China’s Antidumping Regime

WORTH KEEPING AN EYE ON
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As the world’s most dynamic developing economy, the People’s Republic of China faces enormous pressures as it adapts to the more open international trading system mandated by the WTO. With the elimination of most import quotas and the reduction of many tariff and non-tariff barriers to trade, Chinese producers face increasing competition from foreign imports, particularly from chemical products, steel and other basic inputs. Chinese industries, like their counterparts in other nations, have increasingly sought to strike back by invoking the country’s antidumping provisions.

Antidumping actions are designed to address circumstances in which imports are being sold at less than their “normal value” so as to cause, or threaten to cause, material injury to a domestic industry or to materially retard the establishment of such an industry. Where these conditions are satisfied, special antidumping duties may be imposed. In certain cases, these special duties are so high that they effectively close off markets to foreign imports.

While antidumping actions are governed by the WTO, each member state is free to promulgate its own antidumping regime. China first promulgated antidumping provisions in 1997. These have been revised and improved in the intervening years, most recently in February 2002. Since 1997, the country has initiated 20 antidumping cases against foreign imports. However, this overall figure is somewhat misleading since 14 of these proceedings were initiated within the last two years, including 9 cases in 2002 alone.

Given the remarkable recent increase in the number of Chinese antidumping proceedings, foreign producers, which intend to sell to the Chinese market, cannot afford to ignore the very serious potential impact of these proceedings. The Chinese antidumping regulations contain very strict deadlines. Moreover, they raise a host of complex substantive and procedural issues.

The ABCs of antidumping
Chinese antidumping actions proceed simultaneously through two different state agencies: the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) and the State Economic and Trade Commission (SETC). MOFTEC is responsible for determining whether imported merchandise is being, or is likely to be, sold in China at less than its normal value or, in other words, whether imported merchandise is being sold at “dumped” prices. SETC is responsible for determining whether dumped imports are currently causing or threatening to cause material injury to a domestic Chinese industry or to materially retard the establishment of such an industry. An antidumping duty order may not be issued unless both dumping and injury are found.

In addition to their responsibilities in the antidumping arena, MOFTEC and SETC also exercise various governmen-
tal functions relating to the management and planning of the Chinese economy. A foreign exporter subject to an antidumping investigation can be caught between these conflicting interests and objectives. In order to navigate this potential minefield, it can be extremely helpful to retain local Chinese counsel who are sensitive to the political and economic dimensions of a particular antidumping proceeding and are able to identify and mobilize support from upstream Chinese industries and other purchasers of the imports in question.

There are three basic substantive elements in an antidumping investigation:

- whether the imported merchandise is being dumped
- whether the domestic industry is suffering material injury, and
- if so, whether the dumped imports are a cause of that injury

For the purposes of determining whether dumping exists, MOFTEC generally compares the “normal value” of the imported merchandise as reflected in the prices charged to customers in the exporter’s home market or in third countries to the prices charged on exports to China. All prices are adjusted to take into account selling expenses and pricing adjustments. In the absence of foreign sales or when those sales are at below-cost prices, normal value is based on the “constructed value” of the merchandise. Constructed value is defined as the sum of fully distributed manufacturing costs plus actual selling, general and administrative expenses, and actual profit. When MOFTEC is unable to calculate a normal value based on the data submitted, it may use a combination of sales and cost data.

The injury test is satisfied where there is “material injury or threat of material injury to a domestic industry or material retardation of the establishment of such an industry through the effects of dumped imports.” In making injury determinations, SETC considers a variety of factors, including the volume of the dumped imports, the price of dumped imports, the consequent impact on domestic market, productivity, and the overall health of the Chinese industry in question.

**Seeking legal advice**

Foreign legal counsel who understand the international trade dimensions of the proceeding can help mount a similar “extra-legal” campaign to mobilize public and governmental opinion in the exporter’s home country. These efforts can potentially pay handsome dividends since Chinese antidumping investigations appear to be more susceptible to government-to-government resolution than the more adjudicative-type proceedings in the United States and the EU.

Indeed, the importance of seeking qualified legal counsel cannot be overstated. For example, ex parte contacts are not uncommon in China, which can potentially be exploited by foreign respondents. Thus, an exporter who has not retained local counsel may miss important opportunities for influencing the outcome of an investigation. At the same time, experienced foreign trade counsel may potentially assist in promoting fair and transparent proceedings.

Company officials and trade counsel, who are accustomed to the relatively free flow of information in antidumping proceedings conducted in the United States and Europe, may be frustrated by the more closed Chinese proceedings. In theory, interested parties in Chinese proceedings can obtain access to submissions by other parties. However, the antidumping regulation does not specify the precise modalities of such access nor does it provide for automatic (or even a timely) right of access to confidential information.

Under the current regulations, opposing parties only receive access to public summaries of submissions that have been granted confidential treatment. This can, of course, limit one’s ability to prepare meaningful rebuttal comments. It should also be observed that it is often quite difficult to obtain detailed information on the reasoning underlying agency decisions in Chinese antidumping investigations.

As China continues to “fine tune” its antidumping regime, its practice and procedures will continue to evolve. With additional resources and additional experience in administering antidumping investigations, the quality of decision-making will likely improve. As this occurs, it becomes ever more important for foreign exporters to organize early, using a team of experienced Chinese and foreign trade counsel.

Such a course of action offers foreign exporters the best prospect of success in proceedings that might otherwise result in the imposition of prohibitively high antidumping duties, which could effectively close the Chinese market to their exports.

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