COMMITTEE TO SUPPORT U.S. TRADE LAWS

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By Hand and Via E-Mail

The Honorable Carlos Gutierrez
U.S. Secretary of Commerce
U.S. Department of Commerce
14th Street & Constitution Avenue, NW
Washington, DC 20230

Dear Secretary Gutierrez:

We are writing on behalf of the Committee to Support U.S. Trade Laws ("CSUSTL") in response to the Department's notice, Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise, 72 Fed. Reg. 29,302 (May 25, 2007) ("Antidumping Methodologies"). In this notice, the Department has requested public comment ". . . on the conditions under which the Department might grant market–economy treatment to individual Chinese respondents, and, if so, how this might affect our antidumping duty calculations for such enterprises." Antidumping Methodologies, 72 Fed. Reg. at 29,303.

For the reasons set forth below, CSUSTL submits that such a step is unsupported legally and is impractical and urges that the Department not implement any methodology along these lines. The underlying proposition is badly flawed that individual companies operating as part of a non-market-oriented industry in China can and should be treated in whole or in part as if they were operating separately as market-oriented entities.

I. THE DEPARTMENT DOES NOT HAVE A SOUND LEGAL BASIS ON WHICH TO GRANT MARKET-ORIENTED TREATMENT TO INDIVIDUAL CHINESE COMPANIES IN ANTIDUMPING DUTY PROCEEDINGS CONCERNING IMPORTS FROM CHINA

The rationale offered by the Department for its proposal to consider treating individual Chinese companies as market-oriented to some degree or another is that China's economy has evolved over time and now features some degree of private initiative as well as on-going, significant government intervention. See, e.g., Antidumping Methodologies, 72 Fed. Reg. at 29,303. Nowhere in the Department's notice is there any discussion of what the legal basis might be for possibly according market-economy treatment to an individual Chinese company in the context of antidumping proceedings. As turned to next, international law and U.S. domestic law both are quite clear that such a policy and methodology are not contemplated.

A. China's Protocol of Accession at the World Trade Organization ("WTO") Does Not Envision or Authorize Market-Oriented Treatment of Individual Chinese Respondents in Antidumping Duty Proceedings

As an initial matter, it is evident from an international legal standpoint that there is no obligation on the part of the United States, and there is no right of China, to have individual Chinese companies considered as market-economy entities. This conclusion is supported by the relevant portions of paragraph 15 of China's protocol of accession, notably subparagraphs (a) and (d).

> **15. Price Comparability in Determining Subsidies and Dumping**
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> Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

> (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs *for the industry under investigation* or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
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> > (i) If the producers under investigation can clearly show *that market economy conditions prevail in the industry producing the like product* with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs *for the industry under investigation* in determining price comparability.
> >
> > (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show *that market economy conditions prevail in the industry producing the like product* with regard to manufacture, production and sale of that product.
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> * * *
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> (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. *In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.*

Protocol and Decision of the Accession of The People's Republic of China to the World Trade Organization, WT/L/43223 (Nov. 2001) (emphasis added).[1]

[1] Available at http://www.mac.doc.gov/China/ProtocolandDecision.pdf.

As the italicized portions of these pertinent excerpts from paragraph 15 demonstrate, the express focus of this provision speaks only of *the industry or sector under investigation*. There is no mention of or allowance for treatment of individual Chinese companies as market-oriented entities for antidumping purposes. In fact, the language regarding findings of partial market-orientation of China is explicitly limited to industries and sectors.

The omission of any reference to eligibility in this regard for any individual Chinese company should be construed as precluding a requirement that the United States accord any such benefit to China. Had there been a mutual consensus and intent by the WTO's Member States otherwise, that purpose would have been articulated. Under these circumstances, it is apparent that there is no authority under China's protocol of accession at the WTO for the Department to do what it is considering.

B. The Antidumping Statute and the Department's Regulations Likewise Do Not Envision or Authorize Market-Oriented Treatment of Individual Chinese Respondents in Antidumping Duty Proceedings

In the 1994 Uruguay Round Agreements Act, the United States implemented in U.S. domestic law the Uruguay Round's various agreements. Section 773(c) of the Tariff Act of 1930 (19 U.S.C. § 1677b(c)) is the portion of the antidumping statute that deals with computing normal value in antidumping proceedings when non-market-economy countries are involved. Nowhere in section 773(c)'s language is there any reference or inference that individual companies in a non-market economy can qualify as market-oriented.

Also importantly, there was no change to section 773(c) in this regard after China's accession to the WTO in December 2001. Had China's protocol of accession included possible treatment of individual Chinese companies as market-oriented in antidumping proceedings, it is

reasonable to expect that U.S. domestic law would have been amended to reflect that substantial a change.

Lastly on this score, the Department's regulations at 19 C.F.R. § 351.408 outline the Department's non-market-economy dumping methodology and do not permit consideration of individual Chinese companies as market-oriented. The Department's regulations thus are consistent in this respect with paragraph 15 of China's protocol of accession at the WTO and with section 773(c) of the U.S. antidumping statute.

