DEVELOPMENTS IN PRC ANTI-DUMPING PRACTICE UNDER THE REVISED ANTI-DUMPING REGULATIONS

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By the promulgation of the Regulations of the People's Republic of China on Anti-dumping and Anti-subsidy in 1997(1997 Regulations), China started anti-dumping investigations against imported products. Particularly since its accession to the World Trade Organisation (WTO) in 2001, China has become one of the most active WTO members in terms of initiating anti-dumping investigations. Until May 2006, a total of 44 investigations have been filed against imports, most of which ended with the imposition of high duties.

The 1997 Regulations were split in November 2001 into the Regulations of the People's Republic of China on Anti-dumping (Anti-dumping Regulations) and Regulations of the People's Republic of China on Anti-subsidy. In April 2004, the Anti-dumping Regulations were further revised to reflect the incorporation of the Investigation Bureau of Industrial Injury (IBII) – one of the investigatory authorities previously part of the State Economic and Trade Commission – into the Ministry of Commerce (MOFCOM). IBII, together with the Bureau of Fair Trade of Imports and Exports (BOFT), is thus under a single, unified authority. The revision also incorporated certain practices developed in the post-accession period.

The following are some important examples of MOFCOM anti-dumping practice since 2004, which illustrate how this regime is developing rapidly in China:

EXAMINATION ON PUBLIC INTERESTS

The most remarkable revision to the Anti-dumping Regulations in 2004 (2004 Regulations) was the addition of the provision of public interests. According to article 33 of the 2004 Regulations, MOFCOM can decide to suspend or terminate the anti-dumping investigation if a price undertaking made by an exporter is acceptable and there is a demand of public interest. Although article 33 is introduced from similar provisions in the US Tariff Act of 1930, it does not specify which public interest factors should be examined by MOFCOM.

In fact, before the 2004 revision, according to article 10 of the Provisional Rules of Ministry of Foreign Trade & Economic Cooperation on Price Undertakings in Anti-dumping Investigations, MOFCOM has taken public interest as a consideration when examining the price undertaking proposal from foreign exporters. It usually requests an exporter to provide a public version of its price undertaking proposal, which is filed for the comments of other interested parties. In previous investigations, only Chinese petitioners file their comments on the price undertaking proposal.

In the *Chloroform* and *Benzofuranol* cases, whose final determinations were made after the 2004 revision, MOFCOM reached the price undertakings with foreign exporters in both cases; but it still did not disclose in its final determinations which public interest factors had been examined. Such ambiguous provisions and practice relating to public interest examination virtually grant MOFCOM excessively wide discretion – which might constitute an uncertain risk to foreign exporters. Taking the *Benzofuranol* case as an example, in article 9.2 of the price undertaking agreement that was agreed, it provides that: "if MOFCOM decides the continuing of price undertaking is not compliant with the public interests of PRC anymore, MOFCOM can withdraw the price undertaking and notify the foreign exporter [...] the foreign exporter may file the comments on this decision within 20 days from receiving the notification [...] the notification will become effective since the 30th day of issuance [...] at the same time MOFCOM may decide to re-impose the anti-dumping measures." According to this provision, MOFCOM may repeal the price undertaking reached if it decides that the change of market situation has caused the price undertaking to be inconsistent with public interests, while the foreign exporter has no legal basis to argue against such determination.

According to article 37 of the 2004 Regulations, imposition and collection of anti-dumping duty shall comply with the public interest, which is similar with the provision of article 21 of EC Basic Regulation (No. 384/96), which provides that the application of anti-dumping measures shall be in the Community interest. However, article 37 still does not specify the factors or procedures of public interest examination.

In the final determinations of 12 cases subsequent to the 2004 revision, MOFCOM's examination of the public interest mainly concentrates on the relationship between the petitioners and downstream industries, as all the products under investigation in those cases are imported industrial raw materials.

MOFCOM usually grants sufficient opportunities to the downstream industries to submit their opinions, including issuing the questionnaire, accepting the written submission, holding the hearing and visiting the premises of downstream industries. As far as the above procedure is concerned, MOFCOM's examination on the interests of downstream industries is seemingly sufficient. But unlike its EC counterpart, it seldom uses a separate section in its preliminary and final determinations to make a complete disclosure and analysis on the subject of public interest. MOFCOM usually gives a conclusion directly without referring to the opinions and evidence submitted by each interested party, evidence it has collected and the analysis on these opinions and evidences. In the final determination of the *Kraft Linerboard* case, which was concluded in 2005, MOFCOM did not even write any words regarding the public interest, though the downstream industry has submitted substantive opinions and evidences against this investigation. This has seriously impaired the fairness and reasonableness of this final determination.

