To Be an Aggressive but Patient Learner —Analysis of China’s Participation in Defending Anti-Dumping Challenges Within the WTO Framework

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ABSTRACT

The year of 2013 is the twelfth year of China’s membership to the World Trade Organization (WTO). In Chinese zodiac, a twelve-year period constitutes a cycle of life. During the past twelve years, China’s journey into international trade has proven arduous as it faced numerous trade remedy challenges. Standing at the switching point leading to a new cycle of life, China should look back while reconsidering its trade policy for the next cycle. What lessons has China drawn from previous experiences? What kind of strategy should China adopt in the future to defend its interest in the dynamic global trade? With these questions in mind, this note aims at reviewing China’s performance since its accession to WTO and offering advices on how to make full use of WTO legal rules to promote its legal and economic interests within the WTO framework in the future. Anti-dumping (AD) challenges, which give rise to frequent trade frictions to China, will be the starting point.

According to WTO reports, China has been the Top 1 victim of AD investigations/measures since 1995 and the total investigation/measure against China kept increasing annually from 1995 to 2012.¹ In order to change this tough trading situation, it is necessary to look into determinative factors in AD proceedings under General Agreement on Tariffs and Trade 1994 (GATT 1994) and Agreement on Implementation of Article VI of the GATT 1994. These factors are dumping, injury and causation, together with official interpretations and precedential application of these factors. Based on these legal implications,

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¹ The cutting point of this paper for data collection is based on the cut-off date of WTO reports, which is 31 December 2012.
Chinese companies could learn better how to apply these rules in specific cases to challenge inconsistency between the AD determination and WTO rules. On the other hand, they might always be able to find supportive legal arguments when studying similar cases in the past. Notably, China had two nice tries in the cases of EU–Fasteners and U.S.–Anti-dumping and Countervailing Duties. In these two cases, China consciously looked into detailed legal text, presented comprehensive supporting evidences and made powerful arguments. In the future, China should learn from these successful arguments and apply them in accordance with different situations.

Based on acknowledgement of China’s previous experiences, this paper will propose a new attitude in future AD proceedings. This paper tries to introduce a combination of Taoism, an ancient Chinese philosophy emphasizing patience and respect for natural progress, and “Aggressive Legalism,” which aims at active utilizing of WTO rules as both a shield and a sword. When facing future AD challenges, China should be a patient learner of WTO law package, and this process demands a lot of patience. By rigorously applying WTO legal rules, China can benefit from a more efficient learning process to build up its legal capacity and promote its economic interests. In the next 12-year cycle from 2013, it is promising for China to be a strong rule maker and a big beneficiary of WTO rules.
I Introduction

China has gone through a tough journey engaging in international trade after its accession to the WTO on December 11, 2001. During the past twelve years, China has experienced great excitement by accessing WTO—the only international organization dealing with the rules of trade among nations around the world—and has expected to benefit from smooth and free trade flows. Chinese people have had confidence in a future win-win situation since the accession. They believe that it would not only “significantly expand[s] world trade, strength[es] the multilateral trade system’s integrity and credibility,” but also entitles China to “benefit from its more deep integration to the world’s economy.” Alongside the Reform and Opening-up Policy in the past 35 years and specifically China’s membership to the WTO in the past 12 years, China’s economy indeed enjoyed unprecedented rapid growth. China has made a successful leap from being the world’s seventh biggest economy in 2001 with GDP of USD 1.324 trillion to the world’s second biggest economy in 2012 with GDP of USD 8.227 trillion. Constant GDP development around 8% was regarded as magic. In addition, volumes of import and export volume increase at 21.7% annually from 2001 to 2011. China could not have maintained these amazing economic developments without a worldwide fair playground established based on the WTO principles and legal instruments, such as the Most-Favorite-Nation (MFN) principle, the end of textile and clothing quotas based on the WTO Agreement on Textiles and Clothing (ATC), etc.

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3 See Fan Zhai & Shantong Li, The Implications of Accession to WTO on China’s Economy, Address at the Third Annual Conference on Global Economy Analysis 2 (June 27–30, 2000).
4 In 1978, the Communist Party of China (CPC) made a decision to launch a nation-wide reform and opening up campaign at the 3rd Plenary Session of the 11th CPC Central Committee. It was a critical choice, which eventually leads China into a brand-new development epoch. For brief introduction, see China in Photos—Thirty Years of Reform and Opening Up, CHINA-EMBASSY.ORG, http://al.china-embassy.org/eng/zggk/t527777.htm (last visited Aug. 11, 2013).
In the meanwhile, China has suffered great pain from being subject to various initiations\textsuperscript{8} challenging its domestic trading environment and policies. These initiations create far more fierce trade frictions than those of the pre-WTO period. Take anti-dumping (AD) initiations against China launched by other WTO members as an example, the annual average number of initiations increased 55% between China’s pre- and post-accession.\textsuperscript{9} Apart from the increasing number of AD challenges, the range of industries subjected to AD initiations/Measures has become broader. For instance, the subjected sectors in AD investigations initiated by the European Union (EU) spread from heavy industries, such as steel manufacturing and chemical industries, to a much more enlarged scope recently, including daily consumer products, like certain plastic sacks and bags\textsuperscript{10}, certain candles\textsuperscript{11} and wireless wide area networking modems.\textsuperscript{12}

Such is the nature of international trade that for each WTO member, benefits and challenges coexist in the volatile global trading system. On one hand, Chinese enterprises and the central government should recognize the painful fact that intentional trade is a double-edged sword which challenges domestic policies from all aspects. On the other hand, they should act as water, which flows beneath the fragile skin but hides great power to rise up. To facilitate this process, it is imperative to study the rules and dispute settlement mechanism for trade frictions within the WTO framework and eventually to figure out a suitable strategy reducing obstacles to China’s outbound trade.

When heading into a new 12-year-long cycle of life, this note presents four parts to rethink the previous participation in the WTO and proposes new strategies for the future. The first section will present an overview of AD challenges against China since its accession to WTO. The second section will take China’s foreign trade as a basis, looking into

\textsuperscript{8} The words “initiate” and “initiation” in this note adopt the official meaning in footnote 2 of Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, which means “the procedural action by which a Member formally commences as investigations as provided in Article 5.”

\textsuperscript{9} World Trade Organization data, annual anti-dumping measures for the year 1995 through 2012 is 20, 43, 33, 28, 42, 44, 55, 51, 53, 49, 56, 72, 62, 76, 77, 44, 51, 60. From 1995 to 2001, there were 38 initiations against China per year on average while the number increased to 59 after China’s accession.


\textsuperscript{12} Investigation started on June 30, 2006 and is still underway.

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factors applied by the dispute settlement body (DSB) when deciding the existence of dumping and the implementation of anti-dumping measures in detail. Then, this note will summarize certain general applied litigation strategies apart from specific legal requirements concerning AD. Finally, this note will propose a new attitude or thinking methodology to the Chinese legal profession in future proceedings, which may reduce continued challenges launched by other WTO members. This note tries to introduce a combination of Taoism and “aggressive legalism” in order to maintain China’s continued high-speed development.

II Overview of Anti-dumping Investigations/Measures against China within the WTO framework

As indicated from the statistics collected by WTO, China has been a more and more active player in international trade throughout the past years ever since the WTO came into existence in 1995. In the field of using trade remedies in cross-border trading, especially anti-dumping, China undoubtedly was the most frequently targeted country both before and after its accession to WTO. The following statistical analysis will mainly illustrate the actual status of China with regard to the anti-dumping section within the WTO framework.

A Top Three Victims of AD Investigations/Measures in WTO from 1995 to 2012.

According to the WTO report, which is updated every six months, China has been the major victim of AD investigations and AD measures in the past sixteen years. As shown from Chart 1, products exported from China kept being the first target of AD investigations within the WTO framework in the past seventeen years, with numbers of investigations far more than the second and third WTO members—Republic of Korea (Korea) and the United States (U.S.). While exported goods from China were facing 51 AD investigations annually on average, Korea and U.S. were subject to 17 and 14 initiations per year on average respectively. What is more, roughly speaking, AD initiations against China kept increasing and there had been a large jump since China’s accession to WTO at the end of 2001, especially in the period from 2006 up to 2009. From the year 1995 to 2001 before China’s accession, there were 38 ini-

itiations per year on average, while from the year 2002 to 2012 after Chi-
na’s accession, the number increased to 59.

Chart 1: Top Three WTO Members Subject to Most Frequent AD Initia-
tions (1995-2012)

Source: WTO Website

Similarly, as indicated from Chart 2, the same pattern of AD inves-
tigations shown from Chart 1 applies to AD measures against China: 
China was the number one subject of AD measures taken by other WTO 
members, and the amount increased sharply after China’s accession. In 
contrast, as the number two and number three targets subject to most 
frequent AD measures, Korea together with Chinese Taipei (subject to 18 
AD measures annually on average) were only subject to roughly one half 
AD measures of the ones faced by China (subject to 37 AD measures 
annually on average).
As indicated below chronologically from Table 1, standing with its more than 100 peer WTO members, China itself faced roughly one seventh of total AD investigations and measures within the WTO framework before 2002. Even more shockingly, this amount increased to more than one fourth of the total after China’s accession to WTO at the end of 2001.
Table 1: Annual AD Investigations/Anti-dumping Measures against China (1995–2012)

<table>
<thead>
<tr>
<th>Year</th>
<th>The World’s Total AD Investigations</th>
<th>AD Investigations Against China</th>
<th>Percentage (%)</th>
<th>The World’s Total AD Measures</th>
<th>AD Measures Against China</th>
<th>Percentage (%)</th>
</tr>
</thead>
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<tr>
<td>Before Accession to WTO</td>
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<td></td>
<td></td>
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<tr>
<td>1995</td>
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<td>20</td>
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<td>119</td>
<td>26</td>
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<tr>
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<td>226</td>
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<td>28.1</td>
<td>146</td>
<td>44</td>
<td>30.1</td>
</tr>
</tbody>
</table>

Source: WTO Website

**C Sectoral Distribution of AD Investigations/Measures against China from 1995 to 2012:**

An analysis of the sectoral distribution of targeted products presents an enlightening landscape showing AD challenges faced by various industries. According to the harmonized system section headings, which report AD initiatives/measures on a sectoral basis, the main products made in China most frequently subject to AD challenges are base metals and articles of base metals. Charts 3 and 4 below indicate detailed

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14 *See id.*
sectoral distributions of initiations and measures. The total amount of AD challenges against based metals takes up more than one fourth of the total AD investigations and measures against China.