C. Summary

Whether one looks at China's protocol of accession at the WTO or the relevant provisions of the U.S. antidumping statute or the Department's own regulations, there is no legal ground or authority for the sort of market-oriented treatment of individual Chinese companies in antidumping cases that the Department is contemplating. Under current international and domestic law, only Chinese industries or sectors in their entirety are eligible to be considered one-by-one for market-oriented evaluation. It was in this incremental fashion – industry-by-industry or sector-by-sector and not company-by-company – that the WTO's Member States agreed that progress by China toward being considered a market economy as a country after December 11, 2016, would be recognized in antidumping matters. CSUSTL urges that the Department not disrupt this arrangement and respectfully believes that the Department has no international or domestic legal discretion to do so.[2]

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[2] Why the European Community ("EC") has seen fit to adopt a policy along these lines and what the EC's experience has been with this policy are not considered here beyond saying that (a) the EC's decision in no way binds the United States to follow suit and (b) CSUSTL respectfully disagrees with the appropriateness of the EC's action on the legal and practical grounds raised here in these comments.

II. ANY POLICY THAT TREATED INDIVIDUAL CHINESE COMPANIES AS MARKET-ORIENTED IN ANTIDUMPING PROCEEDINGS ALSO WOULD BE IMPRACTICAL AND SHOULD BE REJECTED ON THIS ACCOUNT AS WELL

A. General Observations

Even without the serious legal impediments noted above, CSUSTL is concerned with a fundamental inconsistency inherent in the conceptual framework *per se* that the Department's notice has raised. As the Department commented there, no Chinese industry to date has ever been granted market-oriented status. See Antidumping Methodologies, 72 Fed. Reg. at 29,303. How an individual Chinese company could be so completely insulated from its own and overlapping non-market-economy industries and markets in China as to be market-oriented itself is difficult to fathom. Further, any attempt to demonstrate how an individual Chinese company could be shown to be so insulated in a given instance would be extremely complicated and excessively time-consuming to undertake within the tight time limits mandated by the statute in any, much less all, of the many Chinese antidumping proceedings before the Department.

In particular, if an industry in China is so pervasively affected by non-market conditions as to preclude a finding by the Department that the industry as a whole is market-oriented, it is highly questionable that any individual Chinese company within that industry and tied to other non-market industries in China could operate as a market-oriented business entity or that any market-oriented behavior by an individual Chinese company could be established and quantified in a way that would not be tainted by the industry's non-market situation overall.

A Chinese company's pricing to Chinese customers served by a non-market-economy industry in China, for example, could not be unaffected by the non-market conditions involving the customer base of that industry as a whole. Similarly, such a company could not escape the

non-market distortions affecting its purchase of goods and services in the supply chain universally applicable to its industry.

In CSUSTL's judgment, if the Department were to go down the path that the Department seems to be thinking it might pursue, the Department and the parties would be confronted at each step with the fundamental contradiction just observed and with a well-nigh impossible task. These obstacles and shortcomings are highlighted and brought into sharper perspective by the principal factors that would be relevant to any inquiry into whether an individual Chinese company should be accorded market-economy status.

B. An Individual Chinese Company in a Non-Market Chinese Industry Could Not Reasonably Ever Be Viewed As Segregated from Its Industry and Market So As Properly to Be Considered to Be Market-Oriented

Among other considerations, an analysis of whether an individual Chinese company could be considered market-oriented for antidumping purposes, even though its industry was not market-oriented, would involve scrutiny of the structure of the industry, the legal status of the individual respondent and the other members of the industry, the economic structure of the individual respondent and its industry, all pricing behavior by the individual respondent and its industry, the respondent's costs of production and its industry's costs of production, interaction and support by the various levels of the Chinese government with both the individual Chinese company and its industry and related industries, and various qualitative and quantitative benchmarks.

In other words, if the Department were to consider whether an individual Chinese company were market-oriented, the agency would need to carry out that inquiry in the context of an analysis of that Chinese company's industry and other industries with which the Chinese

company was active. Only in this manner could the agency logically attempt to ascertain whether the individual Chinese company was truly operating in a market-oriented mode apart from its non-market-oriented Chinese industry and market, a proposition that is unrealistic in CSUSTL's opinion given the extensive influence in the market and on companies in China that the national, provincial, and local Chinese governments have.

As turned to next, a review of some of these factors that would have to be considered under section 771(18) of the Tariff Act of 1930 (19 U.S.C. § 1677(18)), simply underscores how virtually impossible it would be for an individual Chinese company to set itself off as a market-oriented firm uninfluenced by its non-market-oriented industry and market in China.

1. Exchange-Rate Distortions

One factor that must be taken into account when the Department decides whether a non-market-economy country should be graduated to market-economy status under the antidumping law is whether the country's currency is freely convertible into the currencies of other countries. In China's case, however, it is widely agreed that the yuan or renminbi is undervalued, by some estimates by 40 percent or more, as the result of protracted, large-scale intervention in the exchange market by China's government. With such undervaluation skewing costs and prices generally, this condition by itself should preclude any individual company operating in China from being given market-economy treatment.