With a view to the above problems, the senior official of MOFCOM said on its official website last year that it may revise the Provisional Rules on Price Undertakings in Anti-dumping Investigation and Provisions on the Anti-dumping Investigation of Industry Injury to impose a more specific and detailed guidance on public interest examination.

THE RISE OF REVIEW INVESTIGATIONS

Since the first investigation – the *Newsprint* case in 1997 – MOFCOM has initiated 44 investigations against imported products. But the foreign exporters are not only interested in those original investigations. With the gradual maturation of China's anti-dumping legislation and practice, and as the Chinese market continues to grow rapidly as a proportion of their global business, foreign exporters on whom punitive anti-dumping duty was imposed in the original investigations are trying to return to the Chinese market through review investigations.

Ten review investigations have been filed by MOFCOM since 2004, among which four are interim reviews filed by foreign exporters, two are interim reviews filed by Chinese industries, one is an interim review filed on its own initiative, one is the new shipper review filed by a foreign exporter, and two are sunset reviews filed by Chinese industries. As far as the filed number is concerned, foreign exporters take more initiatives than Chinese industries by requesting the review investigations.

It is foreseeable that the number of review investigations in China will increase rapidly, for the following reasons:

First, with the continuing prosperity of the Chinese economy, the importance of China in the global market is increasing, which will encourage foreign exporters to file review investigations more readily. Until now, in most interim review cases they had filed, foreign exporters obtained favourable results compared with those of the original investigations. In the *styrene-butadiene rubber (SBR)* interim review filed by Korea Hyundai, for example, the final duty under review was decreased to 4.15 per cent from the 19 per cent set in the original investigation. Similarly, in the *MA/EA/BA/2EHA* interim review case filed by PT Nippon Shokubai Indonesia, the final duty in review was decreased to 3 per cent from the 11 per cent set in the original investigation.

A second reason for a likely increase in review investigations in China is that Chinese industries have become more experienced in using the anti-dumping rules: more and more often they are filing review applications on original investigations in which the results are favourable to foreign exporters. An example of this was is in the *TDI* interim review case filed by Chinese petitioners, where the original duties imposed on foreign exporters were significantly increased.

Third, MOFCOM has a separate division handling review cases, which is independent from the two divisions that deal with the original investigations. So far, it has concluded several cases of interim review and sunset review. Such experience will enable them to handle future review applications more efficiently. The accumulation of further investigation experience will facilitate the initiation and handling of more review cases in the future.

And finally, many cases concluded in 2003 are due to expire in 2008. Chinese industries may apply for sunset reviews in the hope that present anti-dumping measures are resumed.

MOFCOM'S FIRST ANTI-DUMPING CASE RELATING TO AN AGRICULTURAL PRODUCT

MOFCOM launched an anti-dumping investigation against *Potato Starch* originated from the EU on 6 February 2006, which became the first anti-dumping case relating to an agricultural product initiated by China, and attracted much attention.

Although the products under investigation in all 44 of the previous cases initiated by MOFCOM fell into the category of industrial products – especially chemical, steel and paper products – this does not mean these are the only important industries in terms of MOFCOM's anti-dumping investigations. As a matter of fact, agriculture and farmers' interests have always been key concerns of the Chinese government. The decision makers and scholars of WTO policy in China have carried out the in-depth research on how to protect agricultural and agricultural products processing industries after China's accession to the WTO. Against a backdrop of increasing volumes of imported agricultural products, anti-dumping investigations concerning agricultural products may well proliferate and become a hot issue.

The trade in agricultural products is characterised by strong tendencies towards trade protectionism, because it is usually connected with the interests of multitudinous small-scale farmers who are susceptible to vacillations in prices; it significantly affects the economic development of agricultural areas. For this reason, the anti-dumping investigation relating to agricultural products is important among the anti-dumping cases initiated by certain WTO members, notably the US. The US has initiated a series of anti-dumping cases against Chinese agricultural products, including honey, crawfish tail, preserved mushroom, garlic, shrimp, etc.

The US, the EU and the main trading partners of China, also have well-developed agricultural industries. These are posing strong competition to Chinese agricultural products – even in the Chinese domestic market. A trade deficit in agricultural products in China (totalling US$4.64 billion in 2004) has made the protection of domestic agricultural industries all the more pressing. The twin pressures of appreciating renminbi and increasing imports from the US have contributed substantially to the problem.