Chart 3: AD Sectoral Distribution of Initiations against China (1995-2012)

Source: WTO Website
It is a widespread phenomenon that products like base metal are frequent subjects of anti-dumping investigation and measures around the world.\(^{15}\) According to WTO report, base metals are the number one AD target of reporting members, with the total number amounting to 27.9\(^{16}\) of total AD investigations, and chemical products are the number two target amounting to 20.3\%.\(^{17}\) Both of the base metal and chemical product industries are capital intensive and require large-scale productions, which make it very difficult for the manufacturers to adapt to changing demands and supplies of the market. Necessarily, governments would adopt certain protective measures for such industries in order to keep the

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\(^{15}\) 周灏 (Zhou Hao), WTO 时代中国遭受反倾销的国别和商品结构分析 [Research of Countries and Commodities Structure of China’s Suffered Anti-Dumping in the WTO Era], 财贸经济 [FINANCE AND TRADE ECONOMICS], vol. 2, at 91 (2007).

\(^{16}\) See Anti-Dumping By Exporting Country, supra note 12. During the reporting period from 1 Jan. 1995 to 31 Dec. 2012, 1181 AD initiations out of a total of 4230 were against base metal.

\(^{17}\) See id. During the reporting period from 1 Jan. 1995 to 31 Dec. 2012, 858 AD initiations out of a total of 4230 were against products of the chemical and allied industries.
companies functioning smoothly.\textsuperscript{18} When it comes to the case of China, since these industries are classic AD areas, and because China is a main producer of many of these products globally, there are more chances for such companies in China to be involved in AD investigations/measures than their foreign counterparts.

\textbf{D WTO Members Initiating AD Investigations/Measures against China.}

To understand the geographical distribution of China’s “rivals,” it is helpful to take a full view of all WTO members initiating AD investigations and taking measures against China ever since 1995. As indicated by Chart 5, India, U.S. and the EU are the top three active WTO members initiating AD investigations and measures against China. Besides, the number of WTO members that apply AD as their trade remedy against China, keeps increasing.

Chart 5: AD Initiations/Measures Taken by Reporting Members (1995–2012)

\begin{figure}
\centering
\includegraphics[width=\textwidth]{chart5.png}
\caption{AD Initiations/Measures Taken by Reporting Members (1995–2012)}
\end{figure}

Source: WTO Website

\textbf{a) Bilateral Trade between China and India}

With its aggressive AD policy, India has been the most active AD user against China. From 1995 to 2012,\textsuperscript{19} India has initiated 677 AD

\textsuperscript{18} Zhou Hao, \textit{supra} note 14, at 91.

\textsuperscript{19} See \textit{Anti-Dumping By Exporting Country}, \textit{supra} note 12.
investigations and 508 AD measures against its trading partners in total, which is the number one WTO member applying AD as its trade policy to protect cross-border trade. Out of the 677 AD investigations, 22.7% were against China, and 24.8% of its 508 AD measures were adopted against China. What is more, the AD investigations and AD measures taken by India against China account for 16.8% and 19.0% of the total AD investigations and AD measures against China initiated by all WTO members from 1995 to 2012.

Besides China, many other WTO members, such as Korea, the EU, Chinese Taipei, Thailand, and the U.S., are the main “target” countries or districts subject to AD investigations initiated by India. One reason why India initiates AD investigations so actively is that India’s AD law is very loosely drafted, therefore it leads to a lot of administrative discretion, apart from normal politics. Second, along with the rapid increase of import volume from China, it is inevitable that trade frictions between these two trading partners happen more often. During the recent five years, annual rate of import growth from China leaps almost every year: 63.2% in 2006, 64.9% in 2007, 31.3% in 2008, and 37.9% in 2010, with the exception of 0.06% of decrease. Third, both India and China are direct competitors in key industries, which also partly explains India’s aggressive attitude towards Chinese exportation.

b) Bilateral Trade between China and U.S./EU

Following India closely are the next two active anti-dumping users: the U.S. and the EU. The total number of AD investigations against China initiated by these two members, as shown from Chart 5, is 223, which amounts to one fourth of all the investigations against China. Similarly, the number of total AD measures finally taken by the U.S. and the EU is 172, which also accounts for one quarter of all the measures against China.

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20 According to WTO, India initiated 154 AD investigations against China from 1995 to 2012 and 126 AD measures in total.
21 According to WTO, China was subject to 916 AD investigations and 664 AD measures from 1995 to 2012 in total.
22 According to WTO, the top-exporting members targeted by India from 1995 to 2010 are China (142 initiations), Korea (48 initiations), the EU (47 initiations), Chinese Taipei (45 initiations), Thailand (36 initiations) and the U.S. (33 initiations).
23 Zhou Hao, supra note 14, at 90.
When it comes to the reasons why the U.S. and the EU are the top active anti-dumping users against China, the longstanding trade relations between China and the two members could explain. Based on data presentation from the U.S. Department of Commerce, China was the number one importer of the U.S. and the importing volumes was 424,874 million USD, amounting to 18.9% of the total merchandise import volumes of U.S.\(^{25}\) China has also been the biggest trading partner with the EU. According to Eurostat\(^{26}\), a Directorate-General of European Commission, the import volumes from China in 2012 was 289.7 billion EURO, amounting to 18.7% of total import volumes between extra EU 27 and their global trading partners.\(^{27}\) Also from Chinese perspective, China exports more goods to the EU and the U.S. than to other markets.

c) More Developing Countries Began to Take AD Investigations/Measures against China

Taking a look at the current WTO members initiating AD investigations against China from a large scale, one may find that more and more developing countries step into this group. For example, as shown from Chart 5, Argentina, Turkey, Brazil, and South Africa are close followers in AD challenges towards China.

\section*{E Conclusion}

Based on the above statistical layout of current AD investigations and measures in the WTO framework, four preliminary conclusions are drawn to describe the harsh situation that China has gone through. First, China has been the number one victim of both AD investigations and AD measures since WTO came into existence in 1995, and these numbers were far higher than those of the other WTO members in this regard. Second, based on a chronological analysis on AD investigations and measures against China from 1995, the rate of annual growth for China kept increasing sharply after China’s accession into WTO. Third, analyzing the sectoral distribution of AD investigations and measures against


China, the most frequent subject industries are base metals and articles of base metals due to the inherent characteristics of this industry and the large export volume from China. Finally, although the most active AD initiators against China are still those strong economies, such as India, the EU, and the U.S., more and more developing countries began to use AD measures as remedies for trade conflicts with China. In one word, the current anti-dumping situation towards China is not optimistic. This explains why it is imperative for China to figure out how to defend its interests in dealing with this situation in the future.

III Factors Analysis of “Dumping”

With the purpose of looking for a way out of the pressing trade situation, learning the basic legal instruments within the WTO would be a useful starting point. The current governing agreements on AD within the WTO framework are Article VI GATT 1994, Agreement on Implementation of Article VI of the GATT 1994 (ADA), Interpretative Note ad Article VI GATT and China Accession Protocol Section 15. ADA regulates the contracting parties’ rights to apply AD measures, if existence of dumping is confirmed. Dumping exists where the aimed product causes “injury” to certain domestic industry of the reporting party where the export price is lower than its “normal value,” which is based on the domestic market of the exporting party.28

There are a lot of scholarships and cases on the relationship between Article VI and ADA.29 From a general point of view, Article VI provides the baseline requiring that dumping should be rectified with a legally proper method. As for ADA, it continues to function as a “framework agreement leaving substantial discretion to the WTO members.”30 The ADA provisions contain more details on dumping and have been clarified a lot by various WTO and appellate body reports.31 The reports of panels and the appellate body provide some guidance to figure out this relationship. In US–1916 Act,32 when examined whether the U.S.

28 See Anti-Dumping By Exporting Country, supra note 12.
31 Id.
1916 Anti-dumping Act was consistent with Article VI of GATT, the Panel emphasized the “close link” between Article VI and ADA: ADA is “essential for the interpretation of Article VI. Articles 1 and 18.1 [of ADA] confirm the close link between Article VI and the Anti-dumping Agreement.” Moreover, the Panel held that Article 18.1 of the ADA should be read as “part of the context of Article VI” for two reasons: one is that “the WTO Agreement is a single treaty instrument” and according to Article 31.2 of the Vienna Convention, interpretation of a treaty should comprise its preamble and annexes. Although it is arguable whether the Panel has correctly stated the status of Article 18.1 of the ADA, this article presents an obvious principle in international trade, which is to prohibit dumping among WTO members.

According to ADA, there are three requirements to be satisfied in order to justify an anti-dumping investigation, including dumping, injury and causation between the dumped imports and injury. The following sections will discuss WTO rules concerning these factors in detail.

A Determination of “Dumping”

Four important concepts are introduced by Article 2 in defining dumping, which are like product, export price, normal value (NV), and ordinary course of trade. The following part will analyze these factors.

a) Like Product

As defined by Article 2.6 ADA, like product refers to “a product which is identical, i.e. alike in all respects to the products under consideration.” If there is no such a product, it refers to “another product which, although not alike in all respect, has characteristics closely resembling those of the product under consideration.” The Panel in U.S.–Softwood lumber II regards this provision as a definitional article, which does not create obligations on WTO Members in itself, or it could not be the basis

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33 Id. ¶ 6.195.
34 Id.
37 VERMULST, supra note 29, at 9.
38 ADA, supra note 35, art. 2.6.
39 Id.
for an independent violation.\textsuperscript{40} The accuracy of the definition of the product is important because “it sets the parameters of the investigation” and limits the scope of the application of AD measures.\textsuperscript{41}

\textit{b) Export Price}

After specifying like product for the product under consideration, authorities shall establish its export price. As export price is the actual price charged by the producer to the importer, determination of export price is not a problem.\textsuperscript{42}

\textit{c) Normal Value}

To establish the existence of dumping, a difference between the export price discussed in the above section and the NV (NV) of the product under consideration is the touchstone. Unlike the easiness of establishing the export price of the product, in order to determine the NV of such product two different scenarios needs to be distinguished. When there are sales of the like product in the domestic market, Article 2.1 ADA indirectly defines NV as “the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”\textsuperscript{43} Otherwise, Article 2.2 ADA directs that NV may base on third country exports or constructed NV.

