

**NOTIFICATION OF LAWS AND REGULATIONS UNDER
ARTICLES 18.5 AND 32.6 OF THE AGREEMENTS**

Questions Posed by the UNITED STATES Regarding
the Notification of THE PEOPLE'S REPUBLIC OF CHINA

The following communication, dated 17 October 2002, has been received from the Permanent Mission of the United States.

The United States thanks China for its recent notification of its countervailing duty regulations.¹ As referenced in its notification, China has also implemented provisional rules regarding the notified regulations, which, to our knowledge, have not yet been notified to the Committee on Subsidies and Countervailing Measures as required by Article 32.6 of the Agreement on Subsidies and Countervailing Measures ("ASCM").²

- When does China intend to notify these provisional rules?
- Does the State Economic and Trade Commission (SETC) plan to issue provisional rules governing its responsibilities under the notified regulations? If so, when will such rules be issued?

Apart from the provisional rules that have already been issued, what other level of rulemaking, if any, is required or contemplated to implement these notified regulations? Are there other forms of guidance or official interpretation, such as case precedent (*stare decisis*) that will influence decisions by the Ministry of Foreign Trade and Economic Cooperation (MOFTEC), SETC and the State Council?

Article 1 of the notified regulations specifies that they are "formulated in accordance with the Foreign Trade Law of the People's Republic of China...". Does "Foreign Trade Law" refer exclusively to Law No. 19-586 adopted 12 May 1994 by the Seventh Session of the Standing Committee of the Eighth National People's Congress? If not, what other laws apply to the notified regulations?

China's language in Paragraph 4 of Article 3 of the notified regulations appears overly broad. It effectively states that any funding given by the Government through a private body will be

¹ G/SCM/N/1/CHN/1 (11 September 2002)

² We understand that provisional rules issued by China that apply to countervailing measures address (1) petitions and initiations; (2) hearings; (3) verifications; and (4) questionnaires.

considered a subsidy. Please explain how Paragraph 4 conforms with ASCM Art. 1.1(iv), and whether funding by a private body in circumstances other than those described in ASCM Art. 1.1(iv) is considered a subsidy under this paragraph.

Paragraph 2 of Article 4 of the notified regulations appears to consider as specific any subsidies provided by law or regulation in the exporting country. ASCM Art. 2.1(a) requires that the underlying law or regulation explicitly limit access to a subsidy in order for a specificity determination to be made. Please explain how Paragraph 2 is consistent with ASCM Art. 2.1(a).

The illustrative list of export subsidies attached to the notified regulations does not match precisely Annex I to the ASCM (e.g., none of the footnotes are provided). Is China's intent to follow Annex I of the ASCM?

With regard to Article 6 of the notified regulations,

- Paragraphs 2 and 3 reflect the calculation methods described in ASCM Arts. 14(b) and 14(c), but omit the statements in the ASCM articles that loans and loan guarantees are not considered benefits unless there is a difference in what would have been paid for a comparable loan or loan guarantee that the firm could actually obtain from commercial sources (plus fees, in the case of loan guarantees). Is the intent of Paragraphs 2 and 3 to mirror the requirements of ASCM Arts. 14(b) and 14(c)?
- The measurement standards set forth in ASCM Arts. 14(b) and 14(c) refer to the kind of loan the exporter or producer could actually obtain. As written, Paragraphs 2 and 3 would seem to permit any commercial loan to be used as a benchmark, regardless of whether the exporter or producer would actually qualify for such a loan. Is this correct and, if so, how does it reconcile with the standards set forth in the ASCM?
- How is Paragraph 4 consistent with the requirement of ASCM Art. 14(a) that for an equity infusion to be considered as conferring a benefit, the investment decision must be regarded as inconsistent with the usual investment practice of private investors in the territory of the Member?
- How does Paragraph 5 take into account the standards for determining the market price specified in ASCM Art. 14(d)?

Paragraph 2 of Article 8 of the notified regulations states that, in examining the volume of subsidized imports, the competent authority should examine whether the volume "has been increasing significantly, or the possibility of a significant increase in dumped imports."

- Is Paragraph 2 of Article 8 applicable to analysis of current material injury, threat of material injury, or both?
- If Paragraph 2 of Article 8 is applicable to analysis of current material injury, how is examination of "the possibility of a significant increase in subsidized imports" consistent with ASCM Art. 15.2?
- If Paragraph 2 of Article 8 is applicable to analysis of threat of material injury, how is examination of "the possibility of a significant increase in subsidized imports" consistent with ASCM Art. 15.7(i), which requires a finding of a "likelihood" of substantially increased importation?

