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Jianming Shen

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A Critical Analysis of China's First Regulation on Foreign Dumping and Subsidies and Its Consistency with WTO Agreements

By
Jianming Shen†

I. Introduction	296
II. Substantive Rules on Dumping and Subsidy	299
A. Dumping	299
1. Normal Value	299
2. Export Price	300
B. Subsidies	301
1. Financial Support or Benefits	301
2. Actionable and Exemptible Subsidies	302
C. Injuries Required	304
1. Causation	305
2. "Domestic Industry" Defined	306
3. Determination of Injury	306
III. Procedural Rules on the Taking of Actions	308
A. Investigative Proceedings	308
1. Investigating Authorities	308
2. Initiation of Investigation by MOFTEC	309
3. Initiation of Investigation by Private Petition	310
4. Affirmative or Negative Decision on a Petition	313
5. Investigations and Substantive Determinations	313
B. Anti-dumping and Countervailing Measures	315
1. Provisional Measures	315
2. Suspension and Continuation of Investigation	316
3. Imposition of Offsetting Duties	318
IV. Conclusion	320

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† Research Fellow in International Law, Faculty of Law, University of Hong Kong. Formerly Kenneth Wang Research Professor of Law, St. John's University School of Law, New York. Former faculty member, International Law Institute and Faculty of Law, Peking University, Beijing, China. S.J.D., 1994, University of Pennsylvania; LL.M., 1988, University of Pennsylvania; M.A., 1984, University of Denver; LL.B., 1983, Peking University.

I.

INTRODUCTION

For the first time in its history, as its bid for WTO membership has come to the forefront of international trade issues, the People's Republic of China has promulgated a set of rules and procedures for combating foreign dumping and subsidies. On March 25, 1997, the State Council promulgated the long-awaited Anti-dumping and Countervailing Regulation of the People's Republic of China (hereinafter "ACR"), which became effective immediately upon its promulgation.¹

During the past two decades, Chinese goods and exporters have been on numerous occasions the targets of foreign investigations and measures for alleged dumping and subsidies. According to one report, "[u]p to the end of [1996] nearly 250 investigations were held into cases of alleged Chinese dumping."² It has been virtually unheard of, however, for China to impose similar measures upon foreign goods and exporters. According to the same report, no cases of alleged foreign dumping on the Chinese market were recorded until the beginning of March 1997. One of the main reasons for this imbalance in the imposition of investigations and measures is that China's major trading partners have developed relatively sophisticated systems of anti-dumping and countervailing laws, while China has lacked the legislation and experience to handle foreign dumping and subsidies. The absence of relevant laws does not, however, suggest that the Chinese market has not been a victim of the trade-distorting effects of foreign dumping and subsidy. In fact, foreign dumping alone "costs China 10 billion yuan (1.2 billion dollars) every year in losses." The "industries worst hit were cars, textiles and food. . . ."³ *Beijing Review*, an English-language weekly, recently observed:

China has been facing an increasingly severe problem of foreign countries blindly dumping their surplus commodities into the country. The problem has prompted domestic enterprises and industrial sectors to urge the government to formulate relevant anti-dumping regulations and laws, as a means to protect domestic industries in accordance with trade protection methods [allowed] by the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO).⁴

The efforts to establish an anti-dumping and countervailing duty system in China began with the enactment of the Foreign Trade Law (hereinafter "FTL") by the Standing Committee of the National People's Congress (NPC) in May 1994.⁵ The FTL, however, merely creates a broad framework of statutory

1. Anti-dumping and Countervailing Regulation of the People's Republic of China, Order No. 214 [hereinafter ACR] of the State Council of People's Republic of China, promulgated March 25, 1997, effective from the date of promulgation; PEOPLE'S DAILY (Overseas Edition), Mar. 29, 1997, at 6, reprinted & translated in 1997 2 CH. L. CH. & ENG. Q. 44-46 & 109-113 (1997).

2. *China to Crack Down on Dumping of Imported Goods*, Agence Fr.-Presse, Mar. 29, 1997, available in WESTLAW, at 1997 WL 2086736.

3. *Id.*

4. *Anti-dumping Guaranteed by Law*, 40 BEIJING REV., No. 17, Apr. 28 - May 4, 1997.

5. Foreign Trade Law of the People's Republic of China [hereinafter "FTL"], enacted May 12, 1994 at the 7th Sess. of the Standing Committee of the 8th NPC, effective July 1, 1994, reprinted in CCH CHINA L. FOREIGN BUS. para. 19-19-586.

norms. Of its 44 articles, only three relate to measures against foreign dumping and subsidies.⁶ Moreover these three articles do not give Chinese enterprises or industries sufficient guidance with regard to unfair foreign competition in the form of dumping and subsidies. Nor do they provide relevant Chinese authorities with clear guidelines to handle private complaints. As is typical of many Chinese laws enacted by the NPC or its Standing Committee, the FTL must be supplemented by implementing regulations, rules and/or administrative interpretations. The newly issued ACR supplements the FTL and provides a framework to enforce claims of injury due to dumping and subsidy.

The ACR's stated purpose is to maintain China's foreign trade order, to ensure fair competition and to protect relevant domestic industries in accordance with the relevant provisions of the FTL.⁷ It is hoped the ACR will give legitimate protection to Chinese industries from foreign dumping and subsidies while balancing dumping and subsidy allegations. At the National Conference on Anti-dumping Work held in Beijing in May 1997, Shi Guangsheng, Vice Minister of the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC"), stated that as the Chinese market opens to the outside world, China would not tolerate foreign enterprises dumping goods into the Chinese market at prices below their normal value. He emphasized that China should protect its lawful rights and interests in exports while at the same time it "should also actively and adequately carry out anti-dumping work with regard to imports." He urged Chinese enterprises to familiarize themselves with the Anti-dumping and Countervailing Regulation and learn how to utilize this weapon to protect their lawful rights and interests and boycott foreign dumping.⁸

The ACR is the product of extensive study and research of international instruments and foreign experiences. Signs of GATT-related rules and concepts can be seen throughout the ACR.

This article examines the emerging Chinese anti-dumping and countervailing measures legal regime as outlined in the FTL and more particularly the ACR. Part II compares the substantive Chinese rules on foreign dumping and subsidies as well as the methods of measuring injuries to domestic industries to the regime proposed by the GATT and its subsidiary agreements. Part III looks at the procedural rules governing the adoption of measures against foreign dumping and subsidies and draws a broad comparison to the U.S. rules in this area. This section analyzes the procedures for investigating foreign dumping and/or subsidies and explores the anti-dumping and countervailing measures that China may impose against foreign dumped and subsidized imports. The article

It is inaccurately reported that "[i]n 1994 China adopted anti-dumping legislation." *China to Crack Down Foreign Dumping*, *supra* note 2. In fact, no special anti-dumping legislation had ever been adopted in China until the promulgation of the Regulation of March 1997. The 1994 legislation referred to in the above report must have denoted the 1994 Foreign Trade Law which contains only one article on foreign dumping.

6. FTL, *supra* note 5, arts. 30-32.

7. ACR, *supra* note 1, art. 1.

8. *Zhongguo jiang Jiada Fan Qingxiao Gongzuo Lidu* (China to Strengthen Anti-dumping Work), PEOPLE'S DAILY, May 13, 1997.

concludes that the ACR in essence conforms with relevant provisions and agreements within the WTO framework and, despite room for improvement, signals another big step forward for China in the establishment of a transparent regime of foreign trade laws.

A. *Dumping and Subsidy Defined*

Dumping, the selling of goods at an unreasonably low price to an importing country, is considered an unfair international trade practice which takes the form of price discrimination between the exporter's home market or a third country market and the importing country's market. Dumping occurs most often in two situations: (1) where the exporter or producer needs to rid itself of surplus inventory or production, or (2) where the exporter or producer is seeking to penetrate the market of the importing country. Dumping is usually not a governmental activity. Rather, it is a practice implemented by private companies or industries, which may in whole or in part be owned by governments.

The GATT, an agreement which regulates the behavior of governments in international trade, specifically condemns the private practice of dumping only insofar as it causes or threatens material injury to the relevant industry of the importing country or materially retards the establishment of such industry. However, since private dumping distorts the normal order of international trade and affects fair competition, Article VI of the GATT, and the implementing Agreement (Anti-dumping Agreement), authorize affected governments to take appropriate measures, including the imposition of anti-dumping duties, to prevent or offset the effects of foreign private dumping.⁹

Export-oriented subsidization, in contrast, is the governmental practice of providing payments and other substantial economic benefits to industries or companies in order to lower their costs of production or distribution and enable them to sell their products in foreign markets at competitive prices. According to the United States International Trade Administration (ITA), "a subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production, and lessening world wealth."¹⁰

While some might question the accuracy of the ITA's statement, it is at least clear that the provision of such subsidies may have the effect of distorting competition in international trade. If a contracting party of the GATT grants an export subsidy, "[it] may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives [of the GATT]."¹¹ For this reason, the GATT and the Agreement on Subsidies and

9. The General Agreement on Tariffs and Trade 1994 [hereinafter "GATT 1994"], art. VI; Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade 1994 [hereinafter "Anti-dumping Agreement"].

10. ITA, *Wire Rod from Poland: Final Negative Determination*, 49 Fed. Reg. 19,374, 19,375 (1984).

11. GATT 1994, *supra* note 9, art. XVI(B)(2).

Countervailing Measures (hereinafter, "SCM Agreement") discourage the governmental practice of subsidization. Both authorize contracting parties to adopt countervailing measures, including the imposition of countervailing duties, to compensate for the margins of subsidies.¹²

II.

SUBSTANTIVE RULES ON DUMPING AND SUBSIDY

A. *Dumping*

Article 30 of the FTL stipulates that dumping of a particular foreign product occurs when "it is imported at a price below its normal value."¹³ Article 3 of the ACR provides that if the export price of a given foreign import is below its normal value, such importation into China constitutes dumping.¹⁴ These provisions are virtually identical to those found in GATT Article VI,¹⁵ the 1994 Anti-dumping Agreement,¹⁶ and the domestic legislation of numerous trading powers.¹⁷ Whether dumping has occurred depends on the determination of "normal value" of a product and its actual "export price."

