

The Handbook of Trade Enforcement

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Overview

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The current regulation governing the countervailing investigations initiated by Ministry of Commerce of China (MOFCOM) is the Regulations of the People's Republic of China on Countervailing Measures (Countervailing Regulations), which was promulgated by the State Council of China on 26 November 2001, with its last amendment on 31 March 2004. However, on 1 June 2009, MOFCOM initiated its first countervailing investigation on Grain-Oriented Flat-Rolled Electrical Steel originating in the US. Until February 2011, MOFCOM has initiated a total four countervailing investigations against imported products from the US and EU.

Competent authorities

According to article 5 of the Countervailing Regulations, MOFCOM is the competent authority for the countervailing investigation against imported products. Within MOFCOM, the Bureau of Fair Trade for Imports and Exports (BOFT) is responsible for investigating whether a subsidy under the investigation is specific to an enterprise or industry or group of enterprises or industries, and if so, calculating the amount of a subsidy, and the negotiation of price undertakings with foreign producers, while the Bureau of Industry Injury Investigation (BIII) is responsible for the industry injury investigation and the examination on causal link and public interests. However, according to article 7 of the Countervailing Regulations, in the cases involving agricultural products, MOFCOM shall conduct the industry injury investigation jointly with the Ministry of Agriculture.

After the conclusion of its preliminary findings or final findings, MOFCOM shall make the proposal to the State Council Tariff Commission (SCTC) regarding the implement of specific provisional or final countervailing measures, and SCTC shall make a decision based on such proposal, which will then be published by MOFCOM in the form of an official notification together with its own findings. The customs offices shall implement the specific countervailing measures from the effective date set forth in MOFCOM's notification.

Investigation procedures

The investigation procedures of the countervailing investigations are basically same as those of the anti-dumping investigations.

Initiation

MOFCOM shall formally initiate the investigation by publishing a notice of initiation, within 60 days from the date of receipt of the complaint, which is normally filed by Chinese domestic producers or their association, if MOFCOM is satisfied with its examination on the complaint. As a normal practice, MOFCOM will invite the relevant exporting countries to have a consultation prior to the publishing date of the notice of initiation (initiation date). The notice of initiation is available on MOFCOM's website.

Appearance registration

Any interested party such as domestic industry, foreign exporter or producer, importer, end-user, association and governmental agency that is willing to participate in the investigation, is required to file an appearance registration with the BOFT and BIII within 20 days from the initiation date.

The interested party could file its preliminary comments on product scope, complainant's standing, subject, country and other relevant matters, as stated in the notice of initiation with MOFCOM, within 20 days of the initiation date.

Sampling

If there are too many registered foreign producers, MOFCOM may decide to carry out the countervailing investigation by means of sampling. If so, the questionnaire will be issued only to the sampled companies.

Issuance of questionnaires

The BOFT and BIII have two separate questionnaires for subsidy and industry injury investigation. The questionnaires shall be issued to the interested parties within 10 working days from the end of registration, but usually immediately after the end of registration or sampling.

MOFCOM normally grants foreign producers 37

days to reply to the questionnaires. Such period can be extended not more than 14 days upon due application. However, in its recent investigation practice MOFCOM normally only grants seven days' extension.

MOFCOM may also issue the supplemental questionnaires to foreign producers to ask for clarification or seek further information. Particularly, MOFCOM requires that all submissions including replies to the questionnaires made by foreign producers be prepared in Chinese and submitted through a Chinese licensed practising lawyer.

Preliminary findings

MOFCOM does not establish the investigation schedule for specific cases. In recent countervailing investigations, MOFCOM has usually made the preliminary findings within six to eight months from the initiation date.

In the preliminary findings, MOFCOM normally grants 20 days to all interested parties to present their comments on the preliminary findings.

Price undertakings

Foreign producers or the government of an exporting country (region) can offer price undertakings to MOFCOM after the preliminary findings.

There are two differences between the price undertakings of countervailing investigation and the price undertakings of anti-dumping investigations.

First, in anti-dumping investigations, such price undertaking offers shall be filed with MOFCOM within 45 days from the publishing date of preliminary findings. However, in a countervailing investigation, the Countervailing Regulations do not specifically provide for when the price undertaking offer shall be filed, instead, they generally provide that the price undertaking offer could be filed during the period of a countervailing investigation.

Second, in a countervailing investigation, the Countervailing Regulations provide that, in cases where a foreign producer offers a price undertaking without the consent of the government of its own country (region), MOFCOM shall not accept such undertaking. However, in anti-dumping investigations, such consent of the government of exporting country (region) is not a precondition of MOFCOM's acceptance.

The BOFT is responsible for examining the price undertakings offer, often consulting with the domestic industry. The Countervailing Regulations require MOFCOM to take the public interests into consideration when examining the price undertakings offer from foreign producers.

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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.

Most of our partners and associates have many years of hands-on experience of overseas study or practice. With outstanding legal expertise in their respective fields, a passion for legal practice, an accurate understanding of client's needs, swift reactions to changes of policy orientation, and flexible approaches and innovative solutions, we have earned the confidence of our clients through the dedication, diligence and care with which we execute and deliver our services.

We have represented clients in diverse industries and geographical regions, including domestic and foreign government agencies, international government and non-government organisations, foreign enterprises, commercial banks, investment banks and private equity funds.

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.

We are the first PRC member firm of Lawyers Associated Worldwide.

Hearing on industry injury

Any interested party can apply for a public hearing on industry injury before the BIII. Such hearing request shall be submitted in written form. The BIII normally schedules the public hearing after the preliminary findings.

Apart from the public hearing, the BIII also holds a hearing attended by both the petitioners and downstream users with the purpose to achieve a certain beneficial balance between Chinese upstream and downstream industries.

On the spot verification

After the preliminary findings, the BOFT case handlers will visit foreign producers' offices and factories to verify the accuracy and completeness of reported information and to collect further information and materials needed for the investigation. The BOFT carries out on the spot verification only on those foreign producers who have been fully cooperative in the investigation.

The BIII also carries out on-the-spot verification of domestic producers. There are normally two on-the-spot verifications targeting different producers, one before the preliminary findings and the other before the final findings.

Final findings

Before the final findings both the BOFT and the BIII will disclose to the interested party the basic facts on which the final findings are based. Normally the interested party will be granted 10 days to file its comments.

MOFCOM usually announces the final findings within 12 months from the initiation date. This period may be extended under special circumstances, but in no case will an extension be granted beyond six months.

**Lin Yang**

RayYin & Partners Lawyers

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.