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The Honorable Donald L. Evans
Secretary of Commerce
Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

Attention: Edward Yang (Room 7860)
Albert Hsu (Room 3713)

Re: Investigation Into the Status of the Russian
Federation as a Non-Market Economy Country Under the
Antidumping and Countervailing Duty Laws - Rebuttal
Comments

Dear Mr. Secretary:

On behalf of our client, the American Chamber of Commerce in Russia ("AmCham"), we submit the following additional comments/rebuttal in connection with the Department's investigation of the status of Russia as a non-market economy under the antidumping and countervailing duty laws. These

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comments should be considered to supplement and not replace those set forth in AmCham's February 7, 2002 rebuttal comments.

Please do not hesitate to contact the undersigned should you have any questions or comments.

Respectfully submitted,

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Enclosures

I. Introduction

There is no "bright line" test for evaluating the six factors used by the Department in making market economy determinations.¹ Indeed, as set forth in detail in AmCham's February 7 rebuttal comments, and as has been repeatedly stated by the Department in the context of its previous analyses of non-market economies seeking market economy status, "each of the six factors discussed is framed in terms of the *extent* of government intervention, and not in terms of absolutes, suggesting that complete *laissez faire* and a perfectly competitive market economy is not the applicable standard."²

This test, however, does not require that countries be judged against a theoretical model or a perfectly competitive *laissez-faire* economy. Instead, the Department must evaluate the totality of the facts in determining whether a country has met the standard of a market economy.³

¹ 19 U.S.C. § 1677 (18)(B).

² Memorandum for Robert S. LaRussa, "Antidumping Investigation of Certain Small Diameter Carbon and Alloy Seamless Standard Line Pipe and Pressure Pipe from the Czech Republic: Non-Market Economy ('NME') Country Status" at 16 (Dep't Commerce, Nov. 29, 1999) (emphasis in original); Memorandum for Robert S. LaRussa, "Antidumping Duty Determinations on Cold-Rolled Carbon-Quality Steel Products from the Slovak Republic - Market vs. Non-Market Economy Analysis" at 14-15 (Dep't Commerce, Oct. 13, 1999) (emphasis in original); Memorandum for Troy Cribb, "Antidumping Duty Investigation of Certain Steel Concrete Reinforcing Bars from Latvia - Request for Market Economy Status" at 20 (Dep't Commerce, Jan 10, 2001).

³ Memorandum for Faryar Shirzad, "Antidumping Duty Investigation of Silicomanganese from Kazakhstan - Request for Market Economy Status" at 4 (Dep't Commerce, March 25, 2002) (the "Kazak Determination").

As noted, this principle was recently affirmed by the Department in its March 26, 2002 determination that Kazakhstan should henceforth be treated as a market economy. In its analysis, the Department recognized that the Kazak economy was not a perfectly operating market economy. For example, the Department noted that privatization efforts in Kazakhstan had slowed markedly since 1997, wage arrears continue to be a problem, the natural monopolies subject to price controls appears to be extensive, a number of large companies remain in majority state ownership, and the level of corruption is a matter of note.⁴

Notwithstanding these negatives, the Department determined that the Kazak economy had emerged from a centrally planned system and had made reforms throughout its economy. The country "has transitioned from its former heavy, ubiquitous and 'all encompassing' central government to a new supportive, mainly regulatory state which basically aims at supplying infrastructure. Overall, functioning markets have replaced controls in the economy."⁵ In making this finding, the Department made clear that in order to find market economy status, it is not necessary that the country fully meet every factor relative to other market economies; rather, it is only necessary that economic reforms have reached a threshold level such that the country can be considered to have a functioning

⁴ Kazak Determination 1, 8, 10, 14, 15, and 17.

⁵ Kazak Determination at 16.

market economy in which prices and costs exist that can be tied to U.S. antidumping law.⁶

As established at the March 27, 2002 administrative hearing and in the numerous submissions filed by proponents of graduating Russia from non-market to market status, the Russian economy is at least at the same market-oriented level as that of Kazakstan and should be granted market economy status.