2. Wage-Rate Distortions

Another factor that would need to be explored is the extent to which wage rates for the individual Chinese company and for the other Chinese companies in the industry were set by free bargaining between labor and management. Wage rates in China, however, are not determined

by free bargaining, and so here, too, it is hard to see how it would make sense to consider an individual company in China to be market-oriented anymore than it makes sense to consider Chinese industries as market-oriented.

3. Distortive Limitations on Foreign Firms' Ability to Engage in Joint Ventures and Other Investments

A third factor to be analyzed would be the extent of distortions attributable to limitations on foreign participation in joint ventures and other investments in China. These limitations are common in China, and their effects on the operations of Chinese companies and on the markets in China are both far-reaching and often hard to ascertain and quantify. The interrelationships between such limitations on foreign investments in an industry in China and on any particular company in China would likely be significant and often extensive and would undercut the notion that any individual Chinese company or its industry could accurately be said to be market-oriented.

4. Distortions Caused By Chinese Governmental Ownership or Control of the Means of Production

Chinese governmental influence over Chinese companies and the Chinese market is retained also via Chinese governmental ownership and control of the means of production in a large number of industries. It is difficult to imagine that there are many, if any, Chinese companies that are unaffected by such governmental ownership and control either in that company's industry or in a related industry that is either a supplier or purchaser of that company and its industry or both. Once again, the reality is that individual Chinese companies are affected in myriad ways by the Chinese government's web of ownership and control. How an individual

Chinese company in this situation could be operating or could be shown to be operating as a market-oriented entity is well-nigh incomprehensible.

5. Distortions Due to Chinese Governmental Control Over the Allocation of Resources and Over Decisions on Prices and Output

A fifth factor that the Department would be required to weigh is the degree of Chinese governmental control over the allocation of resources and pricing and output decisions. Such control by the Chinese government in China's economy is extensive and negates claims by an individual Chinese company and its industry of their having market-oriented operations. What resources are available, what the costs of those resources are, how much output is produced, and at what prices the output is to be sold are all integral business decisions. As mentioned earlier, it does not seem possible that any individual company in China could be so removed from the Chinese government's far-reaching economic controls in these regards as to be truly market-oriented.

6. Summary

The foregoing factors individually and in combination are a formidable deterrent to any finding that an individual Chinese company could be deemed to be market-oriented when the Department to date has never determined that any industry in China is market-oriented.

III. CONCLUSION

As the Department stressed in its study in August 2006, China's economy remains thoroughly directed by the Chinese government. It remains to be seen how much progress China's economy will make by December 11, 2016, toward becoming market-oriented in fact. At nearly the halfway mark of the fifteen-year period before it will automatically be considered as a market economy for antidumping purposes, China still has a long way to go.

As this submission has sought to point out, there is a straightforward set of guidelines in China's protocol of accession at the WTO that whatever progress China makes toward a market economy is to be measured industry-by-industry and sector-by-sector, not company-by-company, under the WTO's antidumping regime. These guidelines are reflected in the U.S. antidumping statute and in the Department's regulations. These guidelines as a matter of international and domestic law should be faithfully followed by the Department.

From a practical vantage and as a matter of policy as well, there is every reason to adhere to the international and domestic law that is designed to govern this subject.

- Even the prospect that market-oriented status might be awarded by the Department to individual Chinese companies before December 11, 2016, rather than on an industry-by-industry or sector-by-sector footing, might slow any headway by China to allow its economy to become market-driven.
- Along the same lines, an antidumping policy to treat individual Chinese companies as market-oriented, contrary to China's protocol of accession at the WTO, would send mixed signals to China. The worth of the Department's decision to apply countervailing duties to China's governmental subsidies is that China correctly is being expected by the United States to uphold China's international legal commitments not to subsidize its domestic industry and exports and instead to have China make a successful transition to a market economy. Prior to December 11, 2016, the best chance the United States has to encourage that transition is to recognize under China's protocol of accession if and when an entire Chinese industry or sector truly becomes market-oriented. Permitting on a piecemeal basis individual Chinese companies the privilege of market-oriented status in

U.S. antidumping proceedings will give China very significant benefits that were not negotiated almost certainly without any advantage for the United States in return.

- It would be incongruous for the Department to expend precious resources of its own and of U.S. producers and workers in attempting to resolve whether any individual Chinese company in any respect could be called market-oriented when no Chinese industry has ever been considered by the Department to be market-oriented.
- There is every reason to anticipate that the outcome of such time-consuming deliberations would and should be that no individual Chinese company should be treated as market-oriented.
- The shouldering of this self-imposed load in case after case involving China would be extremely taxing on the Department and to no real purpose.
- At a time when the United States is incurring tremendous and unsustainable debt, and U.S. industries and workers are losing market share, revenue, and jobs due in significant measure to China's mercantilist policies such as the undervaluation of the yuan or renminbi, the wisdom of the approach the Department has broached for consideration is very much open to question and reasonable doubt.

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Thank you for considering these comments by CSUSTL.

Respectfully submitted,

David A. Hartquist

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