There are three methods to determine the NV of a subject product. The first way is to determine the NV according to domestic sales. Article 2.1 ADA provides that if there are sufficient domestic sales of the like product, NV shall be the comparable price in the ordinary course of trade of such like product. The next method is to refer to constructed NV. Where no suitable domestic sales of the like product exist, Article 2.2 ADA comes into play. This article provides that the NV may base on third country exports or constructed NV in three situations. Specifically speaking, constructed NV equals to the cost of production in the country of origin plus a reasonable amount of cost for administrative, selling and general costs and profits.

The third category, which is also a disputable legal issue for China, is about NV in non-market or market economies. Whether China can be


\textsuperscript{41} \textit{VERMULST}, \textit{supra} note 29, at 11.

\textsuperscript{42} Id. at 14.

\textsuperscript{43} ADA, \textit{supra} note 35, art. 2.1.
recognized as market economy and if not, how should Chinese exporters be treated in specific cases is a disputed issue for many years. Article 2.7 ADA provides that Article 2 is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994, i.e. Article 2 maintains the standing of what constitutes a non-market economy (NME) and does not take account of prices and costs in such NME. The most widely accepted theory justifying refusal to recognize an economy as a market economy is that prices and costs in such economies are not set by market forces but due to government involvement. Therefore, to make a fair comparison, the authorities introduce the export price of like product in a surrogate country or analogue country as the basis for NV.

When China signed the WTO’s Accession Protocol (the Protocol), one of China’s great concessions is that accepting the status as a NME up to sixteen years. However, China has been making great efforts trying to obtain recognition of market economy status (MES) from other WTO members these years, and the good news is that more than 150 countries in the world and more than 80 WTO members (out of 159) have recognized China’s MES by November 2011. Still three-fourths of the “high-income countries” refuse to recognize China’s MES, which are China’s major trading partners, e.g. the U.S., the EU, India and Brazil. When we take a look at the recent attitude of these major economies, it is predictable that these WTO members will not voluntarily recognize China’s MES until the status takes effect after the 16-year transitional period ends. How to deal with the MES in three years before 2016 shall be discussed separately in another paper. This note will only focus on the current tough situation presenting in front of China.

44 VERMULST, supra note 29, at 44.
46 Id. at 35.
47 VERMULST, supra note 29, at 44.
48 Accession of PRC, supra note 1.
50 Id.
As an NME, China’s domestic companies face great obstacles in defending its trade rights against an AD challenge. Recognition as a NME will lead to inapplicability of Article VI of the GATT.\(^{52}\) The reason for not applying Article VI base on the idea that if the market does not actually set the prices, comparing market prices on different markets would be meaningless.\(^{53}\) On this point, an interpretative note adding to the first paragraph of Article VI GATT in 1995 explained as follows:

It is recognized that, in case of imports from a country which has a complete or substantially complete monopoly of trade and all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purpose of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.\(^{54}\)

In interpreting this provision, scholars recognized two important points. The first point is that strictly speaking, this provision only applies to countries where there is a complete or substantially complete monopoly of trade and all domestic prices are fixed by the State. However, there is no such pure country where the state does not influence operation of economy at all in reality.\(^{55}\) In the original words of Detlof and Fridh, “[e]ven before the decline of Soviet Union, such countries are hard to find, and it is unlikely that any of the countries classified as non-market economies today fit this description.”\(^{56}\) Despite of this, practitioners still recognize a state as an NME although not all the price is controlled by the government. This situation happens when the WTO member agreed otherwise.\(^{57}\) Legally speaking, Section 15 of the Protocol is vaguely drafted. This Section is potentially disadvantageous to China and it might be one of the reasons explaining why so many disputes arise under the

\(^{52}\) Yan Luo, Anti-Dumping in the WTO, the EU and China—The Rise of Legalization in the Trade Regime and its Consequences 162 (2010); See Francis Snyder, The Origins of “Nonmarket Economy”: Ideas, Pluralism and Power in EC Anti-Dumping Law about China, 7 EUR. L.J. 369, 381 (2001); Francis Snyder, The EU, the WTO and China: Legal Pluralism and International Trade Regulation 209–64 (2010).

\(^{53}\) Id. at 162.

\(^{54}\) GATT, art. VI, para. 1.


\(^{56}\) Id. at 10.

\(^{57}\) Luo, supra note 51, at 163; see also J. Maloney & G. Horlick, Market Economy Status of Ukraine in Anti-Dumping Cases in the United States and European Union, 1 Global Trade & Customs J. 49, 49 (2006).
NME issue. On one hand, this section does not simply signify China’s commitment to NME treatment in certain years. On the other hand, this section provides a dangerous legal ground for investigating authorities to explore ambiguous text to justify unreasonable AD measures. Section 15 does not set the criteria on the establishment of market economy or methodology for price comparison. Instead, it only permits an importing country to disregard Chinese domestic prices and costs and use its own NME methodology (with the obligation to notify the WTO), on the condition that Chinese producers cannot demonstrate that market economic conditions prevail in the industry producing the like product.\footnote{LUO, supra note 51, at 162.} When reading section 15 and paragraph 151 together, one may reasonably consider that in handling cases involving China, an investigation authority is free to abuse discretion by referring China as an NME as a whole.

The second important point emphasized by scholars is, this provision simply does not affirm that the prices set by the State is appropriate for comparison, and does not introduce alternative solutions, let alone an analogue country as the basis for calculating NV thereof.\footnote{DETOF \& FRIDH, supra note 54, at 10.} However, based on ADA, one can introduce an analogue country on the condition that an exporting country is determined as a NME. In most cases, India is chosen for China.\footnote{Id. at 21.} So far, there is no explicit guidance as to what exactly constitute NMEs and how to treat NMEs in anti-dumping proceedings according to the WTO agreement. Specific treatments depend on different anti-dumping initiators.\footnote{Id. at 2.} In fact, to categorize a country as a NME is rather discretionary.

\section*{i U.S. Practice}

The U.S. Department of State defines an NME as follows: “...In a nonmarket economy, production targets, prices, costs, investment allocation, raw materials, labor, international trade, and most other economic aggregates are manipulate within a national economic plan drawn up by a central planning authority. Hence the public sector makes major decisions affecting demand and supply within the national economy.”\footnote{U.S. Department of State International Information Programs, The Language of International Trade—Glossary, UNITED STATES DIPLOMATIC MISSION TO GERMANY (Oct. 23, 2001), http://usa.usembassy.de/etexts/econ/language.pdf.}

A specific example for China being treated as an NME is \textit{U.S.--Continued Dumping and Subsidy Offset Act of 2000}. The U.S. de-
scribed a three-step determination process in its First Written Submission to the Panel in US-AD and CVD on Chinese Products as follows: “First, in determines the quantities of the factor of production (essentially, inputs) used to produce the product subject to investigation... Second, [c]ommerce values these inputs in the surrogate, market economy country... Third, [c]ommerce adds amounts for factory overhead, selling, general and administrative (‘SG&A’) expenses, and profit, calculated on the basis of the ratios of these costs to the costs of the other inputs in the surrogate country.”

The U.S. Department of Commerce (DOC) has a long-standing practice not to assign all exporters in NME cases their individual duties. The standard adopted by the U.S. DOC to qualify an exporter for an individual dumping margin is to have “sufficient autonomy over [its] export activities.” A separate rate test is usually applied by the U.S. DOC, which essentially requires an exporter to demonstrate that “its export activities, on both a de jure and de facto basis, are not subject to government’s control.” Evidence for no control from governments includes a finding of de jure absence of government control over export activities without “restrictive stipulations associated with ... business and export licenses” and “any legislative enactments devolving central control of export trading companies.” Evidence supporting a finding of a de facto determination includes the involvement of a government authority in export price determination, the authority in negotiating and signing contracts and the respondent’s autonomy from the government in selecting of management, etc.

As scholars have realized, although the U.S. NME criteria and methodology have been fiercely criticized as unfair, it seems very difficult to challenge in the DSM since the U.S. kept pushing China to accept most of its practices in the Protocol and U.S.–China bilateral agreement. Hence, although it is arguable that the U.S. DOC practice on the selection

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64 LUO, supra note 51, at 171.
65 Id.
67 Id.
of surrogate values and calculation of the countrywide rate in NME cases are discriminatory, China did not challenge the US practice.\textsuperscript{69}

\textit{ii EU Practice}

Looking into the EU practice in handling AD cases, the EU adopts a similar system as the U.S. in treating NME countries.\textsuperscript{70} As regulated in Article 2(A)(7)(a) of the Basic Regulation, if imports are from an NME, NV shall be determined on the basis of the price or constructed value in a market economy third country, the price from such a third country to other countries, or on any other reasonable basis.\textsuperscript{71} In other words, the EU methodology of calculating an NV in an NME case is also based on the price or constructed NV in an analogous country. Moreover, the EU system nevertheless ends here. In the system, no factors of production approach are used to calculate the NV, i.e. the quantity of inputs used to produce the product concerned by an exporter in an NME country is irrelevant to the calculation of the NV in an EU investigation.\textsuperscript{72}

Although the five MET criteria look straightforward, the EU authorities have “broad administrative discretion to interpret whether a company meets each of the conditions, particularly with respect to the first three.”\textsuperscript{73} In numerous cases, the Commission has applied these criteria to examine hundreds of Chinese companies and rejected the MET for the majority of them.\textsuperscript{74} In addition, the Commission has developed a few practices associated with its MET methodology, such as individual treatment and sampling, and consistently applies them in AD investigations involving Chinese products.