II. Additional Comments/Rebuttal

With this background, AmCham requests that the Department consider the following additional comments/rebuttal in making its determination:

1. Corporate Governance Code/Judicial Reform

At the March 27 hearing, opponents of RF graduation alleged that Russian corporations that do allow foreign investment have no guidelines or other parameters by which to ensure that shareholders' rights are protected.⁷ These allegations are meritless.

As noted in AmCham's February 7 submission, the Federal Commission for the Securities Market ("FCSM"), an organization similar to the U.S. Securities and Exchange Commission, supervised the drafting of a Code of Corporate Conduct designed to enhance good governance rules in Russian companies. That

⁶ Kazak Determination at 4.

⁷ See e.g., Transcript before the Department of Commerce in the matter of the Status of the Russian Federation as a Non-Market Country under the U.S. Antidumping and Countervailing Duty Laws (March 27, 2002) ("Tr.") at 130.

corporate governance code (the "Code") was formally adopted on April 4, 2002 following a public process in 2000 and in 2001 in which AmCham has been advised by the FCSM that over 2,500 Russian companies and organizations were involved, 3,500 comments were received and reviewed, and 222 amendments were approved based on these comments.⁸ A copy of the Code is set forth in Exhibit A.

The Code is based on OECD corporate governance principles, and is designed to foster disclosure, transparency and equal treatment of shareholders. Some of the important provisions of the Code include:

- the board of directors should include at least three independent directors;
- the board of directors should establish committees;
- the board of directors must approve financial and business plans of a company;
- the election of a Secretary in Joint Stock Companies;
- the establishment of internal audits; and
- the establishment of the concept of fiduciary duties and responsibility.

We are also enclosing in Exhibit B, a presentation made by the FCSM Chairman, I. Kostikov, to AmCham on April 3, 2002, which explains the principal provisions of the Code and its importance for Russian companies. A number of the items from Chairman Kostikov's presentation (the "Kostikov Presentation") are worthy of emphasis. First, on page 2, Chairman Kostikov

⁸ See Kostikov presentation at 36.

demonstrates (*citing* the EBRD) that corporate governance protections in Russia are on a par with a country such as Latvia which has obtained market economy status, and is ahead of a number of other countries which have also obtained market economy status, including Poland, the Czech Republic, the Slovak Republic, and Kazakstan. Indeed, according to the EBRD, the perception of the extensiveness and effectiveness of corporate governance in Russia is higher than that in other CIS, Southeastern Europe and "Accession" countries (page 3 of the Kostikov Presentation).⁹

Second, in the period between the release of the draft code in September 2001 through March of this year, the capitalization of the companies on the principal Russian stock market index increased by well over 50% (\$33 billion) to a total of \$84.1 billion, despite falling world crude oil prices over that period of time (page 39 of the Kostikov Presentation). This increase in capitalization is no doubt due, in no small part, to (i) the public discussion of the draft Code,¹⁰ (ii) the fact that, as AmCham has been advised by FCM, Russian companies began adopting Code protections even prior to its final approval, and (iii) the additional shareholder protections the Code provides which make Russian joint stock companies a more attractive investment for both domestic and foreign investors.

⁹ AmCham has been informed that the EBRD data on the perception of the extensiveness and effectiveness of corporate governance in Russia was based on an EBRD poll of practicing legal experts in 27 European countries. "Accession" countries are those which have recently applied for EU membership.

¹⁰ See Kostikov presentation at 39-40.

Third, while the Code is not yet mandatory, it is backed by already enacted amendments to the Joint Stock Company Law (providing for the protection of shareholder rights, the equitable treatment of shareholders, and allowing appeal to the courts to reverse refusals of the board of directors to include a matter on the agenda of a shareholders' meeting, and to pass shareholder resolutions) and to the Russian criminal code (providing criminal penalties for failure to disclose information, for disclosure of false and misleading information in prospectuses, and for issuance of securities without state registration) which greatly enhance shareholders' rights. In addition, upcoming amendments to the securities market law, the criminal code and new laws on affiliated persons and insider trading will further enhance such rights.¹¹

In addition to corporate reform, as noted by AmCham's President at the March 27 hearing,¹² the Russian Federation ("RF") has implemented legislation to achieve judicial reform.¹³ First, the Code on Arbitration Procedure ensures that judges act in good faith and render judgments on an unbiased basis. Second, the Law on the Status of Judges has eliminated the role of the prosecutor's office in the civil and commercial judicial process -- the prosecutor's office is no longer permitted to be involved in resolution of corporate or commercial litigation. Third, the Law on the Court System limits the right of RF courts to review awards issued by local and foreign arbitration courts.