1. *Normal Value*

The term "normal value" has been sometimes labeled "fair value" or "foreign market value."¹⁸ The FTL contains no provision for calculating the normal value of foreign imports, but the concept of normal value and some related concepts are delineated in the ACR. Article 4 states that the normal value of a foreign import is to be determined according to the comparable selling price in the domestic market of the exporting country for a product identical or similar to the imported product. That price will be taken as the normal value of the import. If no comparable domestic price exists, the normal value of the import is either (1) the comparable price of such identical or similar product exported to a third country or (2) the production cost of such identical or similar product plus a reasonable amount for expenses and profits.¹⁹ The ACR, however, does not specify how to determine the comparable price in the exporting country's home market or in the market of a third country, nor does it define what should be included as "reasonable expenses and profits." While relevant Chinese agencies and adjudicators have some discretion in interpreting these concepts, they may make references to foreign practices and international rules.

In the United States and elsewhere, the comparable price in the domestic market of the exporting country is commonly referred to as the "home market

12. *Id.* arts. VI & XVI; Agreement on Subsidies and Countervailing Measures, 1994 [hereinafter "SCM Agreement"].

13. FTL, *supra* note 5, art. 30.

14. *See, e.g., id.*; *see also* J.E. PATTISON, ANTI-DUMPING AND COUNTERVAILING DUTY LAW (1990).

15. GATT 1994, *supra* note 9, art. VI.

16. Anti-dumping Agreement, *supra* note 9, art. 2.

17. *See, e.g.*, 19 U.S.C. § 1673 (referring to both "fair value" and "normal value").

18. *See, e.g., id.*; *see also* PATTISON, *supra* note 14.

19. ACR, *supra* note 1, art. 4(1) & (2).

price.” The comparable price for the like product sold in a third country market is often termed “third country price,” while the combination of production costs and reasonable expenses and profits is called “constructed value.”²⁰ Under the Anti-dumping Agreement, the normal value based on the home market price is “the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country[’s]” own market.²¹ The Agreement states that “third country price” denotes “a comparable price of the like product when exported to an appropriate third country,” but it further requires that this third country price be “representative.”²² As to the “constructed value” of an imported product, the Anti-dumping Agreement is again more specific than the ACR in stating that such value comprises “the cost of production in the country of origin” and “a reasonable amount for administrative, selling and general costs and for profits.”²³ Further, the Anti-dumping Agreement specifies more closely the calculation of production costs and administrative, selling and general costs and profits.²⁴

2. *Export Price*

Article 3 of the ACR requires that the normal value of a product be compared with its “export price” for the determination of whether dumping has occurred.²⁵ “Export price” refers to the actual amount paid or payable for the product being sold in the importing country. Article 5 provides that the export price of a product sold for export to China can be determined in either of two ways. Normally, where there is a price actually paid for the imported product, or a price that should be paid for such product, that price is to be considered the export price.²⁶ To the extent that this price is ascertainable, it is termed the “transaction value,” “purchase price” or “actual export price.” The ACR is silent on whether to make any addition to or deduction from the transaction value in order for the “export price” to approximate the ex factory value of the product.²⁷

Where there is no paid price or price that should be paid for an import, or where it is difficult to determine such price, the export price of such imported product is to be based on either: (a) the price at which such product is first resold to an unrelated independent buyer after importation; or (b) the price which MOFTEC, upon consultation with the General Administration of Cus-

20. See, e.g., PATTISON, *supra* note 14; see also JOHN H. JACKSON & EDWIN A. VERMULST, *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* 133, 162, 444-449 (1989).

21. Anti-dumping Agreement, *supra* note 9, at art. 2.1.

22. *Id.* art. 2.2.

23. *Id.*

24. *Id.* art. 2.2.1, 2.2.2.

25. ACR, *supra* note 1, art. 3.

26. *Id.* art. 5(1).

27. In the United States, the ITA may add to the purchase price expenses for packaging costs, import duties or indirect taxes and deduct from it expenses for transportation costs and duties and taxes levied by the exporting country. Similarly, in the European Union, the export price is “the price at which the product is sold in the EC, less the costs incurred from the time it left the factory.” See Greyson Bryan & Dominique Guy Boursereau, *Antidumping Law in the European Communities and the United States: A Comparative Analysis*, 18 *GEO. WASH. J. INT’L L. & ECON.* 631, 677-678, 644 (1985).

toms (GAC), has approximated "on reasonable bases" (*genju heli jichu*).²⁸ This provision of the ACR tracks its counterpart in the Anti-dumping Agreement under which the export price, if not available, "may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the conditions as imported, on such reasonable basis as the authorities may determine."²⁹

The price based on the first sale after importation can be termed "importer's sale price" (ISP) or "exporter's sale price" (ESP). Such ISP is typically used when the foreign exporter, often a parent manufacturer, is related to its Chinese importer, its subsidiary operation in China, and it is thus difficult to determine the transaction price between the exporter and the importer. The price based on MOFTEC's reasonable calculation may be termed "constructed export price" (CEP). This can be used where an imported product is resold to a related party in China, or where the product is resold in a condition apparently different than its original imported condition, even if the product is resold to an independent buyer.

Pursuant to Article 6 of the ACR, the margin of dumping is the normal value of the dumped product less the export price of the imported product.³⁰ The export price of an imported product and its normal value should be compared in a fair and reasonable manner so as accurately to ascertain the true dumping margin.³¹ Here again, the ACR conforms to Article 2 of the WTO Anti-dumping Agreement.³²

B. Subsidies

1. Financial Support or Benefits

Chapter V of the ACR contains four articles that specifically deal with subsidies and countervailing measures. Article 36 defines foreign subsidization as the granting by foreign governments or public institutions, directly or indirectly, of financial support or benefits to industries or enterprises.³³

This definition is not unfamiliar to lawyers and traders in the developed world. Theoretically, this broad notion of subsidy can cover any of the forms of financial benefits as defined under Article 1.1 of the SCM Agreement. Under the SCM Agreement, a subsidy includes financial contributions which confer a benefit made by the government in the form of (i) direct or potential transfer of funds, (ii) foregoing or exempting an otherwise payable government revenue, (iii) provision of goods or services other than general infrastructure or purchase of goods, and (iv) funding, entrusting or directing a private institution to carry

28. ACR, *supra* note 1, art. 5(2).

29. Anti-dumping Agreement, *supra* note 9, art. 2.3.

30. ACR, *supra* note 1, art. 6, para. 1.

31. *Id.* para. 2.

32. Anti-dumping Agreement, *supra* note 9, art. 2.

33. ACR, *supra* note 1, art. 36.

out any of the above three types of practices.³⁴ In addition, under the SCM Agreement such a subsidy includes “any form of income or price support as defined by Article XVI of GATT 1994[.]”³⁵ These comprise any form of income or price support “which operates directly or indirectly to increase exports of any product . . . or to reduce imports of any product.”³⁶

Although the ACR does not delineate specific government actions likely to be considered subsidies, the examples mentioned in Article 1.1. of the SCM Agreement seem to qualify as “financial support *or* benefits directly or indirectly provided to an industry or enterprise by a foreign government or a foreign public organization” (*italics added*) as defined by Article 36 of the ACR. Thus, the definitions of subsidies proposed by the ACR and GATT appear to be consistent.

Despite the widespread similarities, there is one arguable discrepancy between the two laws. The SCM Agreement requires that in order to qualify as a subsidy, a financial contribution or any form of income or price support must confer a benefit to an industry or enterprise that receives such contribution or support. In the ACR, on the other hand, the terms “financial support or benefits” indicate that the conferring of a benefit is not required in the case of “financial support.”

The effect of this difference in wording is that more anti-subsidy actions could be brought under the ACR than under the SCM Agreement. Seemingly, under the former, one need not prove that a foreign enterprise or industry benefited from receipt of direct or indirect financial support from its government. In other words, in a countervailing duty proceeding under the ACR, all one needs to prove is that the foreign government granted financial support, not necessarily the receipt of any actual benefit. Despite this apparent distinction, it is difficult to conceive of financial support extended to an industry or enterprise that would not simultaneously confer any benefit. Thus, the ACR and Article 1.1(b) of the SCM Agreement may turn out to be comparable in application.

2. *Actionable and Exemptible Subsidies*

Not all subsidies are subject to countervailing measures. Under the SCM Agreement, a subsidy is actionable “only if such a subsidy is specific” to an enterprise or industry or to a group of enterprises or industries.³⁷ Article 2 of the SCM Agreement provides for certain rules and exceptions to determine whether a subsidy is specific and requires the clear substantiation of a determination of specificity “on the basis of positive evidence.”³⁸ Many countries’ domestic laws also adopt this approach. In the United States, for example, a subsidy must be specific to an industry or an enterprise in order to impose countervailing meas-

34. SCM Agreement, *supra* note 12, art. 1.1(a)(1) & 1.1(b).

35. *Id.* art. 1.1(a)(2).

36. GATT 1994, *supra* note 9, art. XVI(A)(1).

37. SCM Agreement, *supra* note 12, art. 1.2.

38. *Id.* art. 2.

ures. Subsidies that are of general availability and applicability are not subject to U.S. countervailing measures.³⁹

In contrast, the ACR does not apply a specificity test to dutiable foreign subsidies. Nor does it differentiate between permissible and impermissible subsidies, or between prohibited subsidies ("red-light subsidies"), actionable subsidies ("yellow-light subsidies") and non-actionable subsidies ("green-light subsidies").⁴⁰ Under Part II of the SCM Agreement, subsidies that are contingent upon "export performance" or upon "the use of domestic over imported goods" are not permitted.⁴¹ Such export subsidies and import-substitution subsidies are deemed to be specific *per se*.⁴² There are no comparable provisions in the ACR. Nor does it provide guidance regarding what types of foreign subsidies are actionable. The ACR simply provides in Article 37 that all imported foreign products that involve subsidies are subject to the provisions of "this Regulation."⁴³ This seems to suggest that the new law does not govern foreign subsidies that do not pass their benefits onto products imported into China, namely subsidies that are not characterized as export subsidies. On the other hand, the words "that involve subsidies" may well be interpreted to cover both export subsidies (prohibited subsidies) and non-export subsidies that directly or indirectly cause an adverse impact upon the Chinese economy (actionable subsidies).

