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Overview

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The countervailing investigations against imports from the US

The most remarkable event in 2009 was the escalation of the dispute between the US and China over a series of trade remedy cases. On 1 June 2009, MOFCOM announced the initiation of anti-dumping and countervailing investigations on grain-oriented flat-rolled electrical steel originating in the US. This was the first countervailing investigation initiated by MOFCOM, and also the first case in which MOFCOM conducted anti-dumping and countervailing investigations simultaneously in the same case. It is not surprising that the US was chosen as the target for this first case, as to date it has initiated 24 combined AD and CVD investigations against various imported products from China, after it changed its long-standing policy of not conducting countervailing investigations against imports from non-market economy countries. It initiated its first CVD investigation against coated paper imported from China in 2006.

On 12 September 2009, President Obama announced his decision to impose a 35 per cent tariff on automobile and light-truck tyres imported from China, despite China's strong opposition. China regards this decision as a clear violation of the rules of the World Trade Organization and the commitments of not undertaking new trade protectionism made at the G-20 financial summit. MOFCOM immediately initiated an AD and CVD investigation against chicken imported from the US on 27 September, and another AD and CVD investigation against imported cars on 6 November.

The irony is that although countervailing investigation is new to MOFCOM, it has already obtained extensive experience of US cases because it is obliged to reply to CVD questionnaires issued by its US counterpart for foreign governments. MOFCOM is now relishing the opportunity for retaliation.

Although in the above three cases MOFCOM combined AD and CVD investigations in the same case, they are in fact two separate investigations. MOFCOM has separate case numbers, separate investigation teams, separate registrations, separate questionnaires and separate hearings and disclosures. In the grain-oriented flat-rolled electrical steel case, the case findings of AD and CVD investigations were consolidated, while in the chicken case the preliminary findings of the AD investigation were made separately on 5 February 2010.

Adoption of product control numbers

In the anti-dumping investigation into iron or steel fasteners originating in the EU, MOFCOM for the first time adopted the use of product control numbers (PCNs) in its dumping investigation questionnaire. Respondents are required to create a PCN for each product model according to the given product characteristics of the PCN. The PCN is then used to make comparisons between prices and costs of the products sold in different markets or by different respondents.

It is usually a difficult task for the investigators to determine the appropriate product characteristics of the PCN for their investigation; MOFCOM, however, did not face a real challenge in its first case. As redress for the EU's fasteners case, the product scope under investigation in MOFCOM's fasteners case is exactly same as in the EU's case; MOFCOM has essentially copied the PCN of its EU counterpart. Only one new characteristic has been invented by MOFCOM: the requirement for HS codes to be the first characteristic of a PCN. This innovation is not consistent with normal anti-dumping practice. As the product scope under investigation is defined by narrative description, the relevant HS codes are only for reference. By including HS codes as a characteristic of PCNs, HS codes become a binding definition of the product's scope.

In the anti-dumping investigation into polyamide 6 originating in the US, EU, Russia and Taiwan, MOFCOM used PCNs for the second time. In this investigation MOFCOM was more experienced with the PCN method. It requested the petitioners to propose the product characteristics of the PCN, then invited the respondents to

make comments on the petitioners' proposal. The petitioners were also given the chance to make counter-comments. After this procedure, MOFCOM finalised the product characteristics of the PCN and issued the questionnaire.

The sampling method in injury investigations

In the fasteners case, a total of 46 Chinese manufacturers responded to MOFCOM's sampling questionnaire and expressed their willingness to be sampled. MOFCOM decided to select 15 manufacturers with the largest production quantity as sample companies. It was the first time that MOFCOM has used the sampling method in its injury investigation, which is provided in article 24 of Provisions on the Antidumping Investigation of Industry Injury. The problem was that after the initiation notice of the fasteners case, only three Chinese manufacturers filed the appearance registration with MOFCOM and only one of them was been included in the sample. According to MOFCOM's previous practice, only registered manufacturers are entitled to participate in the subsequent investigation, including receiving the questionnaire and submitting the reply. For this reason the sampling decision in the fasteners case does not seem consistent with MOFCOM's previous practice.

Normal value determined by export price to third country

In the final determination of 1,4-butanediol originating in Saudi Arabia and Taiwan on 24 December 2009, for the first time MOFCOM used the export price to a third country to calculate the normal value.

According to article 4 (2) of Regulations of the People's Republic of China on Antidumping, where there are no sales in the domestic market, or the price and the quantity of such sales do not permit a fair comparison, the normal value could be calculated by the export price to an appropriate third country or the cost of production plus a reasonable amount for expenses and profits. In all its previous investigations, MOFCOM only calculated the normal value from the cost of production plus a reasonable amount for administrative, selling and general costs and profit. One basic consideration of the previous practice is that if the exporter dumps its product in China, it can also dump its product in other third countries; thus MOFCOM prefers to construct the normal value with the submitted cost and profit data of the respondents.