The first established practice associated with the MET is the individual treatment, as provided by Art. 9(5) of the Basic Regulation. As another important exception to the one-country-one-duty rule, if a company does not qualify for MET, it can apply for individual treatment, which allows their own export prices to be used to calculate the dumping margin. Individual treatment is similar to the U.S.’s separate rate test,

\textsuperscript{70} \textsc{Luo, supra} note 51, at 173.
\textsuperscript{74} \textsc{Detlof \& Fridh, supra} note 54, at 276.
although with slightly different condition. The second practice that often arises in an NME investigation is sampling. This step is sometimes a problem for China due to the large number of producers and exporters in China. In cases where a large number of respondents are involved while the Commission does not have the resources to conduct the investigation, it resorts to sampling techniques.\textsuperscript{75} However, the Commission stopped applying the MET desk-check system after the \textit{EU–Footwear (China)}\textsuperscript{76} case. In this case, it granted only one MET among 154 cooperating Chinese exporting producers and rejected the MET application from all non-sampled companies, which were up to 140 companies.\textsuperscript{77}

\section*{B Determination of “Injury”}

Article VI (6)(a) of GATT 1994 stipulates that unless the effect of the dumping is determined as to “cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry,”\textsuperscript{78} no AD duty could be levied on the exporter. As for detailed determination of material injury, Article 3, associated with Articles 2.6 and 4 ADA present three interrelated concepts.

\textbf{a) Like Product}

According to Article 2.6 ADA, like product refers to a like product or in absence of such a product, the product has characteristics closely resembling those of the product under consideration.\textsuperscript{79} Determination of like product also leaves the authorities plenty of room for discretion. Since in practice, concrete economic data in all respects regarding the like product may not be available and Article 3.6 ADA grants the authorities freedom to assess the dumped imports by examining “the production of the narrowest group or range of products.”\textsuperscript{80}

\textbf{b) Domestic Industry}

According to Article 4 ADA, domestic industry refers to all domestic producers of the like product or those of them accounting for a major proportion of its total domestic production. An implicit restraint of this

\textsuperscript{75} Vermulst & Graafsma, \textit{supra} note 72, at 128.
\textsuperscript{76} See Panel Report, \textit{European Union—Anti-Dumping Measures on Certain Footwear from China}, WT/DS405/R (28 October 2011) [hereinafter \textit{EU–Footwear (China)}].
\textsuperscript{78} GATT, art. VI (6)(a).
\textsuperscript{79} ADA, art. 2.6.
\textsuperscript{80} ADA, art. 3.6.
definition is its interrelation with injury. For example, Panel in Mexico—Corn Syrup stated, “the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1.”\textsuperscript{81} The Panel in Argentine–Poultry held that term “a major proportion” does not mean more than 50 per cent of domestic production\textsuperscript{82} since it would clearly require an absolute majority otherwise.

According to Article 6.10 ADA, where there are a high number of domestic producers, the authorities may decide sampling in order to make a representative assessment of the companies’ situation in the exporting country. However, whether determination is required to be based on the sampling is not clear from this article. In EC–Bed linen, the Panel disagreed with India’s argument that where a sampling is selected, the Panel is implicitly required to close their eyes to “ignore other information available to it concerning the domestic industry it has defined.”\textsuperscript{83} The Panel’s reasoning is that the above conclusion would be inconsistent with the fundamental underlying principle, which requires a fair anti-dumping investigation and an objective evaluation of the evidence.\textsuperscript{84}

c) \textit{Injury}

As defined in footnote 9 of Article 3 ADA, there are three types of injuries might leading to anti-dumping investigation: material injury to a domestic industry, threat of material injury to a domestic industry, and material retardation of the establishment of such an industry. Since the third injury—material retardation—“have ha[s] been extremely rare in anti-dumping history,”\textsuperscript{85} this section only discusses the first two kinds of injury.

i \textit{Material Injury}

As an overarching provision, the appellate body often emphasizes Article 3.1 because of the basic requirement as to positive evidence and

\textsuperscript{81} Panel Report, Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, ¶ 7.147, WT/DS132/R (Jan. 28, 2000) [hereinafter Mexico Corn Syrup].


\textsuperscript{83} Panel Report, European Communities—Anti-Dumping on Imports of Cotton-Type Bed Linen from India, ¶ 6.181, WT/DS141/RW (Nov. 29, 2002) [hereinafter EC Bed Linen].

\textsuperscript{84} Id.

\textsuperscript{85} VERMULST, supra note 29, at 74.
an objective examination in injury determination.\(^{86}\) For example, in *U.S.—Hot-Rolled Steel*, the appellate body held that the term positive evidence indicates that the evidence must be of an “affirmative, objective and verifiable character and that it must be credible.”\(^{87}\) In addition, the appellate body in *Thailand—H-Beams* held that injury determination shall be based on all relevant reasons and facts before it, and such facts are not limited to information only disclosed to the parties to the investigation.\(^{88}\)

Second, as for the meaning of dumped imports, the Panel in *EC—Bed linen*, endorsed EU’s argument that once a product in question has been determined as dumped products, this conclusion will apply to all imports of that product form that source, i.e. particular producers/exporters.\(^{89}\)

Third, as for what constitutes an objective examination of two key aspects: the volume of the dumped imports and the effect on prices of such dumped imports in domestic market and the consequent impact of these imports on domestic producers of such products. On one hand, Article 3.2 requires the authorities to consider whether there has been a significant increase in dumped imports. However, the Panel in *Thailand—H-Beams* held that the textual term *consider* does not require the authorities to conduct an explicit finding or determination as to whether there is indeed significant increase in volume of dumped imports.\(^{90}\) On the other hand, Article 3.4 further elaborates how to examine consequent impact on domestic industry. Article 3.4 requests the authorities to evaluate all relevant economic factors and indices related to the state of industry. In addition, this article includes a non-exclusive list including actual and potential decline in sales, profits, output, market share, productivity, return on investment, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wastes, growth, and ability to raise capital or investments.\(^{91}\) As the Panel in *EC—Bed Linen* and the Panel in *Mexico—Corn Syrup* analyzed, considering the

\(^{86}\) Id.

\(^{87}\) Appellate Body Report, United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, ¶ 192, WT/DS184/AB/R (July 24, 2001) [hereinafter *U.S.—Hot-Rolled Steel*].


\(^{89}\) *EC Bed Linen*, supra note 82, ¶ 6.136.

\(^{90}\) Panel Report, *Thailand—Anti-Dumping Duties on Angles, Shapes and Section of Iron or Non-Alloy Steel and H-Beams from Poland*, ¶ 7.161, WT/DS122/R (Sep. 28, 2000) [hereinafter *Thailand H-Beams (Panel)*].

\(^{91}\) ADA, art. 3.4.
phrase “shall include an evaluation of all relevant factors” and the change of wording introduced in the Uruguay Round, the factors enumerated in the list are of mandatory nature and each of sixteen factors shall be evaluated in each case.\textsuperscript{92} Furthermore, examination of relevant economic factors other than these listed ones could also be required.\textsuperscript{93} On the question of to what extent the examination leads to satisfaction of the requirements of Article 3.4, the Panel in EC–Bed Linen and the Panel in Guatemala–Cement II both held that the consideration of the factors must be apparent so that the Panel may assess whether the authorities acted in accordance with Article 3.4.\textsuperscript{94} Therefore, a simple “checklist” approach or mere presentation of tables of data is not enough; rather, the above factors must be analyzed in an economically and factually correct manner.\textsuperscript{95}

\textit{ii} Threat of Material Injury

Considering the speculative nature of the determination of threat of material injury, Article 3.7 presents four extra conditions to be satisfied for determining threat of material injury.\textsuperscript{96} First, the determination must have a factual basis, not merely according to allegation, conjecture, or remote possibility.\textsuperscript{97}

Second, the change in circumstances that would create injurious dumping must be “clearly foreseen and imminent.”\textsuperscript{98} As the Panel in U.S.–Softwood Lumber observed, it might well be possible that the change in circumstance results from a series of events or development relating to domestic industry and/or the dumped imports rather than one single event.\textsuperscript{99}

Third, four specific factors are included in a threat determination in Article 3.7, which is connected with the word \textit{and}, meaning that all of the four factors shall be considered during the determination. When address-

\begin{itemize}
\item \textsuperscript{92} EC Bed Linen, supra note 82, ¶¶ 6.154–6.159; See also Mexico Corn Syrup, supra note 80, ¶ 7.128; Thailand H-Beams (Panel), supra note 89, ¶ 7.225.
\item \textsuperscript{93} Mexico Corn Syrup, supra note 80, ¶ 7.128; see Thailand H-Beams (Panel Report), ¶ 7.225; Panel Report, Guatemala—Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico, ¶ 8.284, WT/DS156/R (Oct. 24, 2000) [hereinafter Guatemala Cement II].
\item \textsuperscript{94} EC Bed Linen, supra note 82, ¶ 6.163.
\item \textsuperscript{95} VERMULST, supra note 29, 89–90 (summarizing Thailand H-Beams (Panel), ¶¶ 7.236–237 and Panel Report, Egypt—Definitive Anti-Dumping Measures on Steel Rebar from Turkey, ¶¶ 7.41–51, WT/DS211/R (Aug. 8, 2002)).
\item \textsuperscript{96} VERMULST, supra note 29, at 94.
\item \textsuperscript{97} ADA, art. 3.7.
\item \textsuperscript{98} Id.
\item \textsuperscript{99} Softwood Lumber, supra note 39, ¶ 7.53.
\end{itemize}
ing the question whether these four factors are enough to entitle a threat determination, two Panels offered two completely different opinions. In *Mexico–Corn Syrup*, the Panel held that, besides consideration of the four factors in Article 3.7, a threat determination shall also cover the 15 factors enumerated in Article 3.4 about injury determination, since “[the Article 3.7] analysis alone is not a sufficient basis of a determination of threat of injury… [and] an analysis of the consequent impact on imports is required.”\(^\text{100}\) On the contrary, the Panel in *United States–Softwood Lumber I* opined that the wording *should* and *consider* in Article 3.7 indicates that the authorities are not required to “make an explicit ‘finding’ or ‘determination’ with respect to the four factors,” and therefore, even failure to consider one or more of them would not constitute a violation of Article 3.7.\(^\text{101}\)

### C Causation

Article 3.5 ADA covers the requirement of a demonstration of a causal link between dumping, injury and the non-attribution requirement\(^\text{102}\), which examines any other known factors cutting off the causal link. Both of the Panels in *U.S.–Hot-rolled Steel* and *Thailand–H-Beams from Poland* viewed Article 3.5 as not presenting an obligation on authorities of proactively finding the factors enumerated where they are not clearly raised by the interested parties.\(^\text{103}\) These panels also evaded discussing the question as of whether the authorities would be compelled to examine the factors known to the investing authorities while not known to the interested parties.\(^\text{104}\)

### D Conclusion

Based on the above factors relied on investigating authorities to determine the final AD measures, Chinese companies may find that WTO agreements provide detailed rules at each step. Reading these rules and case opinions will help China understand the WTO legal requirements on AD into more details.

