

## **China's Antidumping Laws and Regulations: What do they say? How do they affect U.S. exports? Are they consistent with WTO Agreement**

This paper analyzes the Antidumping Regulation enacted by the PRC in December 2001 ("PRC Regulation") from the standpoints of (1) *WTO-consistency*, (2) *thoroughness* (identifying areas in which added detail might be desirable for the benefit of the trading public and the PRC administering authority), and (3) *effectiveness* (suggesting ways in which the antidumping remedy established in the PRC could be strengthened consistently with WTO obligations). Part I of this paper covers those articles of the PRC Regulation dealing with the determination of dumping. Part II covers articles dealing with product identification and injury. Part III covers articles dealing with antidumping procedures.

### **I. DETERMINATION OF DUMPING**

#### **A. Normal Value**

Under Article 4 of the PRC Regulation, there are three options: (1) "comparable" prices in the exporting country; (2) prices of similar products exported to a third country, or (3) cost of production plus reasonable expenses and profit. Methods (2) and (3) are in principle available when "products similar to the imported product do not have comparable prices at normal trade in the domestic market of exporting countries (areas), or the price or volume cannot be compared fairly with similar products."

*Comment: The PRC Regulation could provide greater clarity, to the trading public and to the implementing authority, by specifying what "at normal trade" and "cannot be compared fairly" mean. It would also be useful to specify how cost of production should be calculated, including what constitutes reasonable expenses and profit. Consideration could also be given to providing alternate methods of ascertaining the normal value of imports from a non-market economy country.*

#### **B. Export Price**

Under Article 5, there are three options: (1) price actually paid or payable; (2) the price for which the imported product is resold for the first time to an independent buyer; or (3) a price constructed by MOFTEC on a "reasonable basis." Method (2) applies in principle when "the imported product does not have an export price or the price is unreliable." Method (3) supersedes method (2) "if the imported product is not resold to an independent buyer or is not resold under the conditions at the time of import."

*Comment: The PRC Regulation does not make clear what constitutes unreliability of the export price such that the second or third methods above would be used. In addition, the PRC Regulation could be expanded somewhat to clarify what qualifies as a “reasonable basis” for a constructed export price.*

### **C. Dumping Comparisons**

Under Article 6, export price and normal value “should be compared according to fair and reasonable means, taking into consideration various comparable factors which affect price.” Article 6 reflects a preference for comparing “the weighted average of normal value and weighted average price of total comparable trades,” or for comparing normal value and export price “on an individual trade base.” Article 6 does allow comparison of “weighted average normal value with the price of each individual trade,” but only “when huge export prices exist among different buyers, areas, and times and it is difficult to make comparisons using the {preferred} methods.”

*Comments: (1) The PRC Regulation does not specify what adjustments are possible and what types of information are needed to justify adjustments. MOFTEC practice in this area should reflect the WTO requirement (AD Agreement, Article 2.4) that an unreasonable burden of proof not be imposed. (2) Requiring “huge” discrepancies to justify weighted-to-individual comparisons may unnecessarily restrict the PRC authority’s discretion and ability to remedy injurious dumping.*

## **II. PRODUCT COVERAGE AND INJURY**

### **A. Like Product and Subject Merchandise**

Under Article 12, the like product is a product “identical to the dumped imported product” or, failing that, the product “with the closest characteristics to that of the dumped imported product.”

*Comment: The PRC Regulation would provide better guidance by including criteria according to which a like product can be identified when no identical product is available. In addition, the Article 12 formulation appears to narrow the discretion otherwise available to the PRC authority under AD Agreement Art. 2.6, which defines the like product as “a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics **closely resembling** those of the product under consideration (emphasis added).”*

### **B. Domestic Industry**

Article 11 defines the domestic industry as “all domestic producers of identical or similar products,” or as “producers whose gross production volume consists of the majority share of gross production volume for identical or similar domestic products.” Article 11 excludes from the domestic industry domestic producers who are “connected

with exporters or importers,” or who are themselves “importers dealing with dumped imported products.” Article 11 also provides that “if a producer in a domestic regional market is marketing all or almost all of its identical or similar products in that market, and in addition, the demands of the market for identical or similar products are not fulfilled by producers from other regions of China, then the producer may be considered an independent industry.” Article 10 provides that the impact of dumped imports should be evaluated “on a one-to-one basis with identical or similar domestic products; when a one-to-one basis cannot be made, there should be an examination of production within the closest product category or scope of identical or similar domestic products.”