In the preliminary determination of the 1,4-butanediol case, MOFCOM first decided to select the EU as an appropriate third country after comparing the product similarity, sales quantity and other market conditions such as average sales quantity of single transactions, transaction terms and sales channels between EU and Chinese markets. The respondent argued that there were some special market conditions in the EU market, such as market monopolisation, long-term supply contracts and strong euro appreciation against the US dollar. These special market conditions did not grant a fair comparison between the EU and Chinese markets. In the final determination, MOFCOM accepted such argument and selected Japan as an appropriate third country.

Recent developments in sunset review investigations

In the final determination of the sunset review of acrylate esters originating in Korea, Malaysia, Indonesia and Singapore on 8 April 2009, MOFCOM determined not to continue the anti-dumping measure on imports from Korea while continuing the anti-dumping measure on imports from the other three countries. The only manufacturer of acrylate esters in Korea participated in the investigation, thus MOFCOM determined that this manufacturer could represent the whole Korean acrylate esters industry. By analysing its questionnaire response, MOFCOM concluded that this manufacturer did not dump its product during the period of review. Furthermore, MOFCOM investigated the capability of increasing exports, exports to China and exports to third countries and concluded that there was no obvious possibility of trade diversion after the termination of the anti-dumping measure on imports from Korea. This was the first time that MOFCOM had excluded a country under investigation in the sunset review while maintaining the anti-dumping measure on other countries under investigation.

Like its EU counterpart, MOFCOM did not revise the dumping margins in the sunset review. Moreover, MOFCOM did not accept any application of interim review or new shipper review before the sunset review because MOFCOM considered such review investigation may overlap with the subsequent sunset review and may in

fact revise the existing dumping margins. In the phenol case, it seems that MOFCOM has broken away from its previous practice.

On 31 July 2008, MOFCOM issued a notice of the expiration of the anti-dumping measures on phenol originating in Japan, Korea, US and Taiwan. On 14 January 2009, a Taiwan manufacturer filed an application for a new shipper review. On 31 January 2009, MOFCOM initiated the sunset review of the phenol case, and on 2 March 2009, MOFCOM initiated the new shipper review of the Taiwan manufacturer. On 1 December 2009, MOFCOM issued the final decision in the new shipper review and determined an individual anti-dumping duty to the Taiwan manufacturer. On 30 January 2010, MOFCOM issued the final determination of the sunset review of the phenol case, and decided to continue the existing anti-dumping measures, including the new anti-dumping duty granted to the Taiwan manufacturer. It is unclear whether this review and revision of an existing anti-dumping margin by combining a new shipper review with a sunset review is just an exception or signals a MOCOM policy change.

In three recent sunset review cases initiated in 2009, some countries subject to the original investigation were excluded from the sunset review. On 13 November 2009, MOFCOM initiated the sunset review of monoethanolamine and diethanolamine originating in Japan, the US, Malaysia and Taiwan. In the original investigation, Iran and Mexico were also under investigation, however MOFCOM decided to end the anti-dumping measures on these two countries because the petitioners did not request these two countries to be reviewed. Similarly, in the sunset review notice of the chloroform case on 29 November 2009 and the optical fibre case on 31 December 2009, MOFCOM decided to end the anti-dumping measures on imported chloroform from India and imported optical fibre from the US because the petitioners did not request India and the US to be reviewed.

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RayYin & Partners PRC Lawyers is a professional legal service team consisting of lawyers and consultants from Beijing RayYin & Partners and Guangdong RayYin & Partners based in Shenzhen. Over the years, RayYin & Partners has become a distinguishable team despite the severe competition in the PRC legal service market.

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The firm's trade team has extensively advised on and conducted anti-dumping, countervailing and safeguard cases, and matters concerning the application of WTO Agreements. Mr Lin Yang is the head of the firm's trade team.

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Lin Yang is the head of the trade team of RayYin & Partners Lawyers in Beijing. He has been focusing on anti-dumping practice and research since 1998. Mr Yang has extensive experience on advising Chinese clients in the anti-dumping investigations initiated by the investigation authorities of other WTO members such as the US, EU, Korea, Turkey, India, Pakistan, Canada, Indonesia, South Africa, Thailand and Israel. His clients include the leading manufacturers and exporters in numerous exports-oriented industries in China. Mr Yang has advised the Ministry of Commerce of China in the first 'China Safeguard' case initiated by Turkey. Mr Yang also represents multinationals such as Bayer, MeadWestvaco, Pilgrim's Pride Corporation, Ford and INVISTA in the anti-dumping investigations initiated by the Ministry of Commerce of China, providing services in connection with response to questionnaires, on-the-spot verification, non-injury defence and price-undertaking negotiations. Mr Yang has been recommended by *Legal 500*, *Chambers* and *Who's Who Legal* since 2004 for his outstanding anti-dumping practice in China.

Mr Yang contributes significant time to the research of Chinese anti-dumping laws, and regularly publishes articles in many industrial media in China.