the total amount of the dumped product or its increased amount as compared to the same or similar product in China, or the probability of a large increase, (ii) the price of the dumped product, including the price decreases in the dumped product, or the impact of the price of the dumped product on the price for the same or similar product in China, (iii) the impact of the dumped product on domestic industries, and (iv) the production capacity, export capacity, and stockpiles of the dumped product in the country of export. The Anti-Dumping Regulations do not provide clear provisions on the causation between dumping and injury, but it is nonetheless essential to prove the existence of such causation. In order to ensure that injury is not attributed to the dumping of products by mistake, other factors may be considered, including whether the imports from other countries are sold at dumped prices, changes in demand, changes in the patterns of consumption, product quality, unfair competition and force majeure.

In accordance with Article 20 of the Anti-Dumping Regulations, if an interested party fails to provide relevant information, the decision may be made on the basis of available facts. Accordingly, depending on the information provided by exporters of the interested country, the anti-dumping duties imposed on exporters may vary. For example, in the newsprint case, the anti-dumping duties for non-cooperating Korean companies were set at 55%, while an anti-dumping duty for the cooperating Korean producers was set at only 9%.

On December 10, 1997, MOFTEC decided to investigate the dumping of imported newsprint from the United States, Canada, and the Republic of Korea. This was China's first anti-dumping case of imported goods since the Anti-Dumping Regulations became effective. As of February 9, 2001, seven anti-dumping investigations have been initiated by MOFTEC. Companies from Canada, France, Germany, Great Britain, Japan, Netherlands, Russia, South Korea, Thailand, and the United States are the focus of the investigations. The investigated products cover newsprint, silicon steel, polyester fabric, cold-rolled

stainless steel sheet, acrylic esters, carrene (or dichloromethane), and polystyrene.

Before December 10, 1999, there were no Western European companies involved in anti-dumping proceedings. On December 10, 1999, the date of initiation of anti-dumping proceeding against acrylic esters originating in Japan, Germany, and the United States, the German company, BASF Aktiengesellschaft, together with its related companies, participated in the investigation into the alleged dumping of esters of acrylic acid products. This was the first European company to be the subject of one of China's anti-dumping investigations. On December 20, 2000, an anti-dumping proceeding against carrene (or dichloromethane) originating in Great Britain, the Netherlands, France, Germany and so on was initiated. It is true that compared to Australia, the European Union, or the United States, up until now China has initiated relatively few anti-dumping cases against foreign imports. After China's accession to the WTO, the situation will certainly change. How will China continue to implement anti-dumping rules? Is there a risk of abuse of these measures? How will the legislature deal with these issues? It will certainly be important for European companies to understand China's attitude towards anti-dumping measures and their legal reinforcement.

Up until now, China's attitude towards anti-dumping measures has been prudent for two reasons. First, China has had little experience in anti-dumping investigations. As mentioned above, anti-dumping investigations in China began in December 1997. An anti-dumping investigation is very complex and to date very few Chinese have the relevant expertise. In addition, Chinese central governments underwent significant reform several years ago, so the officials in charge of anti-dumping investigations were relatively few and far between. Second, even though the Chinese anti-dumping rules are consistent with the WTO rules, their implementation has been a difficult and sensitive issue.

Anti-dumping, however, is becoming one of the key issues in the Europe-China trade relationship. Both the Chinese government and industries have been paying close attention to these measures. It is worth noting that the Chinese government has issued several decrees providing that anti-dumping measures are normal measures under market economy and that they are allowed under the WTO rules. This seems to imply that China

will actually use anti-dumping measures after accession to the WTO.

It should be noted that in a recent anti-dumping case brought by China's State-owned steel company, the defendants, two Russian steel companies, Novolipetsk Iron & Steel Corporation ("Novolipetsk") and Viz Stal Ltd., successfully defended their case. China's trade ministries reduced Novolipetsk's preliminary duties from 11% to 6% and eliminated the 43% preliminary duties imposed on Viz Stal Ltd.

Chinese industries are also becoming more and more familiar with and supportive of anti-dumping measures. The fact that Chinese enterprises have become more active in cooperating with the European Commission in European anti-dumping proceedings against China is just one example. China's first anti-dumping duties imposed on foreign imports have made others understand at least that it is a measure that exists and that the Chinese are ready to use it. A dozen anti-dumping petitions have been filed with MOFTEC as of June 2000.

At the same time, the Chinese legal framework is currently undergoing further development. Indeed, China is now changing its legislation on anti-dumping. An anti-dumping law, intended to replace the present Anti-Dumping Regulations, currently is being drafted. The future anti-dumping law will be adopted by the People's National Congress and will concern only anti-dumping matters, which is different from the current situation, where a single regulation covers anti-dumping and anti-subsidy. The new law is expected to have more detailed provisions consistent with the WTO's anti-dumping rules. Although it still is difficult to gauge the consequences of the new anti-dumping rules, the implication is that China is making efforts to meet international standards in order to apply its anti-dumping legislation in a more pragmatic and transparent manner.