### IV Selected Unresolved Issues to Work on in Future Cases

\(^{100}\) *Mexico Corn Syrup*, *supra* note 80, ¶ 7.126–.127.

\(^{101}\) *Softwood Lumber*, *supra* note 39, ¶ 7.68.

\(^{102}\) VERMULST, *supra* note 29, at 91.

\(^{103}\) *Thailand H-Beams (Panel)*, *supra* note 89, ¶ 7.273

\(^{104}\) Id.
Apart from the abovementioned substantive legal provisions concerning determination of dumping and application of anti-dumping measures, there are still several other approaches to attack an AD measure in dispute. Sometimes certain aspect of the challenged AD measure cannot be justified within the WTO framework, because domestic legislation is inconsistent with WTO agreement and obligations of an interested party per se. In addition, in cases where a legal requirement is ambiguous and there is large discrepancy among member states about which interpretation should be adopted by the investigating authority, there are chances for arguments from both sides to succeed. What is more, improper procedures adopted by the investigating authorities could also be a ground to challenge the disputed AD measure. To make it simpler, as a respondent against an AD measure, China should figure out every possible supporting argument by looking into the entire determination process of the investigation authorities. These approaches involve litigation strategies, which are also very imperative in a comprehensive case like the ones submitted to the WTO DSB. This section will enumerate certain methods that could challenge legal grounds other than the abovementioned specific factors provided in Article VI of GATT 1994.

A. Inconsistency of the Relied Regulation with WTO Agreements

Sometimes, trade disputes between WTO members end before reaching the DSB. In this way, despite there is an obligation on each WTO member to ensure conformity between domestic laws and the WTO agreements, there is still inevitably existing discrepancy between them. When it comes to the origin of anti-dumping law, such differences among different trading partners are justified since anti-dumping law initially targets at providing ordinary protection to domestic industry irrespective of the impact on other countries. Ever since Jacob Viner noted the first AD measure in the sixteenth century used by an English writer, who charged foreign merchants selling paper at a loss for the sake of smothering the arising paper industry in England, AD has been recog-

106 Jacob Viner (May 3, 1892–September 12, 1970), a Canadian economist and is considered one of the "inspiring" mentors of the early Chicago School of Economics in the 1930s. He is the first scholar to collect previous writings on the subject of anti-dumping. One of Viner’s greatest accomplishments is his book Studies in the Theory of International Trade. This work is not just a history of the theory of international trade but also a guidebook that tells where the early economists who studied trade were wrong and where they were right.
nized as an accepted protective tool for promoting domestic industry.\textsuperscript{107} Doubtlessly, speaking in the modern understanding, this is not really an AD measure since these measures are limited to governments.

Another reason why anti-dumping law came into existence is the necessity to regulate imports, or in a more straightforward expression, to limit imports.\textsuperscript{108} This necessity is in nature the extension of antitrust law.\textsuperscript{109} Taking the U.S. anti-dumping law as an example, Section 73 of Wilson Tariff Act of 1894 aims at regulating such kind of imports by making unlawful conspiracy or combination that was intended to restrain trade or to increase the U.S. price of an imported article,\textsuperscript{110} which is the uncovered area of the Sherman Antitrust Act of 1890.\textsuperscript{111}

Based on the above two reasons, it is reasonable to regard anti-dumping law as an ordinary protection for only domestic industry and without any doubt, regulations on anti-dumping among different countries have large discrepancy. After the WTO came into existence, in order to promote free trade flows around the world, every country should sacrifice certain legislative power and amend its anti-dumping regulations in accordance with WTO agreements. To make it clear, the WTO law does not require a Member to have its anti-dumping regulations. However, if a Member does so, its anti-dumping regulations should be bound by the WTO law.

The above need to promote free flow of international trade is supported by the Marrakesh Agreement Establishing the World Trade Organization (the “Marrakesh Agreement”). The Marrakesh Agreement provides that each WTO member has a principal obligation to “ensure the conformity of its laws, regulations and administrative procedure with its obligations as provided in the annexed Agreements,”\textsuperscript{112} among which there are GATT 1994 and ADA. ADA reiterates this obligation and “imposes an additional obligation”\textsuperscript{113} by providing that “[e]ach [m]ember shall take all necessary steps, of a general or particular character, to ensure … the conformity of its laws, regulations and administrative procedures with the provisions of [ADA] as they may apply to the Member in

\begin{footnotesize}
\begin{enumerate}
\item[107] FINGER & ARTIS, supra note 104, at 14.
\item[108] Id. at 18.
\item[109] Id.
\item[110] Id.
\item[111] Sherman Antitrust Act of 1890 only prohibits contracts or combination in restraint of commerce, monopolization and attempts to monopolize such commerce.
\end{enumerate}
\end{footnotesize}
question.”114 Again, although there is no requirement that each WTO member should adopt its own anti-dumping law, if it does, breach of a provision of GATT or ADA will immediately give rise to a breach of the conformity obligation under the Marrakesh Agreement115. For example, the appellate body in U.S.–Offset Act (Byrd Amendment) upheld the Panel’s opinion that the U.S. measure was inconsistent with the ADA and the ASCM, thereby violating Article XVI: 4 of Marrakesh Agreement.116 The reasoning is that the U.S. measure at issue was a specific action against dumping of exports and structured to dissuade the practice of dumping or subsidization other than one of those permissible under WTO agreements.117

As a frequent target in AD measures, China should always prepare to look into the original legal text by means of the WTO agreements. Actually, China has such a successful experience once in the case of EC–Fasteners. The appellate body in EC–Fasteners upheld the Panel’s findings that Article 9(5) of the European Union’s Basic Anti-dumping Regulation (the “Basic AD Regulation”)118 was inconsistent as such, and as applied in the fasteners investigation, with Articles 6.10 and 9.2 of the ADA. The reason is that this article conditions the determination of individual dumping margins and the imposition of individual anti-dumping duties, on the fulfillment of an Individual Treatment (IT) Test.119 The relevant provisions in this case are Articles 2(7) and 9(5) of the Basic AD Regulation, which regulates market economy treatment (NMT) and IT test separately.120 The appellate body focused on the presumption of the articles of the Basic AD Regulation in dispute. Similarly as noted by the Panel, the appellate body considered that Article 9(5) of the Basic AD Regulation121 established a presumption that “the producers or exporters

114 ADA, art. 18.4.
117 Id.
119 Appellate Body Report, European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, WT/DS397/AB/R (July. 15, 2011), at 38 [hereinafter Iron or Steel Fasteners]
120 Id.
121 Article 9(5) of the Basic AD Regulation provides that “an anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury except, except for imports from those sources form which undertakings under their terms of this Regulation have been accepted. The Regulation imposing the duty shall specify the duty for each supplier or, if that is impracticable, and in general where Articles 2(7)(a)
that operate in NMEs are not entitled to individual treatment, in order to qualify for such treatment, NME exporters bear the burden to demonstrate that they satisfy the criteria of the IT test.”  

Under the WTO agreements, the investigating authority also need to consider other evidences that demonstrate that certain exporters or procedures are in a sufficiently close relationship and should be considered as a single entity so that a single dumping margin and anti-dumping duty should follow. However, Article 9(5) of the Basic AD Regulation applies countrywide dumping margins and countrywide anti-dumping duties for all exporters from the NME WTO member, unless such exporters request individual treatment and demonstrates that all criteria of the IT test are satisfied.

The appellate body further supported China’s submission and explained that Article 9(5) places the burden on NME exporters to rebut an improper presumption. This presumption is the NME exporters are related to the State and should demonstrate that they are entitled to individual treatment. This treatment runs counter to Article 6.10, and this article “as a rule” requires that individual dumping margins be determined for each known exporter or producer. By looking into the function of Article 9(5), the appellate body opined that the IT test provided in Article 9(5) aims at overcoming the improper “presumption of singularity, such that they should be entitled to individual treatment pursuant to Article 9(5).” Therefore, according to the appellate body, the EU did not fulfill its conformity obligation under the WTO agreements by setting up an improper presumption and laying down regulations accordingly.

China’s arguments in EU–Fasteners about conformity obligation according to Article XVI: 4 of the Marrakesh Agreement, along with more specific requirements in Article 18.4 of ADA, is an instructive successful trial experience. In this case, China successfully applied Article applies, the supplying country concerned. Where Article 2(7)(a) applies, an individual duty shall, however, be specified for the exporters which can demonstrate, on the basis of properly substantiated that: (a) in the case of wholly or partly foreign owned firms or joint venture, exporters are free to repatriate capital and profits; (b) export prices and quantities, and conditions and terms of sale are freely determined; (c) the majority of the shares belong to private persons; state officials appearing on the board of directors of holding key management position shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent form State interference; (d) exchange rate conversions are carried out at the market rate; and (e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.”

122 Iron or Steel Fasteners, supra note 118, ¶ 363.
123 Id.
124 Id. ¶ 364.
125 Id.
126 Iron or Steel Fasteners, supra note 118, ¶ 377.
XVI: 4 and Article 18.4 of ADA as useful legal grounds to refute the initiator’s challenge. China should bear this successful experience in mind and consciously resort to these articles in future AD proceedings.

B Ambiguity in Legal Interpretation

Legal words of anti-dumping regulations could be interpreted in different ways and therefore could be argued from both sides. In such situation, emphasizing on certain ambiguous legal language and attacking the loopholes of one particular interpretation of the investigating authority could be a creative way to turn disadvantageous situation into a favoring one.