Part III of the SCM Agreement provides for some permissible yet actionable subsidies, namely those that would have "adverse effects" on the interests of another Member State. Such "adverse effects" are deemed to exist where a subsidy (a) causes "injury to the domestic industry" of another Member State, (b) nullifies or impairs GATT benefits accruing to other Member States, and (c) causes "serious prejudice" to the interests of another Member State.⁴⁴ Examples of subsidies causing "serious prejudice" and exceptions are detailed under Article 6 of the Agreement.⁴⁵ The ACR once again makes no reference to the concept of and conditions for permissible but actionable subsidies.

Other than the subsidies strictly prohibited under Part II and those actionable under Part III, Part IV of the Agreement deals with some subsidies referred to in Article 1 which are not only permissible but also "non-actionable." These include (1) subsidies that do not meet the specificity test and, to a certain extent, (2) subsidies "which are specific . . . but which meet all of the conditions" for either of the following purposes:

- (a) subsidies for research and development activities;

39. See, e.g., *Certain Steel Products from Belgium, Final Determination*, 47 Fed. Reg. 39,304 (1982); *Carlyste Tire Co. v. U.S.*, 4 I.T.R.D. 2017 (CIT, 1983); *Bethlehem Steel Corp. v. U.S.*, 590 F. Supp. 1237 (CIT, 1984); *Cabot Corp. v. U.S.*, 620 F. Supp. 722 (CIT, 1985).

40. See, e.g., SCM Agreement, *supra* note 12, pts. II, III & IV; R.H. FOLSOM ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM ORIENTED COURSEBOOK* 507-511 (3rd ed., West Publishing Co. 1995).

41. SCM Agreement, *supra* note 12, art. 3.1.

42. *Id.* art. 2.3.

43. ACR, *supra* note 1, art. 37, cl. 1.

44. SCM Agreement, *supra* note 12, art. 5.

45. *Id.* art. 6.

- (b) subsidies granted to geographically disadvantaged regions within a country;
or
- (c) subsidies which are used for promoting environmental advancement under certain conditions.⁴⁶

The SCM delineates clearly what criteria are necessary for a subsidy to come under each category, and thus not be actionable despite its specificity.⁴⁷ For example, in order for a R&D subsidy to be non-actionable, it may not cover more than 75% of the costs of industrial research or 50% of the costs of pre-competition development. "Industrial research" and "pre-competitive development activity" are well defined in footnotes.⁴⁸ Further, such an R&D subsidy must be limited to covering the costs of (1) personnel, (2) instruments and infrastructure, (3) consultancy and/or similar services, (4) additional overhead costs and (5) other running costs and all such costs must be for the exclusive purpose of research activity.⁴⁹

Article 37 of the ACR also exempts three types of foreign subsidies similar to those referred to in Article 8.2 of the SCM Agreement. The ACR achieves this by excluding imports involving "subsidies used in industrial research and development, assisting disadvantaged regions and environmental protection" from the scope of application of the ACR.⁵⁰ Article 37 is basically an adapted and condensed version of Article 8.2 of the SCM Agreement. Despite the similarities, however, the ACR fails specifically to exempt subsidies that are not specific to a given industry or enterprise or a group of industries or enterprises. There are no provisions in the ACR comparable to those in the SCM Agreement stipulating the conditions under which a specifically granted subsidy is nevertheless permissible and non-actionable. The ACR is silent as to the meaning of "industrial research and development" and the extent to which subsidies in the form of such R&D are exempt from countervailing measures. Further, it fails to set forth the criteria for determining what qualifies as a disadvantaged region and lacks any limitations or guidance concerning the scope of exemptible subsidies used for the purpose of "environmental protection."

As to the calculation of subsidy, Article 38 provides that "the amount of a subsidy shall be the net subsidy received by the subsidized product."⁵¹ It requires the computation of the amount of a subsidy to be conducted "in a fair and reasonable manner."⁵²

C. Injuries Required

Before measures are adopted to combat an alleged foreign dumping or subsidy, it must be established that the dumping or subsidy has resulted in injury to a Chinese domestic industry as defined by statute and regulations. The injury

46. *Id.* art. 8.1, 8.2.

47. *Id.* art. 8.2, 8.3.

48. *Id.* art. 8.2(a), nn.28, 30.

49. *Id.* art. 8.2(a)(i)-(v).

50. ACR, *supra* note 1, art. 37.

51. *Id.* art. 38, para. 1.

52. *Id.* para. 2.

requirement works to preserve and protect normal trade activities as long as they do not harm the domestic industry. The relevant authorities must be satisfied that there was a causal relationship between the injury and the alleged foreign dumping or subsidy and that the injury is not trivial (although it need not be severe).

1. Causation

Article 2 of the ACR stipulates where imported goods are exported to China "in the form of dumping or subsidization" and such dumped or subsidized goods cause "substantial injury" (*shizhi sunhai*) to an established domestic industry, create a threat of such substantial injury, or constitute a material hindrance to the establishment of a relevant domestic industry, such goods shall be subject to anti-dumping or countervailing measures imposed "in accordance with the provisions of this Regulation."⁵³ This provision reiterates Articles 30 and 31 of the FTL which authorize the State to adopt necessary measures against unfair imports caused by foreign dumping or subsidy if such import "causes substantial damage or creates the threat of substantial damage to an counterpart domestic industry, or causes substantial hindrance to the establishment of a counterpart domestic industry."⁵⁴

Both the FTL and the ACR require that there be a causal link between the "substantial injury" sustained by a Chinese industry and the alleged subsidy or dumping of imported products. Beyond this, neither law provides further guidelines for determining or proving whether a foreign subsidy or dumping is the actual cause of substantial injury to a Chinese domestic industry. This ambiguity creates numerous unanswerable questions. Is the injury attributable solely to the subsidy or dumping or to other factors as well, such as the productivity and export performance of the affected Chinese industry and changes in demand? If multiple factors contribute to the injury, was the injury primarily caused by foreign subsidy or dumping? To what extent do other factors constitute contributory causes of injury? How are such causal links to be proved? Who bears the burden of proof? These issues are not addressed in the ACR but will have to be considered by the investigating authorities. The SCM Agreement and the Anti-dumping Agreement offer detailed guidelines for the determination of injury and its causal link with subsidized or dumped imports that may provide reference in the application of the ACR.⁵⁵

Chapter II, Articles 7-10 of the ACR, does furnish some specific information useful for determination of injuries caused by dumped foreign imports. Chapter II addresses dumping and its resulting injuries but, pursuant to Article 39, the scope of its application extends to the determination of injuries caused by subsidies.⁵⁶ Therefore, the following analysis and discussion applies to injury

53. *Id.* art. 2.

54. FTL, *supra* note 5, arts. 30, 31.

55. SCM Agreement, *supra* note 12, art. 15; Anti-dumping Agreement, *supra* note 9, art. 3.

56. ACR, *supra* note 1, art. 39 (providing that "the relevant provisions in Section II . . . shall apply to injuries caused by subsidies. . .").

determinations with respect to both foreign dumping and subsidization where appropriate.

2. "Domestic Industry" Defined

The ACR defines "domestic industry" as "the aggregate of all producers of identical or similar products within the territory of the People's Republic of China," or those Chinese producers "whose collective output of the products accounts for a greater proportion of the total domestic production of identical or similar products."⁵⁷ The term "domestic industry" may, however, be interpreted to exclude those "domestic producers which are related to the export operators or import operators, or are themselves import operators of the dumped product."⁵⁸ This definition is consistent with the Anti-dumping Agreement and the SCM Agreement, under which a "domestic industry" refers to:

the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that . . . when producers are related to the exporters or importers or are themselves importers of the alleged dumped [or subsidized] product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.⁵⁹

The ACR does not specify whether a "domestic industry," as referred to therein, is comprised only of producers invested or owned by Chinese citizens or legal persons, or whether the category also includes Sino-foreign joint ventures or wholly-owned foreign subsidiaries established under Chinese law. The reference to "within the territory of the People's Republic of China" seems to suggest that Article 10 covers all producers operating within the territory of the People's Republic of China (with the exception of such special regions as Hong Kong), regardless of whether they are in whole or in part owned, managed or controlled by foreign investors. What is clear is that when Chinese domestic producers, particularly those funded wholly or partly with foreign capital, are themselves the importers or are related to the exporters or importers of a dumped or subsidized foreign product, they may be excluded from the term "corresponding domestic industry."

3. Determination of Injury

Under Article 7 of the ACR, the term "injury" includes (1) substantial injury caused by dumping (or subsidy) to an established corresponding domestic industry; (2) threat of substantial injury created by dumping (or subsidy) to such an established industry; and/or (3) substantial hindrance caused by dumping (or subsidy) to the establishment of a corresponding domestic industry.⁶⁰ The phrase "substantial injury" is not further defined. It is not clear whether the

57. *Id.* art. 10.

58. *See id.*

59. SCM Agreement, *supra* note 12, art. 16.1.; Anti-dumping Agreement, *supra* note 9, art. 4.1(i);

60. ACR, *supra* note 1, art. 7.

concept of "substantial injury" is equivalent to that of "material injury" but at a minimum there is overlap in the meaning of the two phrases.

In the United States, the term "material injury" is generally defined "harm which is not inconsequential, immaterial, or unimportant."⁶¹ Factors in the determination of material injury include the volume of imports, the extent of price undercutting, and the impact of imports on affected domestic industry.⁶² The impact on domestic industry is measured using such factors as decline in output, sales, market share, profits, productivity, investment returns, capacity utilization, cash flow, inventories, employment, wages, and ability to raise capital.⁶³ The Anti-dumping Agreement and the SCM Agreement also require an evaluation of injury based on affirmative evidence and an objective examination of the volume of dumped or subsidized imports and their effect on the price in the domestic market for similar products as well as "the consequent impact of these imports on domestic producers of such products."⁶⁴

Article 8 of the ACR requires that the relevant investigating organ, in determining injury caused by foreign dumping (or subsidization) to China's domestic industry, should investigate and review the following items:

- (1) the quantity of a dumped product, including
 - (a) the total volume of dumped goods (*qingxiao chanpin de zongliang*) or
 - (b) the increase in the importation of such dumped product or the possibility of a significant increase in such imports in relation to identical or similar domestically produced products;
- (2) the price of the dumped product, including
 - (a) any price undercutting with respect to such dumped product, or
 - (b) any impact of the price of such imports upon the price of identical or similar domestic products;
- (3) the impact of the dumped product upon domestic industry or industries; and
- (4) the production capacity, export capacity and inventory of the exporting country of the dumped product.⁶⁵

The above are not as comprehensive as those outlined in Article 3.1-3.7 of the Anti-dumping Agreement⁶⁶ and Article 15.1-15.7 of the SCM Agreement.⁶⁷ Nonetheless, they are not in any significant conflict with the WTO agreements. Moreover, even the factors listed in the Anti-dumping Agreement and the SCM Agreement are not exhaustive.