*Comment: The PRC Regulation does not provide guidance on how MOFTEC is to determine whether a producer is “connected” to an exporter or importer of the like product. Some illustrative criteria, at least, would be useful, and a single line of processing test, e.g., for agricultural products, would make China’s antidumping regime more effective with regard to sectors that include closely integrated raw materials and processing industries. The regional industry provision in Article 11 appears to suggest that a single producer may be considered a domestic industry, although that may be merely a translation problem. Finally, the intent and impact of Article 10 are not at all clear; on its face Article 10 appears to constrain the SETC’s discretion in ways that may unnecessarily restrict the ability to offset injurious dumping.*

### **C. Injury and Causation**

Article 7 recognizes three types of injury -- material injury, threat of material injury, and “the creation of obstacles to the establishment of corresponding domestic industry” -- and puts the State Economic and Trade Commission (SETC) in charge of injury determinations. Articles 2, 28 and 37, along with Article 30 of the Foreign Trade Law, provide a general causation requirement. Article 8 of the PRC Regulation sets out a single list of factors to be considered by SETC in assessing both the *existence* of injury/threat, and the *causal relationship* between the injury/threat and dumped imports. These factors include: (1) the quantity of dumped imports, both absolutely and in terms of any market share growth; (2) the prices of dumped imports, including any reduction in such prices and the effect on the prices of like domestic products; (3) the effect of the dumped products on “related economic factors and indexes of domestic industry”; (4) the production capacity, export capacity and “inventory situation” of the exporting country; and (5) other factors causing injury to the domestic industry. Article 8 further states that injury findings must be based on positive evidence “which does not include the contribution of non-dumping factors.”

*Comment: Using a single list of factors to guide analysis of material injury, threat of material injury, and causation almost unavoidably results in leaving out some items which the PRC authority must or should consider in each area. It is still of course possible for the authority to consider all the required factors in actual cases that arise, but a more detailed breakout would be useful in the Regulation itself. The PRC Regulation does not provide guidance to the administering authority on factors to consider regarding whether dumping has caused material retardation of a domestic industry. Comparison of normal start-up difficulties with the actual situation*

*experienced by the domestic industry may be useful in this regard. Further, while Article 8 forbids blaming imports for the “contribution of non-dumping factors,” the PRC Regulation also does not contain a “negative list” of non-dumping causes whose adverse effects must not be ascribed to imports.*

#### **D. Cumulation/Negligible Import Levels**

Article 9(1) permits cumulative injury analysis of products imported from two or more countries where the dumping margins for each are above 2% and the volume shipped by each is not negligible. Article 9(2) further specifies that “it is appropriate to make cumulative estimates according to competitive conditions among dumped products or between dumped products and {like} domestic products.” Article 9(2) also defines imports from a country as negligible when they account for less than 3% of total imports of the like product, except that imports from a group of countries individually accounting for less than 3% may be cumulated if they collectively account for more than 7%.