- Paragraph 3 of Article 8 of the notified regulations discusses the competent authority's examination of pricing and indicates that the authority should examine "price undercutting" of the subsidized imports. Please explain how this language is consistent with ASCM Art. 15.2, under which the investigating authorities are "to consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member..."
- Paragraph 4 of Article 8 of the notified regulations similarly seeks to provide for an examination of the impact of subsidized imports on the domestic industry. In this respect, consistent with ASCM Art. 15.4, such an examination must include an evaluation of "all relevant economic factors and indices having a bearing on the state of the industry." These factors include but are not limited to the enumerated factors listed in ASCM Art. 15.4. However, not all of the factors referenced in ASCM Art. 15.4 are provided in Article 8 of the notified regulations. How does China intend to implement the requirements of ASCM Art. 15.4?
- Paragraph 4 of Article 8 of the notified regulations could also be interpreted as referring to certain factors that, according to ASCM Art. 15.7, should be examined by a competent authority in determining the threat of material injury. Is Article 8 principally or partially directed to a threat analysis? If so, Article 8, Paragraph 4 fails to list the factors specified in ASCM Arts. 15.7(i) and (iii).
- This article also does not contain the requirement in ASCM Art. 15.7 that an affirmative determination of threat of material injury by reason of subsidized imports must be based on a belief that further subsidized imports are "imminent," and that material injury by reason of the subsidized imports would occur unless a countervailing measure were applied. How does China intend to implement these requirements of the ASCM?

Footnote 48 to ASCM Art. 16.1 provides a specific definition of related parties, which is not included in Article 11 of the notified regulations. How does China define a related party?

What entities would China consider to be a "relevant organization" for purposes of filing an application to initiate a countervailing measure investigation, as described in Article 13 of the notified regulations?

Article 21 of the notified regulations provides for the use of "facts available." Please clarify how such use of facts available will be applied.

With regard to Article 22 of the notified regulations,

- What procedures will China follow to provide interested parties reasonable and timely access to information submitted during the course of the proceeding, consistent with ASCM Art. 12.3 and 13.4?
- What procedures (including penalties for violators) do the Chinese authorities have in place to guarantee the confidentiality of information submitted in countervailing measure proceedings?

- How does China intend to address ASCM Art. 12.4 which requires parties submitting confidential information to provide sufficient detail in the non-confidential summaries to permit a reasonable understanding of the substance of the confidential submission?

Article 30 of the notified regulations indicates that any decision to apply provisional measures is proposed by MOFTEC, but decided by the State Council Tariff Commission. The same requirement applies to final determinations, as specified in Article 39, and changes to countervailing measures, as specified in Article 49. Does the Tariff Commission have the authority to overrule a MOFTEC proposal? If so, what oversight rules govern the Commission's decisions? What discretion does the Commission have in setting subsidy margins or otherwise modifying MOFTEC's recommendations?

Under Article 46 of the notified regulations, when provisional countervailing duties are to be refunded following a negative final determination, what actions will be required of importers to obtain the refunds? How quickly will such refunds be made? Will interest be paid on refunds of duties that were originally paid in cash?

What are the specific bodies to which the appeals referred to in Article 52 of the notified regulations may be made? To which body are requests for "administrative review" made? What are the procedures for requesting and conducting such reviews? Which courts have jurisdiction over appeals of countervailing measure decisions? What laws and regulations govern such actions and what standard of evidence is required for the appeal?

Article 54 of the notified regulations specifies that MOFTEC and SETC may take "appropriate measures" to prevent the circumvention of countervailing measures. What constitutes circumvention of countervailing measures? Could you please describe how the authorities will determine whether such circumvention has occurred, and the types of measures the authorities may take if such circumvention has occurred?

Article 55 of the notified regulations specifies that China may take "corresponding measures" when any country "discriminatorily" imposes countervailing measures against exports from China. Based on what authority in the ASCM could China take such action? Under what circumstances does China foresee applying this provision (i.e., what would be considered as "discriminatorily imposing" within the meaning of Article 55)? What sorts of actions would be taken against another country?

Please explain the differentiation between the terms "country" and "region" as used in the notified regulations (e.g., Article 4).