There seems to be, however, a slight discrepancy between Article 9 of the ACR and its counterparts in both WTO agreements. Per Article 3.3 of the Anti-dumping Agreement and Article 15.3 of the SCM Agreement, where the dumping or subsidy investigation concerns the import of a product from more than one foreign country, the importing country's investigating authorities may cumulatively assess the effects of these imports from all such countries:

61. 19 U.S.C. §1677(7)(A).

62. *Id.* § 1677(7)(B), (C).

63. *Id.* § 1677(7)(C)(iii).

64. Anti-dumping Agreement, *supra* note 9, art. 3.1.; SCM Agreement, *supra* note 12, art. 15.1.

65. ACR, *supra* note 1, art. 8.

66. Anti-dumping Agreement, *supra* note 9, art. 3.1-3.7.

67. SCM Agreement, *supra* note 12, art. 15.1-15.7.

only if they determine that (a) the margin of dumping [or the amount of subsidization] established in relation to the imports from each country is more than de minimis as defined in paragraph 8 of Article 5 [of the Anti-dumping Agreement, or paragraph 9 of Article 11 of the Countervailing Agreement] and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic products [italics added].⁶⁸

Article 9 of the ACR provides only that where an anti-dumping investigation involves the import of a product from two or more countries, the investigating organ may conduct a cumulative assessment of the effects of the imported product concerned.⁶⁹ For the purpose of such a cumulative assessment, Article 9 of the ACR does not apparently require the investigating authorities to first determine the existence of more than a de minimis dumping margin or subsidy amount or of a non-negligent volume of imports from each country. Nor does the ACR require that the cumulative assessment be appropriate in light of the competitive conditions of the products concerned. Unless future legislation or administrative or judicial interpretation clarifies this, Article 9 may have the effect of subjecting more foreign imports to anti-dumping or countervailing measures by allowing the effects of imports from more than one country to be assessed cumulatively.

III.

PROCEDURAL RULES ON THE TAKING OF ACTIONS

Chapter III (Articles 11-21) of the ACR stipulates investigating authorities and procedures for conducting anti-dumping investigations. Chapter IV (Articles 22-35) of the ACR, captioned "Anti-dumping Measures," provides for the measures to be taken after a preliminary or final affirmation of the alleged dumping and the resulting injury caused to the corresponding domestic industry. Pursuant to Article 39 in Chapter V (special provisions on subsidies and countervailing measures), the relevant procedural provisions of Chapter III and Chapter IV apply equally to subsidy investigations and the adoption of countervailing measures.

A. *Investigative Proceedings*

1. *Investigating Authorities*

Anti-dumping and countervailing proceedings are administrative and quasi-adjudicative in nature and are conducted by statutorily designated governmental agencies. Such proceedings normally involve two sets of government agencies in which one investigates the dumping or the subsidy, and the other investigates the injury. Similarly, the United States government also divides the investigative responsibilities between two administrative bodies: the ITA and the ITC. The

68. Anti-dumping Agreement, *supra* note 9, art. 3.3; SCM Agreement 1994, *supra* note 12, art. 15.3.

69. ACR, *supra* note 1, art. 9.

ITA is responsible for determining the existence and the extent of the dumping or the subsidy; the ITC is responsible for determining the existence and the extent of the resulting injury.⁷⁰

Article 32 of the FTL provides that when a Chinese domestic industry sustains injury as a result of, *inter alia*, dumped or subsidized foreign imports, "the departments or authorities designated by the State Council shall make investigation and handle such situation in accordance with laws and statutory regulation."⁷¹ The Regulation is significant in that it specifies such designated investigating authorities and departments, which notably include MOFTEC.⁷² MOFTEC plays the most active role in such investigations, but it is not the only player. It must consult with a variety of government agencies and departments. At certain stages, MOFTEC must consult with the State Economic and Trade Commission (SETC),⁷³ a ministry-level commission under the State Council with a theoretically more prestigious status than most ministries. At other stages, the SETC, the General Administration of Customs (GAC) and even "other departments concerned" may have a more active role to play in the investigation.⁷⁴ MOFTEC serves as the principal investigating agency that inquires and determines whether an import is being sold at less than its normal value or whether a subsidy is involved in its sale. The SETC functions as the principal investigating organ to determine whether the dumped or subsidized import is causing or threatening to cause substantial injury to a Chinese domestic industry or is creating a substantial obstacle to the establishment of a corresponding domestic industry.⁷⁵

2. Initiation of Investigation by MOFTEC

Under the ACR, an anti-dumping or countervailing investigation may be initiated either by MOFTEC itself or by private petition. Article 14 of the ACR provides that in "extraordinary circumstances," after consultation with the SETC, MOFTEC may on its own initiative "set up a case file for investigation" (*zixing li'an zhencha*). To do so MOFTEC must possess sufficient evidence to believe that there exists a causal relationship between a dumping (or subsidy) and an injury.⁷⁶ This provision is consistent with Article 5.6 of the Anti-dumping Agreement and Article 11.6 of the SCM Agreement, although these agreements seem to apply a somewhat more stringent standard in authorizing the initiation of investigations by the investigating authorities themselves. These two agreements, in almost identical wording, provide:

If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic

70. 19 U.S.C. §§71, 1673

71. FTL, *supra* note 5, art. 32.

72. ACR, *supra* note 1, arts. 11 *ff*.

73. *See, e.g., id.* arts. 13, 14.

74. *See id.* arts. 17, 19, 20.

75. *Id.* art. 17.

76. *Id.* art. 14. The term *li'an* literally means to place a case on file for further reference, investigation or action.

industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of dumping [or a subsidy], injury and causal link . . . to justify the initiation of an investigation.⁷⁷

There are both similarities and differences between this self-initiated investigation by MOFTEC and the corresponding mechanism in the United States. Under the amended U.S. Tariff Act of 1930, the “administering authority”, i.e., the International Trade Administration (ITA), shall initiate an “anti-dumping duty investigation” or a “countervailing duty investigation” if it “determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty . . . exist” under either §1673 (anti-dumping) or §1671 (countervailing).⁷⁸

The similarities are reflected in the fact that under both systems, the investigating authorities do not have to rely on private petitions to initiate an investigation. Both are authorized to conduct an investigation on their own initiative when they deem it warranted. One difference is that the ACR requires MOFTEC to consult with the SETC prior to initiating an investigation, while, in the United States, the ITA may unilaterally determine whether an investigation is warranted. Another difference is that MOFTEC has discretion, but is not obliged to initiate an investigation where it finds sufficient evidence of a causal relationship between the dumped or subsidized imports and the injury to China’s domestic industry. In contrast, under U.S. law, the ITA has an affirmative obligation, not merely an option or discretion, to investigate foreign imports when it finds elements of dumping or subsidy that warrant further investigation.

3. *Initiation of Investigation by Private Petition*

In most cases, an investigation into dumped or subsidized foreign imports should be initiated by private petition. Under Article 11 of the ACR, a complaint against foreign imports may be filed with MOFTEC by any “domestic producer of identical or similar products or an interested organization” (hereinafter, the petitioner) in the form of a written Petition for an anti-dumping or countervailing investigation.⁷⁹

This provision sets forth a less demanding criterion than the Anti-dumping Agreement and the SCM Agreement. Under these agreements, an investigation based on a private petition should be initiated upon a written application “by or on behalf of the domestic industry.”⁸⁰ The investigating authorities must first determine, *inter alia*, whether a private petition is made “by or on behalf of the domestic industry” concerned. In the case of a negative determination, no investigation will be initiated. Although the determination of whether an application is initiated by or on behalf of the domestic industry can be highly subjective and discretionary, the WTO agreements set forth two crucial objective tests: the

77. Anti-dumping Agreement, *supra* note 9, art. 5.6; SCM Agreement, *supra* note 12, art. 11.6.

78. 19 U.S.C. §§1673(a), 1671(a).

79. ACR, *supra* note 1, art. 11.

80. Anti-dumping Agreement, *supra* note 9, art. 5.1; SCM Agreement, *supra* note 12, art. 11.1.

"50%+" test and the "25%-" test, both of which must be satisfied. If the collective output of the domestic producers who support an application outweighs that of the producers who oppose the application (not including the output of the neutral domestic producers), the application shall be deemed to have been initiated "by or on behalf of the domestic industry." However, if the collective output of the supporting domestic producers is less than 25% of the total domestic production of the like product, then the application will not be considered to have been initiated "by or on behalf of the domestic industry."⁸¹

By contrast again, under the ACR, the petitioner does not have to be the domestic industry or represent such an industry. Any Chinese domestic producer of like products or any "interested organization" may file a petition with MOFTEC to initiate an investigation. There is no requirement that MOFTEC be satisfied that the petition has been filed "by or on behalf of the domestic industry" before initiating the investigation. Thus, in this regard, the ACR makes the initiation of more investigations possible.