Take *U.S. –Anti-dumping and Countervailing Duties* as an example, in which China has had another successful try. In this case, China argues that a violation of Article 19.3127 of Agreement on Subsidies and Countervailing Measures by U.S. DOC’s failure “to establish whether or to what degree it would offset the same subsidies twice by imposing anti-dumping duties calculated under its NME methodology, concurrently with countervailing duties.”128 This dispute concerns countervailing and anti-dumping duties simultaneously imposed by U.S. DOC on four products originating in China following concurrent countervailing duty and anti-dumping investigations. China appealed the Panel’s finding about double remedies, which refers to two situations: (1) where both an anti-dumping and a countervailing duty are imposed on the same product; and (2) where the simultaneous application of anti-dumping and countervailing duties on the same imported products results, at least to some extent, in the offsetting of the same subsidization twice.129

The key legal words on this issue are “appropriate amount” in Article 19.3 of ASCM, to which extent a countervailing duty could be levied on imported products. When the appellate body interpreted this legal term

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127 Agreement on Subsidies and Countervailing Measures, art. 19.3, Apr. 15, 1995, 1869 U.N.T.S. 14 (“When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted.”).


129 Id. ¶¶ 541–43.
to decide whether the countervailing duty levied by U.S. DOC is inconsistent with this article, the appellate body examined dictionary meaning, turned to the context of Article 19 of SCM and other contextual support in other article of SCM and ADA, and prior cases concerning interpretation of meaning of “appropriate.” Finally, the appellate body explained that “the requirement that any amounts be ‘appropriate’ means, at a minimum, that investigating authorities may, not in fixing the appropriate amount of countervailing duties, simply ignore that anti-dumping duties have been imposed to offset the same subsidization.”

It further held that since SCM and ADA set up different appropriate standards and a ceiling for the respective duties, interpretation of the “appropriate” standards could not be used to circumvent the rules in each agreement by understanding the appropriate amounts should not exceed the combined amount of dumping and subsidization found. Since the amount of the countervailing duty imposed by DOC represents the full amounts of the subsidy, and at the same time, the AD duty disputed was levied at least on the basis of the same subsidization, the appellate body reversed the Panel’s interpretation and found in favor of China on this issue.

This successful experience of arguing from interpretation of legal words in WTO agreements provides another model, which could be copied in future AD proceedings. When interpreting legal words, China could learn from how the appellate body did in this case, such as resorting to dictionary meaning, contextual meaning, legislative purpose, and how prior cases interpret the same language.

C Conclusion

From the selected successful experiences discussed above, China looked into detailed legal text and had nice tries by making powerful arguments based on the legal requirements. In future cases, Article XVI: 4 and Article 18.4 of ADA are still basic legal requirements and China may continue its strategy in EU–Fasteners to challenge AD initiations. In addition, applying different legal interpretations as China argued in U.S.–Anti-dumping and Countervailing Duties is another common practice but demands comprehensive supporting evidence. China should also pay attention to the argument that the initiators’ interpretation of WTO

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131 U.S.—AD and Countervailing Duties, supra note 127, ¶ 570.
132 Id. ¶¶ 570–72.
133 Id. ¶¶ 582–83.
law is not in conformity with the way it should have been interpreted. It is doubtless that besides these two specific cases, there are still other successful tries by China and other WTO members in defending its/their legal rights in AD cases. These successful experiences CAN BE applied in accordance with different situation.

V Theories of Strategic Thinking of China

Equipped with the above knowledge and experiences, the author proposes a combined strategy in defending trade interests from AD challenges. Chinese government always emphasizes the extreme important function of guiding strategic principle in directing actions. Stepping into 2011, Chinese Central Government implemented the 12th Five-Year Plan (12th FYP), and entered a brand new strategic development period. The 12th FYP from 2011 to 2015 is a key period as for accelerating the transformation of the mode of economic development, deepening reform and opening, promoting economic impact on long-term stable and rapid development and social harmony, and building a comprehensive well-off society of decisive significance. Considering that more and more trade conflicts are arising, it is pressing for Chinese enterprises to adjust their strategy when dealing with future fierce trading situation. This is also one of the Chinese government’s basic responsibilities during the 12th FYP, which is to keep promoting international trade and comprehensive integration with the world trade. Improving the ability of responding to trade frictions and promoting international trade or similar expressions appear frequently in recent FYPs, but what solutions shall China adopt in the 12th five year in order to achieve this goal? Shall China continue to follow the past path or should it try out a new strategy? In order to facilitate

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the goals of the 12th FYP, this section proposes two strategic thinking modes for China when facing with trading remedy challenges. One is the deeply rooted philosophy in Chinese ancient culture—Taoism, and the other is a recently popular legal theory proposed by many foreign scholars, which is aggressive legalism.

A Natural Progression of Taoism

China is one of the four cradles of civilization. Some ancient Chinese philosophical theories are rooted deeply in the mind of Chinese people, affecting Chinese people’s model of behavior for more than 2,000 years. This section will talk about application of canons from Taoism in directing China’s attitude towards dealing with AD challenges.

a) Keep Learning from the Past Failure and Be Patient

In traditional Chinese culture, Tao Te Ching is a renowned masterpiece of Lao Tzu, the greatest philosopher and thinker in ancient China and the founder of the only indigenous religion -- Taoism. Notions, such as action through non-action or Wu Wei (无为) and emphasis on harmony between humanity and the universe, are deeply rooted in Chinese culture and play a magic role in providing invisible influence on people’s lifestyle. Unexceptionally, these concepts also function well in dealing with trade fractions arising from cross-border trade.

Among 81 cannons of Tao Te Ching, Chapters 8 and 78 could be the ones most directly applicable to the situation where China is subject to frequent AD investigations. These two chapters talk about water: Chapter 8 analyses the nature of water, which is most delicate and highly variable: “the highest excellence is like (that of) water. The excellence of water appears in its benefiting all things, and in its willingness to occupy the low place, without striving (to the contrary). Hence (its way) is near to (that of) the Tao.” Chapter 78 talks about the behavior of yielding, which is doomed to winning. Chapter 78 describes water as a metaphor: “there is nothing in the world more soft and weak than water, and yet for

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137 Taoism (also spelled Daoism) refers to a philosophical or religious tradition in which the basic concept is to establish harmony with the Tao (道), which is everything that exists, the origin of everything and because of the latter it is also nothing. Taoism had not only a profound influence on the culture of China, but also on neighboring countries. Taoist philosophy is deeply rooted in contemporary China, and is unavoidable part of modern Chinese life; see YOU-SHENG LI, THE ANCIENT CHINESE SUPER STATE OF PRIMARY SOCIETIES: TAOIST PHILOSOPHY FOR THE 21ST CENTURY 300 (2010).

138 老子 (Lao Tzu), 道德经 [TAO TE CHING], TAO TE CHING (James Legge trans., 2d ed. 2008).
attacking things that are firm and strong there is nothing (so effectual) for which it can be changed. Everyone in the world knows that the soft overcomes the hard, and the weak that strong, but no one is able to carry it out in practice." Lao Tzu presents his profound insights of human virtue and war strategy among states by simply describing the nature of water. The appearance of weakness of everything in the universe does not necessarily prove its frailty. Instead, beneath this appearance there might be power and strength strong enough to defeat any proud enemy.

China is like water described by Lao Tzu, which might be fragile at the current moment, but it can keep reserving its energy through daily practicing and learning from the past failure. Eventually, China will face less and less obstacles to its outbound trade.

b) Do Not Give Up Learning from Past Failures in AD Proceedings

Lao Tzu discussed the negative outcome of indulgence in Chapter 24 of Tao Te Ching, saying that “he who stands on his tiptoes does not stand firm; he who stretches his legs does not walk (easily). (So), he who displays himself does not shine; he who asserts his own views is not distinguished; he who vaunts himself does not find his merits acknowledged; he who is self-conceited has no superiority allowed to him. Such conditions, viewed from the standpoint of the Tao, are like remnants of food, or a tumor on the body, which all dislike. Hence those who pursue (the course) of the Tao do not adopt and allow them.” Through the six vivid examples of people who pride themselves too much but do not end up with a satisfactory situation, Lao Tzu expressed his view of the Tao (道), which is not to make blind aggression and not to use false pride, self-righteousness, and bragging. From the basic idea of natural progress (自然发展), or wuweierzhi (无为而治), two meanings could be

140 Id. at 43.
141 “企者不立，跨者不行；自见者不明；自是者不彰；自伐者无功；自矜者不长。其在道也，曰余食赘形。物或恶之，故有道者不处。” [He who stands on his tiptoes does not stand firm; he who stretches his legs does not walk easily. He who displays himself does not shine; he who asserts his own views is not distinguished; he who vaunts himself does not find his merit acknowledged; he who is self-conceited has no superiority allowed to him. Such conditions, viewed from the standpoint of the Tao, are like remnants of food, or a tumor on the body, which all dislike. Hence those who pursue the course of the Tao do not adopt and allow them].
drawn from Chapter 24. The first is where a person does not have the ability to achieve something, what he needs to do is not to advance rashly, like standing on his tiptoes to achieve a little more height or stretching his legs in order to walk a little more faster. Before the person grasps adequate knowledge and gains sufficient experience to achieve the expected goal, it would be better for him to strive for accumulating experiences and prepare for expected achievements. Marching forward gradually and leading his life in accordance with the ruling law of nature will finally leads to the goal.

The other implication of Chapter 24 roots where a person has already accomplished his goal. In this situation, the person should stay humble and strive for continued excellence, rather than being boastful and demanding praise without restraint. Being conceited will not only blind oneself of what is imperative to do the next step, but also lose the others’ faith and would get the person isolated at the end. In this sense, Chapter 9 of Tao Te Ching carries the same message, which reads, “it is better to leave a vessel unfilled, than to attempt to carry it when it is full. If you keep feeling a point that has been sharpened, the point cannot long preserve its sharpness. When gold and jade fill the hall, their possessor cannot keep them safe. When wealth and honors lead to arrogance, this brings its evil on itself. When the work is done, and one's name is becoming distinguished, to withdraw into obscurity is the way of Heaven.” (持而盈之，不如其已; 揣而锐之，不可长保。金玉满堂，莫之能守; 富贵而骄，自遗其咎。功成身退，天之道也。”) The moderation to all suggested in this maxim also demonstrates Lao Tzu’s appreciation of the virtue of modesty. Lao Tzu emphasizes the attitude to live a humble life sort of discreetly because he realizes that the reward lies in peace and harmony of the mind, but not quick gains with anxiety all day long. Based on the above two maxims, followers of Lao Tzu believe that to live in accordance with the ruling laws of nature, and to raise the heart high but to put the feet on the earth, is what guidance Tao Te Ching offers everyone longing for success. This also applies to current Chinese situation in responding to AD investigations within the WTO framework. International trade is complicated and dynamic all the time. Chinese government should be patient in developing its ability to lead Chinese exporters into more smooth outbound trade, which might take a long time.