*Comment: The PRC Regulation does not specify the time period over which a comparison of individual country imports and total imports is to be made for the purpose of determining negligibility. Specifying a period would provide greater guidance to the authority. One good standard would be to focus on the most recent 12 month period for which official government import data have been published as of the filing of a petition.*

### **III. PROCEDURAL ISSUES**

#### **A. Petition, Industry Support and Initiation**

Articles 13-14 provide that a petition may be filed by “a domestic industrial natural person, legal person, or relevant organization ... representing a domestic industry” and must contain, among other things, a complete merchandise description as well as evidence of dumping, injury and a “cause-and-effect relationship between dumping and injury.” Article 17 provides that the requisite industry support exists if “the production volume of those supporting the application is more than 50 percent of the total production volume of supporters and opponents,” unless supporters’ production volume is less than 25 percent of total PRC production. Article 16 requires MOFTEC to “examine the application and its attached evidence,” consult with SETC, and determine whether to initiate “within 60 days after receiving the application document.”

*Comment: The PRC Regulation says nothing about the manner in which support expressed by workers, as opposed to enterprises, will be counted in determining industry support. Some guidance on this point could be quite valuable to the administering authority and to the trading public.*

#### **B. Provisional Measures**

Article 24 provides for initial rulings by MOFTEC on dumping and by SETC on injury, suggesting that the agencies will jointly rule on whether a causal relationship exists between the two. Article 28 authorizes provisional relief in two forms: either a

“temporary anti-dumping tax” or the “provision of a cash deposit, letter of guarantee, or other form of guarantee.” Article 29 states that MOFTEC “may propose” a temporary antidumping tax, but that the State Council's Customs Tariff Regulatory Commission “shall decide upon the imposition of” such a tax. However, MOFTEC may itself decide to require a cash deposit, letter of guarantee, or other form of guarantee. Under Article 30, temporary anti-dumping measures cannot be adopted during the first 60 days of an investigation, and may remain in force for no longer than four months from the date they are announced (except where extended to 9 months in “special circumstances”).

*Comment: The PRC Regulation does not specify that extension of provisional relief for a total duration of nine months is allowed only when the administering authority examines whether a duty lower than the margin of dumping would be sufficient to prevent injury (AD Agreement Article 7.4). Moreover, the PRC Regulation does not reflect the WTO requirement that provisional duties be judged necessary to prevent injury during the remainder of the investigation (AD Agreement, Article 7.1).*

### **C. Price Undertakings**

Articles 31-36 provide for undertakings, which either exporters or MOFTEC may propose following an “initial affirmative judgment.” There is no requirement that a proposed undertaking be accepted by either side, but Article 33 provides that when MOFTEC rejects a price commitment, it must explain its reasons to the exporters involved. Article 32 provides, somewhat confusingly, that (1) an exporter’s decision to decline a proposed price commitment “will not affect the investigation,” but that (2) “should the exporter continue to dump the imported products, the investigating body has the authority to evaluate the threat to injury at a higher probability.”

An exporter may be required to “provide on a regular basis information and documentation regarding its implementation of a price commitment,” and under Article 36, if an exporter breaks a price commitment, “MOFTEC may decide to resume the anti-dumping investigation after consulting with SETC .... Basing its ruling on the best information obtainable, it may decide to employ temporary anti-dumping measures, as well as impose 90 days retroactive anti-dumping taxes on imported products prior to implementation of the temporary anti-dumping measures ....”

*Comment: The provision linking refusal of an undertaking to the SETC’s threat-of-injury analysis is not well defined and depending on its implementation could result in violations of the WTO requirement that injury findings be based on positive evidence.*

### **D. Verification of Information and Reliance on Facts Available**

Article 20 provides for “questionnaires, surveys, hearings, and on-site investigations” and states that MOFTEC “may send work teams to the relevant country (area) to conduct the investigation, provided the relevant country (area) does not raise objections.” Under Article 21, if parties “fail to provide information and relevant documents, or fail to provide essential information within a reasonable time frame, or

seriously obstruct the investigation by other means, the investigating body may make a final ruling based upon facts already obtained and the best information obtainable.”

*Comment:* The PRC Regulation provides no detailed procedures or requirements on how the administering authority is to verify information. Added detail would provide valuable guidance to the authority and increase the antidumping remedy’s effectiveness. It would also be useful to specify that final determinations (whether affirmative or negative) may not be based on unverified evidence. The PRC Regulation likewise provides little guidance to the authority regarding application of facts available, including when it is appropriate to apply the more punitive standard of adverse facts available. Criteria for application of each level of facts available would provide the authority with needed guidance and would ensure WTO compliance.