By comparison, under the U.S. law, "an interested party" can file a petition for the initiation of an anti-dumping or countervailing duty proceeding with the ITA. However, the interested party must also file a copy of the petition with the International Trade Commission (ITC).⁸² The U.S. law defines "an interested party" in such a proceeding as—

- (1) a United States "manufacturer, producer, or wholesaler" of a domestic like product;
- (2) a certified or recognized union or group of workers representative of an industry engaging in the production or wholesale of a domestic like product in the U.S.;
- (3) a trade or business association whose members engage in the production or wholesale of a domestic like product in the U.S.;
- (4) an association whose members are mainly composed of (a) interested manufacturers, producers or wholesalers, (b) interested unions, and/or (c) interested trade or business associations; and
- (5) a coalition or trade association representative of (a) processors, (b) processors and producers or (c) processors and growers.⁸³

While the ACR contains no such formula, there is no doubt that the term "producers" in Chinese (*shengchan zhe*) denotes both manufacturers and producers. Moreover, there is no obvious reason why it cannot refer to wholesalers, processors, and growers as well. Hence, the expression "domestic producers (*guonei shengchan zhe*) of identical or similar products" could be interpreted to include all entities engaged in the manufacture, production, wholesale, processing or growing of identical or similar domestic products within the territory of China. Although the term "interested organization" (*youguan zuzhi*) is also not defined in the ACR, it could be similarly interpreted to include all types of non-governmental organizations listed above under U.S. law, particularly trade or business associations and workers' unions representing an industry that is en-

81. Anti-dumping Agreement, *supra* note 9, art. 5.4; SCM Agreement, *supra* note 12, art. 11.4.

82. 19 U.S.C. §§1673a(b)(1), (2) (anti-dumping), 1671a(b)(1), (2) (countervailing).

83. *Id.* §1677(9)(C)-(G).

gaged in the production or wholesale of an identical or similar domestic product. Further, "interested organizations" may even arguably be construed to include government organizations such as a ministry or quasi-ministry in charge of a given industry being injured by foreign dumped or subsidized imports.

According to Article 12 of the ACR, the written Petition (*Shenqing Shu*) to be filed in accordance with the ACR must include the following information:

- (1) name and address of the Petitioner and of the producers it represents (if any);
- (2) name, category and the customs tariff schedule heading number (*guanshui shuizi xuhao*) of the imported product(s), and the name and category of identical or similar domestic product(s);
- (3) quantity and price of the dumped (or subsidized) imports, and their effects on domestic industry;
- (4) causal relationship between the dumping (or subsidization) and the injury; and
- (5) other contents as may be prescribed by MOFTEC.⁸⁴

The Petition must also be supplemented with "necessary evidence."⁸⁵ These requirements conform to Article 5.2 of the Anti-dumping Agreement and Article 11.2 of the SCM Agreement.⁸⁶

Similarly, U.S. law, in a different but not necessarily inconsistent way, requires the petitioner to allege, "the elements necessary for the imposition of the duty"⁸⁷ under the anti-dumping duty provision⁸⁸ or the countervailing duty provision.⁸⁹ Such allegations must be accompanied with and supported by "information reasonably available to the petitioner."⁹⁰ The countervailing duty law of the United States further requires that the ITA, upon receiving a petition for a countervailing duty investigation, notify the government of the exporting country of the petition filed and provide that government an opportunity for consultation.⁹¹ In this regard, there is no comparable provision in the ACR.

Under Article 18 of the ACR, the petitioner in an anti-dumping or countervailing proceeding is allowed to withdraw its Petition. In such a case, MOFTEC must make a public announcement and MOFTEC and other departments concerned may no longer continue with the proceedings.⁹² It is not known, however, whether there is any intended time limit for the petitioner to withdraw its Petition. Nor is there any guidance as to the limits on the power and duty of the investigating authorities to terminate a proceeding merely on the basis of a withdrawal of the petition by the petitioner. This provision differs from its counterparts in the U.S. anti-dumping and countervailing duty laws in two ways.⁹³ The ITC, upon receiving a withdrawal of the petition, may not terminate its investi-

84. ACR, *supra* note 1, art. 12, para. 1(1)-(5).

85. *Id.* para. 2.

86. Anti-dumping Agreement, *supra* note 9, art. 5.2; SCM Agreement, *supra* note 12, 0art. 11.2.

87. 19 U.S.C. §§673a(b)(1), 1671a(b)(1).

88. *Id.* §673.

89. *Id.* §671(a).

90. *Id.* §§673a(b)(1), 1671a(b)(1).

91. *Id.* §1671a(b)(4)(A).

92. ACR, *supra* note 1, art. 18(1).

93. 19 U.S.C. §§1673c(a)(1)(A), 1671c(a)(1)(A).

gation prior to the preliminary determination of the ITA.⁹⁴ In addition, the ITA, upon receiving such withdrawal, may not terminate the investigation by accepting a quantitative restriction agreement “unless [it] is satisfied that termination on the basis of that agreement is in the public interest.”⁹⁵

4. *Affirmative or Negative Decision on a Petition*

Upon receipt of a written Petition, MOFTEC shall examine the Petition and any accompanying evidentiary materials, and shall make a decision whether to investigate the case (*jueding li'an diaocha*, i.e., an affirmative decision) in consultation with the SETC. Although no time limit is specified in the ACR for conducting such examination and consultation and for reaching a decision, MOFTEC can be reasonably expected to act upon a Petition promptly or as soon as possible.

By comparison, U.S. law requires the ITA to make an initial determination “within 20 days after the date on which a petition is filed” on (1) whether the elements necessary for the imposition of an anti-dumping or countervailing duty are alleged in the petition, (2) whether the petition contains reasonable available information, and (3) whether the petition has been filed by an industry or on its behalf.⁹⁶ An investigation will be initiated only if the ITA makes an affirmative initial determination on the above three issues.⁹⁷ If the initial determination is negative, the petition will be dismissed, the proceeding terminated, and the petitioner notified of the reasons for such determination.⁹⁸

An express time limit in the ACR, as in U.S. anti-dumping and countervailing laws, would have been desirable. Without such a time limit, petitioners will have difficulty in knowing when to expect a response from MOFTEC.

Under Article 16 of the ACR, once MOFTEC has reached an affirmative or negative decision on whether to initiate an investigation, it must publicly announce or publish the decision, and notify the petitioner and other interested parties—this may include the exporter and the importer (if known) and the government of the exporting country—of its decision.⁹⁹

5. *The Investigations and the Substantive Determinations*

Once MOFTEC makes an affirmative decision to proceed with an anti-dumping or anti-subsidy petition, the matter becomes the subject of formal investigation. The ACR provides a set of investigation procedures that are designed to reach two substantive determinations. First, there must be a preliminary determination of the existence and margin of dumping or the existence of subsidy and the amount of subsidy. Second, there must be a final determination as to the existence and extent of injury sustained by the corresponding domestic

94. 19 U.S.C. §§1673c(a)(3), 1671c(a)(3).

95. 19 U.S.C. §§1673c(a)(2)(A), 1671c(a)(2)(A).

96. 19 U.S.C. §§1673a(c)(1)(A), 1671a(c)(1)(A).

97. *Id.* §§1673a(c)(2), 1671a(c)(2).

98. *Id.* §§1673a(c)(3), 1671a(c)(3).

99. ACR, *supra* note 1, art. 16.

industry.¹⁰⁰ These two determinations may result either in the termination of the entire proceeding or in the application of offsetting duty or other measures, depending on the actual outcome of the investigations. These procedures are generally similar to those under the United States anti-dumping and countervailing laws.¹⁰¹

Article 15 of the ACR provides that MOFTEC open a case and proceed with an anti-dumping or countervailing investigation (*li'an diaocha*) once it has reached an affirmative decision. It further provides that the time period for such investigations shall be no longer than "12 months from the date of the publication of the decision to set up a case for investigation to the date of the publication of the final determination." "In extraordinary circumstances," this time limit may be extended by an additional six months.¹⁰²

Under Article 17, MOFTEC, jointly with the GAC, is charged with the duty of investigating into the dumping and dumping margins (or subsidization or amount of subsidization) of the imports concerned. On the other hand, the SETC, as well as the other department(s) concerned under the State Council, has the responsibility to investigate into the injury and its extent.¹⁰³ MOFTEC and the SETC are required to issue a preliminary determination based on the results of their investigation. Both MOFTEC and SETC preliminary determinations are to be publicly announced by MOFTEC itself.¹⁰⁴ While there is an overall time limit for completing the entire investigation, the ACR does not specify within how many days or months MOFTEC and the SETC must render their respective preliminary determinations.

Under Article 18 of the ACR, if any of the preliminary determinations on dumping or subsidy and on injury is negative, the entire investigation shall be terminated, and such termination is to be announced by MOFTEC.¹⁰⁵ However, if the MOFTEC and SETC's preliminary determinations are both affirmative, MOFTEC and GAC must conduct a further investigation into the dumping and the margin of dumping (or the subsidization and the amount of subsidization). The SETC and the interested State Council department(s) should once again investigate into the injury and extent of injury caused by the dumping (or subsidization). MOFTEC and the SETC each make a final determination on the basis of such further investigation. The final determinations on the dumping (or subsidization) and the injury are both to be published by MOFTEC.¹⁰⁶

Article 19 of the ACR provides that the investigating authorities may distribute questionnaires and surveys to interested parties, and should provide the interested parties an opportunity to state their opinions should they so request.¹⁰⁷ Article 19 also authorizes MOFTEC to dispatch its personnel to con-

100. *Id.* art. 17.

101. *Cf.* 19 U.S.C. §§1671, 1673.

102. ACR, *supra* note 1, art. 15.

103. *Id.* art. 17, para. 1.

104. *Id.*

105. *Id.* art. 18.

106. *Id.* art. 17, para. 2.

107. *Id.* art. 19, para. 1.

cerned foreign countries for investigation, provided that "the relevant countries [do not] object."¹⁰⁸

Article 20 requires interested parties to accurately report information and provide relevant materials to the investigating authorities. Should such interested parties fail to do so, or hinder the investigation by any other means, MOFTEC and the SETC may make their determinations on the basis of the information and materials that are available to them.¹⁰⁹

Under Article 21, MOFTEC and the SETC should allow the Petitioner and the interested parties to look up the materials of the case except those that should be kept confidential.¹¹⁰

B. Anti-dumping and Countervailing Measures

The actions that may be taken against foreign dumping or subsidies include provisional counter measures, such as the imposition of interim anti-dumping or countervailing duties, and final assessments, such as the formal imposition of anti-dumping or countervailing duties. The ACR also provides for the suspension of on-going proceedings, the continuation of suspended proceedings, and the retroactive imposition of duties.