There is a normal misunderstanding of Tao Te Ching in this context, which might leads to a possible negative effect by just waiting for an outcome without making efforts. Based on the principle proposed by Lao

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144 Id. at 67.
Tzu, wuwei (无为) or no action could be understood as a very negative attitude towards extraneous interference. This could be one way of understanding Lao Tzu’s theory. However, the strategic thinking discussed in this section focuses more on the other part of Lao Tzu’s theory—natural progression instead of rashly advancing in pursuit of instant success. To express it in a much more detailed way, in order to promote more peaceful foreign trade without threatening other WTO members by resorting to AD measures, China should keep actively studying WTO agreements and anti-dumping regulations of major trading partners. In addition, China should reasonably foresee that within five or even more years, the current situation will not be utterly changed, since Chinese companies need time to adapt to the WTO practice and litigation tactics. In this way, in the five or so years to come, China should keep a peaceful heart to accumulate its experience to integrate international trade within the WTO framework, rather than taking an impatient and irritable attitude towards international trading competition. This process must be painful, but as the ruling law of nature or Tao (道) proposed by Lao Tzu, this process is inevitable if China wants to deepen its participation within global trade. Needless to say, not being irritable does not direct China to go to the other extreme, which is really being wuwei (无为) or taking no action. In the coming five years, China should even more actively bring in what it needs in order to stand up firmly with extraneous challenges. This includes comprehensive studies on WTO agreements, relevant anti-dumping regulations of trading partners, widespread legal and economic education of WTO for Chinese youth and Chinese companies, and transformation of economic increasing mode in certain industries, etc. In a word, China should be patient in terms of waiting for the day when it has full capacity to give the constant AD investigations a perfect counterattack.

There is one type of voice inside China, which harshly criticizes the protectionism from China’s importing trading partners. Admittedly, frequent AD challenges originate from the trade protection policy from the AD initiators. However, only criticizing the outside world and waiting for their friendly cooperation with China can never benefit China’s cross-border trade. What the domestic media and certain scholars should focus on at the moment should be picking up more patience and studying how to build up Chinese enterprises’ capacity to defend such challenges. Such behavior can be alike movement of peaceful water—never stop moving forward and finally become a powerful strength.

B Aggressive Legalism
While being a patience learner, China should also be active or even rigorous in the learning process to build up its capacity in order to achieve the above goal, according to Aggressive Legalism. The concept of Aggressive Legalism was first brought by Saadia M. Pekkanen in her article *Aggressive Legalism: The Rules of the WTO and Japan’s Emerging Trade Strategy* in 2001. When describing Japan’s emerging trade strategy of deliberately and strategically using WTO rules, Saadia Pekkanen defines Aggressive Legalism as follows: “a conscious strategy where a substantive set of international legal rules can be made to serve as both ‘shield’ and ‘sword’ in trade disputes among sovereignty states.” This section will discuss whether it is a proper time for China to apply this methodology by comparing the level of development and domestic situations between Japan and China.

a) *Japan’s History of Applying Aggressive Legalism*

When discussing the formation of Aggressive Legalism in Japan, Saadia Pekkanen thinks that a 1988 winning case against Canada under the GATT dispute settlement system signifies the turning point of Japan’s attitude in applying a rule-based approach. Before 1988, the Japanese had a general nature of “reluctant litigants” according to Ichiro Araki, and ever after winning *Canada–SPF Lumber (GATT)*, Japan’s domestic perception about GATT’s fairness and utility of GATT as a legal weapon against foreign complaints and procedures was deeply affected. On its appearance, Japan became active involving in the GATT system and the WTO system ever since its accession. For example, Japan paid full diplomatic attention to ongoing Uruguay Round talks, held overall ambition to push its international economic power status as well as in multiple international organizations, and emphasized on analysis of the WTO consistency of Japan’s trading partners by drawing on leading legal professionals and trade experts. After evaluating these practices from an internal perspective, Saadia Pekkanen says that the driving force

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145 Job and Gertrud Tamaki Associate Professor, Henry M. Jackson School of International Studies; and Adjunct Professor, School of Law, University of Washington, 2004–Present.
147 Id. at 708.
149 Pekkanen, supra note 145, at 709–10.
151 Pekkanen, supra note 145, at 710.
of key Japanese officials is realization that international legal rules could be a strategic source of national power, thus, the vision of these officials was legal.\(^{152}\)

In the middle of her article, Saadia Pekkanen extends her discussion to the double-edged nature of Aggressive Legalism. On one hand, benefits of Aggressive Legalism are obvious: with this strategy, Japan can come up with legitimate legal actions to defend its trade policies that it deems legitimate without considering impact on its trading partners and say no to any request it deems as unreasonable.\(^{153}\) In addition, since Aggressive Legalism is a rather open and transparent strategy, Japan can deal with trade issues with marked independence in the international context.\(^{154}\) However, on the other hand, application of Aggressive Legalism might also hurt Japan itself because its trading partners may also turn around and expose controversial aspects of Japan’s political economy to the full glare of WTO dispute settlement system.\(^{155}\) Take Japan’s loss to a case to U.S. concerning restrictions on imports of 12 agricultural products as an example, this case set up a precedent, which is advantageous to the U.S. for the 1988 liberalization of the beef and citrus quotas. Therefore, the disadvantage of Aggressive Legalism may emerge when the “legal hardball … turn around and expose controversial aspects of Japan’s political economy to the full glare of the WTO DSM.”\(^{156}\)

At the end, Saadia Pekkanen concluded that Japan has benefited a lot both domestically and internationally from applying Aggressive Legalism. According to Saadia Pekkanen, as for the international impact of Aggressive Legalism on a large scale Japan shows power of international law and facilitates diffusion of international legal rules across both developed countries and developing countries.\(^{157}\)

\(b\) Future Application of Aggressive Legalism in China

The concept of Aggressive Legalism draws huge responses from scholars and arouses heated discussion as for rationality of Aggressive Legalism and whether it is suitable for other arising economies,\(^{158}\) such
as China. Many scholars observe that the recent China is similar to Japan in the 1980s in terms of economic development. It is worth considering whether Aggressive Legalism is suitable for current China.

China’s economy grows at a high speed in recent years, which is similar to the Japanese case in 1980s. In addition, it overtook Japan as the largest economy in Asia in 2010. Some scholars consider now as a proper moment to apply aggressive legalism following Japan’s path. Just as Japan, there was a similar litigation culture for Chinese being a reluctant litigator. Whether it is a perfect time for China to fully apply its strategy depends on the current attitude of Chinese companies towards foreign AD initiations, the extent of involvement in multilateral talks at a governmental level and cost of applying this strategy. Taking AD initiations towards other countries is another aspect of using this strategy as a “sword.” However, this topic is beyond the scope of this article.

First, Chinese companies’ attitude towards increasing AD initiations is a main force to adopt Aggressive Legalism since they have defending interest if no AD measures are taken. According to recent feedback of Chinese companies targeted in AD initiations, they are enthusiastic to respond to such challenges and make every effort to defend their interest. Although there are only two AD cases brought by China to the WTO DSB so far, there is a fair amount of information about how Chinese companies treat this situation. What is more, before going to the DSB, many AD initiations are settled between China and the importing countries, and attitude of Chinese companies involved in these cases could help us to understand the current situation.


159 GAO, supra note 149; Jung, supra note 157; Araki, supra note 157.


161 Based on data provided by National Bureau of Statistics of China, China’s growth of GDP in 2011, 2010, 2009, 2008 and 2007 was 9.3%, 10.4%, 9.2%, 9.6%, and 14.2%.


163 See Pekkanen, supra note 145, at 735; Araki, supra note 157, at 171.
Second, the Chinese Central Government has also realized how urgent it is for Chinese companies to build up their capacity to defeat AD challenges by actively applying WTO rules and for the government to establish a thorough system. This system may provide early warning, legal and diplomatic support and a platform for companies to share information. The Ministry of Commerce of China (MOFCOM) has set up a subsidiary called Bureau of Fair Trade for Imports and Exports (BFT),\textsuperscript{164} which is responsible for administration, investigations and defense of trade remedies including anti-dumping, anti-subsidies and countermeasures involving Chinese imports and exports.\textsuperscript{165} Officials of BFT paid special attention to trade remedy investigations in the 11\textsuperscript{th} five-year, and achieved great improvement in the following aspects. First, they strengthened the existing system in accordance with the current external situation of AD investigations.\textsuperscript{166} A four-sector linkage system was set up for early warning and information communication, including MOFCOM, municipal bureau of commerce, industrial associations, and companies involved. Moreover, when it comes to division of function of the above sectors, MOFCOM reiterates that companies involved are the principal actors when responding to trade remedy challenges. At the same time, industrial associations are responsible for coordination of responding matter under guidance of central and local governments. Second, China adjusted and issued relevant laws and regulations in respect of initiating AD investigations against imported products\textsuperscript{167}. Meanwhile, 

\begin{footnotesize}
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  \item \textsuperscript{165} 见国务院办公厅关于印发商务部主要职责内设机构和人员编制规定的通知 [Notice of General Office of the State Council on Distributing the Department of Commerce’s Main Functional Internal Organs and Staffing Requirements] (promulgated by the General Office St. Council, Apr. 25, 2003, effective Apr. 25, 2003) CLI.2.46450 CHINALAWINFO.
Chinese government actively took part in negotiations of multilateral agreements.\textsuperscript{168} Third, the Chinese government made a strong presence in various multilateral talks seeking opportunities to build up trust and clear up doubts by trading partners.\textsuperscript{169}