## **E. Final Measures**

Article 26 establishes a twelve-month investigation period and permits this to be extended to a maximum of eighteen months. The imposition of duties appears to be discretionary even where the basic criteria for relief have been established. Article 37 states that “{i}f the final ruling establishes the existence of dumping as well as resultant injury to domestic industry, an anti-dumping tax **may** be imposed,” and Article 38 explains that while MOFTEC may “propose” an anti-dumping tax, the State Council’s Customs Tariff Regulatory Committee has the final say on whether to impose it. Moreover, under Article 27, an antidumping investigation can be terminated whenever MOFTEC and SETC agree that continuing it “would be inappropriate.”

*Comment:* Giving final authority over remedy decisions to a political body other than the investigating agency could unnecessarily complicate the administration of China’s antidumping remedy, and could reduce its effectiveness by making relief susceptible to political considerations even where there have been fully-investigated findings of dumping and consequent injury. The PRC Regulation would provide a more robust and reliable remedy if it required imposition of a duty no less than the calculated margin of dumping in these circumstances.

## **F. Administrative Reviews**

Article 49 provides that MOFTEC, “with appropriate justification and after consultation with the SETC, may decide to reexamine the necessity of continuing to impose {an} anti-dumping tax,” or may, “after examining corresponding evidence,” refuse to conduct such a review. Following a review, MOFTEC may propose to maintain, modify, or revoke an anti-dumping tax, but the ultimate decision lies with the State Council’s Customs Tariff Regulatory Commission. If the review involves an undertaking, however, MOFTEC may make the maintain/modify/revoke decision itself after consultation with the SETC. Article 51 provides that reviews should follow the same procedural rules that apply to investigations, and be completed within 12 months.

*Comment:* As noted above with respect to final antidumping measures, giving final authority over administrative review decisions to a political body other than the

*investigating agency, whenever an actual antidumping duty (as opposed to an undertaking) is involved, could unnecessarily complicate and politicize the administration of China's antidumping remedy.*

## **G. Sunset Reviews**

Article 48 provides that anti-dumping taxes and price commitments should remain in force no longer than five years. “However, if reexamination determines that termination of the anti-dumping tax could lead to the resumption of dumping and injury or their reoccurrence, the time period for imposition of the anti-dumping tax may be extended appropriately.”

*Comment: If this translation is correct, Article 48 mis-states the standard for keeping an antidumping measure in force. Under WTO rules, it is necessary to find that expiry “would likely” lead to continuation or recurrence of dumping and injury, not just that expiry “could” lead to those consequences. The PRC regulation also establishes no procedural or substantive rules for launching and conducting sunset reviews; including some such rules would be useful to all parties affected by antidumping measures.*

## **H. Judicial Review**

Article 53 allows interested parties to “apply for administrative reexamination” or “file a lawsuit in people's court” as a means of challenging: (1) a final determination of dumping, injury or causation; (2) a decision on whether to impose an anti-dumping tax or impose it retroactively; (3) a decision on a duty refund or imposition of a tax on a new exporter; or (4) the results of an administrative or sunset review.

*Comment: The Regulation could provide better guidance and ensure WTO compliance by setting out a standard of review, time limits, participation rules, and other procedural and substantive parameters for judicial review of determinations made by the PRC investigating authorities.*

## **I. Other Provisions**

Article 56 provides: “If any country (area) implements anti-dumping measures which discriminate against imported products from the People's Republic of China, the People's Republic of China may adopt corresponding measures against that country (area) based on the actual situation.”

*Comment: It is not clear what relevance this provision has to the administration of China's antidumping remedy. Depending on how the authority which this provision seems to provide is applied by PRC agencies, it could result in WTO-inconsistencies.*