1. Provisional Measures

Article 22 of the ACR provides that once a preliminary determination as to the existence of the alleged dumping (or subsidization) and the corresponding injury to domestic industry has been made, the investigating authorities may adopt the following provisional anti-dumping (or countervailing) measures:

- (1) imposing a provisional anti-dumping (or countervailing) duty in accordance with prescribed procedures;
- (2) requesting the posting of cash deposit, bond or any other form of security.¹¹¹

Article 22 further provides that the amount of the provisional anti-dumping duty, and the amount of cash deposit, bond or other security, "should be in proportion to the margin of dumping determined in the preliminary determination."¹¹² In the case of a countervailing investigation, it is logical to assume the provisional measures should then correspond to the amount of the subsidy according to preliminary estimates, although there is no express provision for this in the ACR.

These provisions are consistent with Article 7 of the Anti-dumping Agreement and Article 17 of the SCM Agreement, under which the application of provisional measures requires a preliminary affirmative determination of dumping or subsidy and of consequent injury to a domestic industry. Such measures may take the form of provisional anti-dumping or countervailing duties guaranteed by cash deposits or bonds. In the case of dumping, the amount is "equal to the amount of the anti-dumping duty provisionally estimated, being not greater

108. *Id.* art. 19, para. 2.

109. *Id.* art. 20.

110. *Id.* art. 21.

111. *Id.* art. 22, para. 1.

112. *Id.* para. 2.

than the provisionally estimated margin of dumping.” In the case of subsidy, the amount is equal “to the amount of the provisionally calculated amount of subsidization.”¹¹³

Article 22 of the ACR stipulates that the State Council Tariff Schedule Commission (“SCTSC”) is responsible for deciding whether to impose provisional anti-dumping (or countervailing) duties. The SCTSC makes its decision based on a proposal that MOFTEC submits. MOFTEC itself decides whether the importer must post a cash deposit, bond or other security.¹¹⁴

Article 24 of the ACR provides that the duration of the provisional anti-dumping (or countervailing) duty imposed may not exceed 4 months, starting from the date of the public announcement of the decision to adopt provisional anti-dumping (or countervailing) measures. In special circumstances, the duration may be extended to 9 months.¹¹⁵ This provision follows Article 7.4 of the Anti-dumping Agreement, which states that the period of the provisional measures should be as short as possible and should not exceed four months. Similar to the ACR, this period may be extended to six or nine months in exceptional cases.¹¹⁶

Insofar as provisional countervailing measures are concerned, it remains to be seen how MOFTEC will apply the ACR. Article 39 extends the scope of application of Article 24 to subsidy and countervailing measures. However, it is not quite clear whether the application of provisional countervailing measures may also be “extended to a total of nine months.”¹¹⁷ In contrast the SCM Agreement clearly states that the “application of provisional measures shall be limited to as short a period as possible, not exceeding four months.” No extension is possible beyond the four-month limit in the case of subsidies.¹¹⁸

Finally, it is interesting to note that, under Article 23 of the ACR, all provisional anti-dumping (or countervailing) measures must be publicly announced by MOFTEC but enforced and executed by the GAC.¹¹⁹

2. *Suspension and Continuation of Investigation*

In certain circumstances, such as undertakings to eliminate or limit subsidy, to increase prices or to cease exports, countervailing or anti-dumping proceedings may be suspended without the imposition of offsetting duties or even the application of provisional measures. The ACR provides for the conditions under which an on-going investigation may be suspended as well as those under which

113. Anti-dumping Agreement, *supra* note 9, art. 7.1(ii) & 7.2; SCM Agreement, *supra* note 12, art. 17.1(b) & 17.2.

114. ACR, *supra* note 1, art. 22, para. 3. Note that the State Council Tariff Schedule Commission (*Guanshui Shuize Weiyuan Hui*) is translated as the “State Council Customs Tariff Policy Commission” in the appended English translation of the ACR.

115. *Id.* art. 24.

116. Anti-dumping Agreement, *supra* note 9, art. 7.4.

117. ACR, *supra* note 1, art. 24.

118. SCM Agreement, *supra* note 12, art. 17.4.

119. ACR, *supra* note 1, art. 23.

the suspended investigation may be continued or renewed. In the case of anti-dumping proceedings, Article 25 of the ACR states:

If the exporter dumping products or the exporting country's government promises to adopt effective measures to eliminate the injury caused to the domestic industry, MOFTEC, after consulting with the SETC, may decide to suspend the anti-dumping investigation. It should publicly announce the decision.

MOFTEC may require the exporter or the government of the exporting country mentioned in the preceding paragraph to regularly supply relevant data on the fulfillment of their commitments.

The above provisions are compatible with Article 8 of the Anti-dumping Agreement which permits the suspension or termination of proceedings if the investigating authorities "are satisfied" with the exporter's price undertakings such "that the injurious effect of the dumping is eliminated."¹²⁰ The Agreement specifically refers to the revision of price or the cessation of exports at the dumped price as examples of voluntary measures to eliminate the injurious effect of the dumping. It further provides that the price increases in the promise may not be "higher than necessary to eliminate the margin of dumping" but should preferably "be less than the margin of dumping" if they "would be adequate to remove the injury to the domestic industry."¹²¹

The ACR does not specify the acceptable measures in the exporter's promises or agreements for eliminating the injurious effect of the imports in question. Presumably, such measures may include a voluntary promise from the exporter and/or the exporter's government to cease exports of the dumped goods within a stated period of time, or a promise to revise its price to eliminate any dumping margin. In any event, Article 25 authorizes MOFTEC to require the foreign exporter or the government of the exporting country to periodically submit information and materials relevant to the honoring of the promise. This resembles Article 8.6 of the Anti-dumping Agreement.¹²²

Another problem with Article 25 of the ACR is that, in many cases, it is technically difficult to apply the literal meanings of Article 25 to countervailing proceedings. This is why it would be desirable to have the procedures for anti-dumping and countervailing investigations separately stated. A separate provision could have been embodied in the ACR to deal with the suspension of countervailing proceedings such as in the following proposed wordings:

If the exporter selling subsidized products or the exporting country's government promises to adopt effective measures to eliminate or offset the subsidy completely, MOFTEC, after consulting with the SETC, may decide to suspend the countervailing investigation. . . .¹²³

Article 18.1 of the SCM Agreement presents a better example:

Proceedings may be suspended . . . without the imposition of . . . countervailing duties upon receipt of satisfactory voluntary undertakings under which:

- (a) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

120. Anti-dumping Agreement, *supra* note 9, art. 8.1

121. *Id.* For the United States practice, *see* 19 U.S.C. §1673c(b).

122. Anti-dumping Agreement, *supra* note 9, art. 8.6.

123. The present author's own suggested provision.

(b) the exporter agrees to revise its prices so that the injurious effect of the subsidy is eliminated. . . .¹²⁴

Under Article 26 of the ACR, MOFTEC, upon consultation with the SETC, has the power to decide to resume or continue the anti-dumping (or countervailing) investigation,¹²⁵ in cases where the exporter or the government of the exporting country has failed to honor its commitment to effectively eliminate the injurious effects of its dumped (or subsidized) imports upon a given Chinese domestic industry, or has withdrawn such commitment. This is similar to the two WTO agreements, which provide that “the authorities of the importing Member may take . . . expeditious actions which may constitute immediate application of provisional measures” and even “definitive duties” on products imported not more than 90 days before the application of the provisional measures.¹²⁶

3. *Imposition of Offsetting Duties*

The imposition of definitive anti-dumping or countervailing duties as the utmost offsetting measure is expressly permitted under the WTO Anti-dumping and SCM Agreements if, after reasonable efforts of consultations, the importing country makes a final determination of the existence and margin of dumping (or the existence and amount of subsidy) and such dumped (or subsidized) imports “are causing injury.”¹²⁷

Consistent with the WTO agreements, Articles 30 and 31 of the Chinese Foreign Trade Law provide that, where the import of a product which is imported at a price below its normal value, or the import of a product having received direct or indirect subsidy from the exporting country, “causes substantial damage or creates the threat of substantial damage to the established corresponding domestic industry, or causes substantial hindrance to the establishment of the corresponding domestic industry, the State may adopt necessary measures to eliminate or alleviate such damage or the threat of such damage or hindrance.”¹²⁸ This principle is reiterated in Article 2 of the ACR.¹²⁹ The formal adoption of such necessary measures requires a prior final determination that both the dumping (or subsidization) and the resulting injury exist. Articles 27-35 of the ACR contain provisions for the formal imposition of definitive anti-dumping (or countervailing duties) after the final determinations on dumping/subsidy and injury have been made in the affirmative.¹³⁰ The formal imposition of such duty is the strongest form of anti-dumping or countervailing measures for the elimination or alleviation of the substantial injury or the threat of injury to the relevant domestic industry.

124. SCM Agreement, *supra* note 12, art. 18.1; *cf.* 19 U.S.C. §1671c(b).

125. ACR, *supra* note 1, art. 26.

126. SCM Agreement, *supra* note 12, art. 18.6.

127. SCM Agreement, *supra* note 12, art. 19.1; Anti-dumping Agreement, *supra* note 9, art. 9.1. For the practice of the United States, *see* 19 U.S.C. §§1671e, 1673e.

128. FTL, *supra* note 5, arts. 30, 31.

129. ACR, *supra* note 1, art. 2.

130. *Id.* arts. 27-35.