Since the 44 cases hitherto initiated by MOFCOM have targeted only industrial products, the *Potato Starch* case has necessitated new legislation and practices for the proper implementation of Chinese anti-dumping investigation. Should the farmers or planting enterprises that grow potatoes be admitted into the processing industry of potato starch? Should MOFCOM offer a quicker and more efficient remedy procedure given the seasonal and decentralised nature of agricultural production? Should different dumping calculation methods from those adopted in industrial product cases be introduced owing to the peculiarity of agriculture production? As far as determination of the public interest is concerned, the previous practice of holding meetings attended only by upstream and downstream industry seemed inadequate and required a rethink. Other interested parties, such as the upstream industry of the applicant, ie, peasants and planting enterprises, as well as of the downstream consumers, should be

taken into consideration. All these questions are expected to be resolved as the *Potato Starch* case develops.

THE WITHDRAWAL OF THE FINAL DETERMINATION OF *KRAFT LINER BOARD*

The final determination of the *Kraft Liner Board* case, issued by MOFCOM on 30 September 2005, did not end this remarkable investigation, which lasted for 18 months and involved 21 enterprises in the US, Korea, Thailand and Taiwan; instead, it sparked an even more furious dispute. On 29 November 2005, the American Forest & Paper Association (AF&PA), as one of the interested parties, filed an application for MOFCOM's administrative reconsideration on the final determination of this case. Later, the US trade representative also announced its intention to appeal to the WTO regarding the final determination of the case, on the ground, that the final determination was not WTO-compatible. On 9 January 2006, MOFCOM decided to withdraw the final determination issued on 30 September 2005 through the relevant procedures of administrative reconsideration. As a result, the *Kraft Liner Board* case was recorded as the first anti-dumping investigation case in China whose final determination has been withdrawn.

Although the specific investigation procedure and determination reasons of the withdrawal have been criticised by certain interested parties, this case alone has established the regime and practices of Chinese anti-dumping investigation as a landmark precedent for review.

To ensure the fairness of determinations made by the two competent investigation authorities of MOFCOM – namely IBII and BOFT – as well as compliance with article 13 of the WTO Anti-Dumping Agreement, two parallel review systems on anti-dumping investigation have been established in China.

The first is the judicial review system, which was established by provisions of the Supreme People's Court on Several Issues Concerning the Hearing of International Trade Administrative Cases and Provisions of the Supreme People's Court on Several Issues Concerning the Application of Laws in the Hearing of Anti-dumping Administrative Cases. But until now no final determination of an anti-dumping investigation has been brought up for judicial review in China. Probably an important reason which discourages the application of judicial review is that the PRC courts lack capable judges with substantial knowledge on trade in general, and on anti-dumping investigation in particular.

The other system is the administration reconsideration system. According to the Implementation Measures for Administrative Reconsideration of the Ministry of Commerce issued by MOFCOM on 20 May 2004, any determination made by IBII and BOFT can be reconsidered by another independent competent authority within MOFCOM, namely the Department of Treaty and Law, upon a formal request from any interested party.

It seems that MOFCOM may have less difficulty in terms of professional knowledge than the court when conducting reconsideration on the final determination. But the interested parties still have many concerns about how the ministry can ensure the independence and fairness of reconsideration determination. The *Kraft Liner Board* case is just the beginning. MOFCOM still needs to do more to gain the confidence of interested parties.

According to its determination of reconsideration, the only reason for MOFCOM to withdraw the final determination of the *Kraft Liner Board* case is that some basic facts related to industrial injury investigation were not disclosed to interested parties before the final determination. After the withdrawal, the ministry drafted Measures Regarding Public Information Consultation and Disclosure on Industry Injury Investigation and invited the public to make comments online. This draft regulation will come into effect in the near future, which may help to improve the transparency of MOFCOM's anti-dumping investigation.

The foregoing developments of PRC anti-dumping practice, which have occured since the 2004 revision, attest to the gradual maturation of China's anti-dumping legislation and practice. During this period, internal pressures, such as appeals to the public interest and protection of agricultural industries, combined with external pressures, from other WTO members such as the US government, and from participating, interested parties such as American Forest & Paper Association, have all played a part in China's continuing drive towards improving the fairness and transparency of its anti-dumping regime and practice.