The official BFT website keeps updating specialized knowledge and trade news. For example, the Guidance of Responding Foreign Trade Remedies Investigations edited by BFT, updated foreign investigations towards China, recent news of meetings about defending trade interests and industrial development attended by MOFCOM officials, monthly reports of trade conflicts among other countries, notice of periodical training of WTO rules and a platform for information exchange among companies, industrial associations and scholars, etc. To some extent, these active preparations serve the purpose to fulfill transparency responsibility requested by Trade Policy Review Mechanism. Specifically speaking, the transparency responsibility aims at contributing to improved adherence by all Members to rules, disciplines commitments made under the Multilateral Trade Agreement.\textsuperscript{170} In this way, transparency can lead to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understating of, the trade policies and practices of Members.\textsuperscript{171} Moreover, to observe these efforts made by MOFCOM from a domestic perspective, MOFCOM is eager to change the current situation as the most frequently targeted country of AD initiations in WTO.
Furthermore, taking recent success against EU in *EC–Fasteners* in July 2011 for a concrete example, from the decision of submitting the dispute to the WTO DSB to the recent exciting outcome, the Chinese government presented a positive gesture to offer great political support and professional legal support to the companies involved. Ever since the EU launched AD investigation against Chinese fasteners in 2008, Jiaxing Industrial Association of Fasteners responded the investigation actively. Geographical concentration of producers of specific products is a great advantage in disputes since coordination of companies from the same industry is much easier than companies scattered all over China. In addition, MOFCOM gave strong support in consultations with EC. After EU made its decision of applying AD duty of 87% to Chinese fasteners, spokesperson of MOFCOM expressed extreme anger at EU’s imposition of such a high AD duty because of inconsistency with WTO rules in notification of investigation, investigation and decision-making. Six months later, China made official request of consultation to the WTO, which is China’s first resort to WTO rules against the EU’s trade remedy. Throughout the whole decision-making process of EC, the Panel and the appellate body, Jiaxing Bureau of Commerce kept facilitating organization of responding by the involved companies. These efforts included declaring no existence of martial injury for four

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172 Most of the companies targeted in *EC Fasteners* case were from Jiaxing city, Zhejiang Province, and the value involved was $97 million, see 欧盟紧固件反倾销, 浙24家企业首次赴欧游说 [EU Initiating Anti-Dumping Investigations over Fasteners, 24 Zhejiang Companies Went to Lobby in Europe for the First Time], 新华网 [XINHUA.NET] (Feb. 28, 2008), http://www.jxfastener.org/news.asp?sid=5YA7D3%3FNS%3F38%3FWL%3F36. More information about the Jiaxing Industrial Association of Fasteners is available at http://www.jxfastener.org/.

173 积极应对欧盟对我钢铁紧固件的反倾销调查 [Actively Responding to the Anti-Dumping Investigations over the Steel Fasteners Initiated by the EU], 嘉兴紧固件协会 [JIAXING FASTENER ASSOCIATION] (Dec. 8, 2008), http://www.jxfastener.org/news.asp?sid=4BVZV%3F58%3F38%3FYY%3F3F36.


175 雷敏 (Lei Min), 中方对欧盟对华紧固件采取反倾销措施表示强烈不满 [China Expressed Strong Dissatisfaction Towards the EU’s Anti-Dumping Measures Against Fasteners], 新华网 [XINHUA.NET] (Jan. 28, 2009), http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/newscenter/2009-01/28/content_10729710_1.htm (reporting China’s reaction to the EU’s decision of imposing AD duty of 87%).

176 Request for Consultations by China, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, G/ADP/D79/1, WT/DS397/1 (July 31, 2009).

times to the EU in 2008 and providing WTO rules training to all interested parties, etc.\textsuperscript{178}

Based on the current attitude of both Chinese companies and Chinese government, China should move forward and apply Aggressive Legalism. Comparing with Japan’s situation of 1988, situations of China are mature from every aspect. Success in \textit{EC–Fasteners} is a remarkable turning point as \textit{Canada–SPF Lumber (GATT)}. First, it is the first time when China brings a case against the EU—China’s top trading partner—to the WTO DSB and gets a favorable ruling\textsuperscript{179}. Second, similar to Japan’s active foreign policy establishment,\textsuperscript{180} Chinese government realized the importance of participating in multilateral negotiations and tried hard to show its competence and capacity in rules renegotiation. Third, growing domestic attention, enhancing WTO rules learning and trade policy studies from trading partners, plus relocation of administrative power in dealing with AD challenges, is also similar as the trend of promoting sense of utilizing WTO rules in order to defend Japanese companies’ interests.\textsuperscript{181} Forth, just as Japan’s intentional utility of WTO rules as a sword towards foreign practices it thinks controversial,\textsuperscript{182} China’s AD initiations against imported products increased at a high speed recently.\textsuperscript{183}

In conclusion, China’s success in \textit{EC-Fasteners} could be an historic moment to mark a sharp change in China’s trading policy. With great passion and notice of necessity in learning and utilizing WTO rules in promoting domestic economic development, China could take a more active role in participating in WTO negotiations and defending economic and political interests through full use of WTO legal rules. Actually, alongside its excitement in winning the case against the EU, Chinese government picks up great confidence in its legal capacity to use WTO rules as both a shield and a sword.

\textsection{C Reconcile Taoism and Aggressive Legalism in AD investigations}

\textsuperscript{178} \textit{Id.}
\textsuperscript{179} \textit{See} Pekkanen, \textit{supra} note 145, at 710.
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Id.} at 711.
\textsuperscript{182} \textit{Id.} at 713.
\textsuperscript{183} As indicated by the number of AD initiations against imported products from the MOFCOM website, \textit{see} 反倾销调查 [Antidumping Investigation], 商务部进出口公平贸易局 [BUREAU OF FAIR TRADE FOR IMPORTS AND EXPORTS], Sept. 19, 2011, http://gpj.mofcom.gov.cn/article/Nocategory/201109/20110907745531.shtml (last visited Feb. 15, 2012).
The above two methodologies seem to be contrary to each other, since Tao emphasizes natural building up of legal capacity while Aggressive Legalism aims at active utility of WTO rules as both a shield and a sword. However, one can strike a perfect balance between these two in the context of Chinese strategy formulation. On one hand, China should continue to be patient in accumulating experiences in dealing with AD disputes with the initiators, and this cries for a great amount of cost in both learning and practicing. At the same time, China should become an energetic user of WTO legal rules to defend its interest during the process of responding to external challenging. During this process, it is worthwhile to draw Chinese enterprises’ attention to two extremes, which shall be avoided.

First, the respect to patience and natural progress does not mean passively waiting for exportation of Chinese products complying with AD rules in different countries or within the WTO. As discussed above in Part III, not every AD initiation is justified under the WTO criteria. Without active response and rule learning, passive attitude can only give China’s trading partners the opportunity to abuse AD rules. If Chinese enterprises unfortunately follow this path, it would be impossible for China to defend its own trade interest. From its appearance, failure in responding an AD challenge is payment of huge AD taxation by the targeted company. Nevertheless, it has a more profoundly harmful impact to Chinese cross-border trade due to the image of passive self-deference.

Second, when it comes to aggressive legalism, the author does not recommend the Japanese practice, which is too “aggressive” literally. This refers to the second meaning of using as a “sword.” It is not proper to use the rules simply as a weapon to defend one’s own interest in international trades, sometimes even amounting to protectionism. A better way as the author proposes, China should learn from Japan’s attitude about legal rules but practice this principle in a moderate way. Without any doubt, applying AD rules should serve the purpose of protecting trade interest and maintaining normal trade relationship. In a word, application of the legal rules should be justified rather than adopting it as a lethal weapon blindly.

Another clarification also needs to be laid down before practicing this strategy. By pointing out Taoism when dealing with future trading frictions, the author does not indicate to apply these two principles at the same time in specific cases. The concept of respecting natural process should come into play when the Chinese government (most frequently the MOFCOM), the industrial associations, the entities and other related
stakeholders formulate its long-term plan in capacity building. The goal for this plan is to accumulate knowledge and experiences in defending trade interests when facing AD challenges. Acknowledgement of hardships and a long learning process is necessary. The current domestic public opinion is following a trend of anxiously striving for easy success and exaggerating China’s rising image in the world trade. Frequent criticism the importing countries’ protectionism is not a proper attitude in international trade. Instead, China’s attitude should be a patient learner with a learning schedule in the next 12 years. However, in specific cases, the Chinese respondents shall dig into the WTO rules aggressively. They shall actively involve in the dispute solving process and figure out favorable arguments with supportive evidences. The process could be assisted by involving more legal experts, investing more money in evidence collection and promoting communication with the interested parties.

How to apply the AD rules in a reasonable way is an art, which needs a long period of time in learning and practicing. On one hand, one should actively defend its trade interest in responding frequent challenges, and on the other hand, initiating challenges to trade partners to the extent that maintain normal trade relationship. Admittedly, a long term of learning process and capacity building could not be finished within one day, which still needs time and painful process to achieve. An encouraging point is that applying Aggressive Legalism could facilitate the process of learning. In addition, using the WTO rules should be reagreded as a learning process without over-emphasis on its outcome. When facing further AD challenges what China needs is practicing: adopting the idea of natural progress and aggressive legalism.

D Conclusion

Comparing with being a constant victim within the WTO framework in the past 12 years after accession to WTO, in the next 12 years, China should pick up its confidence in rapid economic and legal capacity growth. The timing is perfect now for China to take advantage of the two strategies. By practicing, it will eventually reconcile Taoism and Aggressive Legalism in promoting continuous economic development.

VI Conclusion

A 12-year cycle of life has almost passed since China’s accession to WTO. In Chinese zodiac, a new cycle of life always marks a new stage of life with a new vision. At this historic moment, Chinese enterprises
should reconsider its strategy in participating in multinational trade to promote continuous development. Based on previous extensive failures in AD proceedings initiated by other WTO members, now is a perfect time for China to change its strategic policy from being a reluctant litigant into an aggressive actor applying WTO legal rules. Undoubtedly, WTO legal rules are rather complicated and prior cases are numerous. However, in order to change the current situation of being the most frequent target of AD measures, China should keep learning the WTO law package. Together with learning legal rules, China can also cultivate its legal thinking through litigation strategies when responding AD challenges. This whole learning process cannot finish within one day, so China should stay patient during this learning process. In conclusion, when facing future AD challenges, China should act as a patient participant in the WTO through rigorously applying WTO rules to protect and promote its interests. In the next 12-year cycle from 2013, it is promising for China to be a powerful rule maker and a great beneficiary of the WTO rules.