Article 27 of the ACR provides that the investigating authorities "may impose an anti-dumping [or countervailing] duty in accordance with prescribed procedures," and such imposition shall publicly be announced by MOFTEC, if it has been "finally determined" that there exist both the dumping (or subsidy) and the injury caused to a corresponding domestic injury.¹³¹ The imposition of such duty is to be proposed by MOFTEC, decided by the SCTSC, and enforced by the Customs.¹³² Under Article 29, the amount of an anti-dumping duty may not exceed the margin of dumping ascertained in the final affirmative determinations.¹³³ By the same token, the amount of a countervailing duty should not be more than the amount of the corresponding subsidy. Article 28 makes it clear that it is the importer of the dumped (or subsidized) imports, not the exporter or the government of the exporting country, that should be responsible for paying the anti-dumping (or countervailing) duty imposed.¹³⁴

Articles 30-31 of the ACR provide for the adjustment of anti-dumping (or countervailing) duty, if there is a difference between the provisional duty and the duty finally determined. If the duty determined after the final affirmative determinations is lower than the provisional duty assessed after the preliminary determinations, the over-charged portion of the duty should be refunded. However, if the finally determined duty is higher than the provisional duty, no retroactive payment for the unpaid portion is required.¹³⁵ When it has finally been decided that no anti-dumping (or countervailing) duty will be imposed, the ACR requires the reimbursement or return of any provisional duty imposed or any cash deposit, bond or other security received.¹³⁶

Under Article 32 of the ACR, the SCTSC, on the basis of a proposal made by MOFTEC, may decide to impose a retroactive anti-dumping (or countervailing) duty on dumped (or subsidized) imports that were imported within 90 days prior to the date of the public announcement of the decision to adopt provisional anti-dumping (or countervailing) measures, if the following two situations both exist: (1) (a) the dumped (or subsidized) imports had a history of causing injury to the corresponding domestic industry, or (b) the importer of the dumped (or subsidized) products knew or should have known that the exporter of the products was dumping (or had been subsidized), and such dumping (or subsidization) was causing or would cause injury to the corresponding domestic industry; and (2) the dumped (or subsidized) products were imported in large quantity within a short period of time and have in fact caused injury to the corresponding domestic industry.¹³⁷

Article 33 of the ACR states that the duration for anti-dumping (and countervailing) duties and for price undertakings shall be 5 years.¹³⁸ Within this pe-

131. *Id.* art. 27, para. 1.

132. *Id.* art. 27, para. 1.

133. *Id.* art. 29.

134. *Id.* art. 28.

135. *Id.* art. 30.

136. *Id.* art. 31.

137. *Id.* art. 32.

138. *Id.* art. 33, cl. 1.

riod of time, MOFTEC, upon consultation with the State Economic and Trade Commission, may, upon its own initiation or a petition from an interested party or parties, review the decision to impose anti-dumping (or countervailing) duties. Within 12 months of the review, MOFTEC may make a recommendation to the SCTSC for modification, termination or reservation of the anti-dumping (or countervailing) duty. The decision on the outcome of the review is to be made by the SCTSC, and published by MOFTEC.¹³⁹

Article 34 states that, where the importer of the dumped (or subsidized) products has evidence that the amount of the anti-dumping (or countervailing) duty exceeds the margin of dumping (or the amount of the countervailable subsidy), it may apply to MOFTEC for a refund of the overpaid portion of payment. After MOFTEC, in conjunction with the GAC, has examined and verified the matter, MOFTEC is to propose a refund, but the issuance of the refund must be decided by the SCTSC and executed by the GAC.¹⁴⁰ The decision to issue the refund must be made within 18 months from when the application for the refund is received.¹⁴¹

IV. CONCLUSION

Although China is not yet a member of the WTO nor party to the GATT and the Anti-dumping and Countervailing Agreements, it has incorporated concepts and rules from the GATT system into its FTL and Anti-dumping and Countervailing Regulation. The drafters of the ACR, however, have not fully addressed certain important issues:

- The ACR fails formally to introduce the mechanism of judicial review; it makes no mention of the role of the People's Court in anti-dumping and countervailing proceedings or post-proceeding reviews; it contains no provision on whether the importer or an interested party may challenge the adequacy or validity of the preliminary and/or final determinations of the investigating authorities in the People's Court;
- The ACR does not delineate methods for determining the comparable price in the exporting country's home market or in the market of a third country applied in ascertaining the normal value of foreign imports being the target of dumping allegations and/or anti-dumping investigations;
- it does not specify what constitutes "reasonable expenses and profits";
- it fails to adopt the specificity test with regard to dutiable foreign subsidies and does not distinguish between prohibited, actionable and non-actionable subsidies;
- the ACR does not stipulate what qualifies as "industrial research and development", to what extent subsidies for R&D are exempt from countervailing measures, what criteria are to be used for determining that a region is "disad-

139. *Id.* para. 2.

140. *Id.* art. 34, para 1.

141. *Id.* para. 2.

vantaged” and whether and to what extent the scope of exempt environmental subsidies is to be limited.

On the other hand, the ACR arguably gives too much attention to certain issues. For example, the ACR seems to require both a subsidy determination and an injury determination to impose countervailing duties in all circumstances. This self-limitation is not necessary. Unless otherwise required by bilateral or regional trade agreements, China does not need to burden itself with finding the presence of material injury caused by foreign subsidies to China’s domestic industry before adopting countervailing measures. Even after China is admitted to the WTO, the GATT and SCM Agreement do not require the determinations of material injury vis-à-vis subsidized goods if the exporting country is not a party to the SCM Agreement or to any relevant bilateral or regional trade agreement requiring injury determinations.

Another obvious shortcoming of the ACR is the lack of specificity in Chapter V. This lack of detail could be interpreted to have a two-fold implication. On one hand, all R&D subsidies, subsidies for assisting disadvantaged regions, and environmental subsidies could be considered non-actionable per se under the ACR. This determination would not depend on the percentage of the R&D subsidies in the costs of research and development, the criteria of disadvantaged regions, or the timing and percentage of cost of adaptation to requirements for environmental protection. On the other hand, all other subsidies are subject to potential investigations and measures under the ACR, regardless of whether they are provided to enhance the export performance of an industry (or enterprise) or to stimulate the production of import substitutes; and regardless of whether they are available to a specific industry or industries (or a specific enterprise or enterprises), or to a larger, more general group of industries (or enterprises).

Further, the overall approach of the ACR, i.e., treating countervailing issues in the same context as dumping, can be confusing and burdensome for administrative judges and practitioners. Article 39 provides that Chapters II, III and IV are applicable to countervailing proceedings. Although countervailing proceedings share many features with anti-dumping proceedings, not every provision in those chapters specifically dealing with anti-dumping proceedings is properly applicable to countervailing matters. A more practical approach would be to divide the ACR into two equal parts, or into two separate regulations, with one specifically dealing with anti-dumping measures and the other with countervailing measures. Such a division would inevitably involve overlaps. Yet administrative judges and practitioners may prefer overlaps, which already exist in many Chinese statutes and regulations, if they could add accuracy and certainty.

Although Article 19 of the ACR authorizes MOFTEC to conduct investigations abroad when necessary, it is not clear what role Chinese lawyers may play in such investigations. Foreign lawyers frequently conduct interrogatories or otherwise collect evidence in China to facilitate their clients’ dumping or subsidization allegations against Chinese goods. On the other hand, many foreign countries have made it extremely difficult and nearly impossible for Chinese lawyers to conduct discovery on their soil. “This non-reciprocity,” writes Guan

Anping, "is not consistent with public international law and the principle of reciprocity under our country's Foreign Trade Law."¹⁴² Thus, it would be desirable to insert and emphasize the principle of reciprocity in the ACR or in other relevant statutes or regulations to make discovery by foreign lawyers in China conditional upon reciprocity.

Moreover, the drafters of the ACR failed to insert a provision under which the injury requirement in the case of countervailing proceedings would apply only to imports from countries that have entered relevant trade agreements with China or whose laws and practices also require an injury determination on imports from China. Under U.S. countervailing law, for example, an affirmative determination of injury is required to impose countervailing duties only with respect to subsidized imports from countries which are Member States of the GATT and the SCM Agreement or have otherwise entered into trade agreements with the United States.¹⁴³ Reciprocity would suggest that if the United States can maintain such a discriminatory provision, there is no reason why China cannot similarly eliminate the injury requirement for dealing with subsidized imports from countries that have not entered into relevant trade agreements with China.

Notwithstanding the ACR's many shortcomings, its significance should not be underestimated. China needs time to gain experience through practice, to refine not only the FTL and the ACR, but also many other statutes and regulations. Administrative judges may play a positive role in resolving the ambiguities caused by vague drafting. MOFTEC and the SETC will likely promulgate a set of "concrete measures" (*juti banfa*) for the implementation of the ACR.¹⁴⁴ With time, the emerging anti-dumping and countervailing system in China may mature into a comprehensive and sophisticated statute or statutes with well-defined concepts.

Second, something is better than nothing. The ACR and the relevant provisions of the Foreign Trade Law, though not yet fully developed, do, after all, provide the basic legal framework for the adoption of corrective measures against foreign dumping and subsidization.

Finally, the ACR is generally balanced and consistent with the GATT principles as well as the Anti-dumping Agreement and the Subsidy and Countervailing Measures Agreement. Chinese industries, foreign exporters and practitioners as well as the governments of China's trading partners should welcome it as another step towards the formation and the development of a more transparent system of foreign trade law in China.

142. Guan Anping, *Guanyu Woguo Fan Qingxiao Peitao Lifa de Tandai* (An Enquiry into Our Country's Supplementary Anti-Dumping Law-Making), *PEOPLE'S DAILY*, May 31, 1997, at 5; Guan Anping, *Zhongguo Lüshi yu Fan Qingxiao* (Chinese Lawyers and Anti-Dumping), *PEOPLE'S DAILY*, Nov. 23, 1996, at 4.

143. See generally, 19 U.S.C. §1671

144. ACR, *supra* note 1, art. 41.

Appendix

Anti-Dumping and Anti-Subsidy Regulations of the People's Republic of China

Chapter One: General Provisions

Article 1 These regulations are formulated in accordance with the "Foreign Trade Law of the People's Republic of China" in order to maintain foreign trade order and fair competition and to protect domestic industry.

Article 2 If imported products 1) are subsidized or are dumped onto the domestic market and 2) cause or threaten to cause material injury to corresponding established domestic industries or create material obstacles to the establishment of corresponding domestic industries, anti-dumping and anti-subsidy measures shall be adopted in accordance with the provisions of these regulations.

Chapter Two: Dumping and Injury

Article 3 Dumping occurs when the export price of an imported product is less than its normal value.

Article 4 Normal value is determined according to the following methods:

- 1) If products identical with or similar to the imported product have comparable prices in the exporting countries' marketplace, those comparable prices shall be the normal value;
- 2) If products identical with or similar to the imported product do not have comparable prices in the exporting country's marketplace, the normal value shall be either 1) the comparable price of identical or similar products exported to a third country, or 2) the production cost of identical or similar products plus reasonable expenses and profit.

Article 5 Export price is determined according to the following methods:

- 1) The price actually paid or the price that should have been paid for the imported product is the export price;
- 2) If no price is actually paid or should have been paid for the imported product, or its price cannot be determined, the export price shall be 1) the price for which the imported product is resold for the first time to an independent buyer, or 2) the price reconstructed according to a reasonable basis by MOFTEC after consultation with the Customs Bureau.

Article 6 The dumping margin is the amount by which the imported product's export price is less than its normal value. In determining the dumping margin, the imported product's export price and its normal value should be compared according to fair and reasonable means.

Article 7 Injury includes causing material injury or the threat of material injury to already established corresponding domestic industry or the creation of obstacles to the establishment of corresponding domestic industry by dumping.

Article 8 In determining injuries caused by dumping to domestic industries, the following matters should be investigated:

- 1) The quantity of product dumped, including the total quantity of product dumped or the incremental increase in its total quantity relative to identical or similar domestic products and the possibility of large increases therein;
- 2) The prices of goods dumped, including reductions in the prices of goods dumped or the effect upon the prices of identical or similar domestic products;
- 3) The effect of the dumped product on domestic industry;
- 4) The dumping export company's production capacity, export capacity and inventory.

Article 9 In an anti-dumping investigation with respect to products imported from two or more countries, a cumulative estimate of the effect of the relative imported goods may be conducted.

Article 10 Domestic industries are all producers making identical or similar products within the territory of the People's Republic of China, or the producers of a large part of the total production of identical or similar domestic products. Domestic producers related to export businesses or import businesses or those who themselves import a dumped product may be excluded from the category of domestic industries.

Chapter Three: Anti-Dumping Investigation

Article 11 Domestic producers of products identical or similar to imported goods, or their related organizations (hereinafter referred to as "the applicant"), may submit a written application for an anti-dumping investigation to MOFTEC in accordance with the provisions of these regulations.

Article 12 The application should contain the following evidence:

- 1) The names and addresses of the applicant(s) and the producers it represents;
- 2) A designation and a description of the imported products, their Import Tariff Code numbers, and a designation and description of the identical or similar domestic products;
- 3) The imported products' quantity and prices and their effect upon domestic industry;
- 4) The causal relationship between dumping and injury;
- 5) Other contents prescribed by MOFTEC.

The necessary evidence should be attached to the application form.

Article 13 After receiving an applicant's written application, MOFTEC should examine the application and attached evidence and, after consulting with

the State Economic and Trade Commission, should decide whether or not to file the case for investigation.

Article 14 If, under special circumstances, MOFTEC has sufficient evidence to believe that dumping, injury and a causal relationship between the two exists, it may, after consulting with the State Economic and Trade Commission, decide on its own to file a case for investigation.

Article 15 The public announcement of the final ruling in an anti-dumping investigation must be made within the 12-month period beginning with the date of public announcement of the decision to file the case for investigation. Under special circumstances, that period may be extended to a total of 18 months.

Article 16 MOFTEC should publicly announce its decision whether or not to file a case for investigation and notify the applicant, known exporters and importers, the exporting country's government, and other interested parties.

Article 17 After the decision to file a case for investigation, MOFTEC and the Customs Bureau shall jointly investigate the existence of dumping and determine the dumping margin, and the State Economic and Trade Commission and the relevant State Council departments shall jointly investigate the existence of injuries and determine the extent of injuries. MOFTEC and the State Economic and Trade Commission shall separately make their initial rulings based upon the results of the investigation. MOFTEC shall publicly announce the initial rulings.

If the initial rulings establish the existence of dumping and injury, further investigations shall be made as to the dumping, dumping margin, injuries and extent of injuries in accordance with the provisions of the preceding paragraph. MOFTEC and the State Economic and Trade Commission shall separately make their final rulings based upon the results of the subsequent investigations. MOFTEC shall publicly announce the final rulings.

Article 18 An anti-dumping investigation should be terminated and such termination publicly announced by MOFTEC under the following circumstances:

- 1) The applicant withdraws the application;
- 2) The initial rulings do not establish the existence of dumping and injury;
- 3) The final rulings do not establish the existence of dumping and injury;
- 4) The dumping margin and the dumped product's imported quantity can be ignored.

Article 19 When MOFTEC and the Customs Bureau or the State Economic and Trade Commission and the relevant department of the State Council jointly investigate, they may distribute interrogatories to interested parties and carry out sample surveys. When requested by an interested party, an opportunity should be provided for it to express its opinion.

When MOFTEC believes it is necessary, it may dispatch personnel to the relevant countries to investigate, provided the relevant countries do not object.

Article 20 When MOFTEC and the Customs Bureau or the State Economic and Trade Commission and the relevant department of the State Council jointly investigate, the interested parties shall accurately report the situation and supply the relevant materials. If they do not accurately report the situation and supply the relevant materials, or by other means hinder the investigation, MOFTEC and the State Economic and Trade Commission may make their rulings based upon the materials available to them.

Article 21 MOFTEC and the State Economic and Trade Commission shall allow the applicant and interested parties access to the case materials, provided the materials are not secret.

Chapter Four: Anti-Dumping Measures

Article 22 If the initial ruling establishes the existence of dumping and of resultant injuries to corresponding domestic industries, the following temporary anti-dumping measures may be adopted:

- 1) According to prescribed procedure, a temporary anti-dumping tax may be imposed;
- 2) The provision of a cash deposit or other forms of guarantee may be required.

The amount of temporary anti-dumping tax, cash deposit and other forms of guarantee should be consistent with the dumping margin determined by the initial ruling.

MOFTEC may propose and the State Council's Custom Tax Policy Commission shall decide upon the imposition of any temporary anti-dumping tax. MOFTEC shall decide whether to require the provision of cash deposits and other forms of guarantee.

Article 23 MOFTEC shall publicly announce decisions to adopt temporary anti-dumping measures, and the Customs Bureau shall implement them.

Article 24 The period for the imposition of anti-dumping taxes is the 4-month period beginning with the date of public announcement of the decision to impose the temporary measures. Under special circumstances, the period may be extended to a total of 9 months.

Article 25 If the exporter dumping the products or the exporting country's government promises to adopt effective measures to eliminate the injury caused to domestic industry, MOFTEC, after consulting with the State Economic and Trade Commission, may decide to suspend the anti-dumping investigation. It should publicly announce the decision.

MOFTEC may require the exporter or the government of the exporting country mentioned in the preceding paragraph to regularly supply relevant data on the fulfillment of their commitments.

Article 26 If the exporter dumping the product or the exporting country's government fails to fulfill or withdraws the commitments, MOFTEC, after consulting the State Economic and Trade Commission, may decide to resume the anti-dumping investigation.

Article 27 If the final ruling establishes the existence of dumping and of the resultant injury to domestic industry, an anti-dumping tax may be imposed according to prescribed procedures, and MOFTEC shall publicly announce the decision.

MOFTEC may propose, the State Council's Customs Tariff Policy Commission shall decide upon, and the Customs Bureau shall implement the imposition of any anti-dumping tax.

Article 28 The antidumping taxpayer is the importer of the dumped product.

Article 29 The amount of the anti-dumping tax must not exceed the dumping margin determined by the final ruling.

Article 30 If the amount of the anti-dumping tax determined by the final ruling is lower than the amount of the temporary anti-dumping tax, the excess tax paid shall be refunded. If the amount of the anti-dumping tax determined by the final ruling is higher than the amount of the temporary anti-dumping tax, the balance of the two taxes need not be paid.

Article 31 If the final ruling does not impose an anti-dumping tax, the temporary anti-dumping tax collected, the cash deposit and other forms of guarantee shall be refunded.

Article 32 When the following two circumstances both exist, the State Council's Tariff Policy Commission, based upon MOFTEC proposals, may decide to retroactively impose the anti-dumping tax on the dumped goods imported within the 90-day period previous to the public announcement of the decision to adopt temporary measures:

- 1) There a) is a history of the dumped product causing injury to domestic industry; or b) the importer of the dumped product knew of or should have known that the product's exporter was dumping the product and that the dumping would cause injury to domestic industry; and,
- 2) A large quantity of the product dumped was imported within a short period and has already caused injury to domestic industry.

Article 33 The time period for the imposition of anti-dumping taxes and price commitments prescribed pursuant to these regulations is five years. Within this time period, MOFTEC, after consulting with the State Economic and Trade Commission, on its own or upon the requests of interested parties, may carry out a reexamination of decisions imposing anti-dumping taxes. Within a period of 12 months from the date that the reexamination begins, MOFTEC may propose to the State Council's Customs Tariff Policy Commission that the anti-dumping tax decision be modified, revoked or maintained. The State Council's Custom Tariff Policy Commission shall make the reexamination decision, and MOFTEC shall publicly announce the decision.

Article 34 If an importer of the dumped product has evidence proving that the amount of the anti-dumping tax it has already paid exceeds the dumping margin, it may apply to MOFTEC for a tax refund. MOFTEC and the Customs Bureau shall jointly investigate and verify the facts. Thereafter, MOFTEC may

submit a tax refund proposal to the State Council's Customs Tariff Policy Commission. The State Council's Customs Tariff Policy Commission shall decide whether to grant the refund request and the Customs Bureau shall implement the decision.

Article 35 MOFTEC, the State Economic and Trade Commission, and the relevant State Council departments may adopt appropriate measures to prevent activities to evade anti-dumping taxes.

Chapter Five: Special Anti-Subsidy Provisions

Article 36 A subsidy is a financial support or benefit directly or indirectly provided to an industry or enterprise by a foreign government or public organization for industries and enterprises.

Article 37 These regulations apply to subsidized imported products. However, these regulations do not apply to imported products utilizing subsidies only for industrial research and development, support for backward regions, environmental protection, etc.

Article 38 The net amount of subsidies received by a product is the subsidy amount.

The subsidy amount shall be calculated using fair and reasonable methods.

Article 39 The relevant provisions of Chapters Two, Three and Four of these regulations shall apply to injuries caused by subsidies, anti-subsidy investigations and the enforcement of anti-subsidy measures.

Chapter Six: Supplementary Provisions

Article 40 Based upon actual circumstances, the People's Republic of China may adopt corresponding measures against any country or region adopting discriminatory anti-dumping or anti-subsidy measures against its exports.

Article 41 MOFTEC, the State Economic and Trade Commission, and the relevant State Council departments may formulate specific measures in accordance with these regulations.

Article 42 These regulations are effective upon the date of issuance.