¹¹ See pages 10-16 of the Kostikov Presentation for a complete review of the legislative enactments and proposals.

¹² Tr. at 181.

¹³ See Kostikov presentation at 55.

Fourth, the Law on Attorney Activities brings laws of procedure in line with the binding force of awards issued by Russian and foreign arbitration courts.

2. Labor Reform

Opponents of Russia being granted market economy status continue to maintain that the government dictates wages, there is no right to bargain collectively or to strike, and wage arrearages are rampant.¹⁴ Moreover, they cite, in support, a March 2001 Department of State Report which predates, by almost one year, Russia's enactment of a significant new labor law.¹⁵ The opponents' story is fiction.

As set forth in AmCham's February 7 presentation, Russia has enacted a significant new labor law which provides for free bargaining between labor and management. RF laws do not permit the Government to set wages, except for the establishment of a minimum wage to protect workers, and for enterprises that are included in the Government's budget. Chapter 20 of the RF Labor Code provides that all parties in a labor relationship participate in salary arrangements and comply with applicable legislation and regulations. Moreover, the only restriction on the right to strike in the RF is that strikes must be approved by a majority of the employees. The RF is thereby actually protecting its workers by not allowing the actions of a minority to jeopardize the jobs of all workers.¹⁶

¹⁴ See e.g., Tr. at 129

¹⁵ See Tr. at 110. For a full discussion of the February 1, 2002 Labor Law, see AmCham's February 7, 2002 submission.

¹⁶ Tr. at 16.

In the Kazak Determination, the Department made clear that limited restrictions on the administration of wages are acceptable.

Kazakhstan does not have laws which prescribe that the [Government of Kazakhstan] administer wages in the economy, *except in [State Owned Enterprises] and in the establishment of a minimum wage.* (emphasis not in original)¹⁷

As to the issue of wage arrearages, in the Kazak Determination, the Department found a free labor market, notwithstanding the fact that arrearages existed.¹⁸ Like in Kazakhstan, wage arrearages in Russia are declining. As noted by AmCham's President at the March 27 hearing:

[t]here was enormous arrears when Mr. Yeltsin was President, and over the years those arrearages have been significantly reduced. And I think that whatever arrears exist now are reflective not so much of some kind of lack of a free labor market but economic realities in certain industries, in certain plants, in certain areas of Russia.¹⁹

3. The Natural Monopolies

Since the beginning of this proceeding, opponents of graduation have raised the issue of the RF's apparent ownership and control of the utilities and the transportation industries.²⁰ That issue should no longer be relevant, given the fact that the Government of Kazakhstan (the "GOK") also owns and controls its

¹⁷ Kazak Determination at 7.

¹⁸ Kazak Determination at 8.

¹⁹ Tr. at 58.

²⁰ See, e.g., Tr. 114, 137.

utilities, the transportation industry, as well as enterprises in some commercial sectors.²¹ That control and the GOK's ability to determine output and prices of the natural monopolies were insufficient to warrant the Department rejecting market economy status for the Kazak economy. Indeed, the Department noted that even though the list of natural monopolies subject to price controls in Kazakstan appeared to be extensive, such sectors are the same as those in which many Western countries exercise price regulation.²² Based on that precedent, RF involvement in the same industries should likewise be insufficient to warrant the Department rejecting market economy status for Russia.

4. Foreign Investment

At the hearing, the Department asked about foreign investment in Russia.²³ The fact is that foreign investment in Russia is strong and is continuing by a wide variety of large Western investors. Set forth in Exhibit C is an AmCham chart of investment data provided by Western businesses operating in Russia, including the dates of investment. As you will note, many of these significant investments are recent, including \$800 million by Chevron in 1999-2001, \$600 million by Conoco in 1999-2000, \$300 million by General Motors in 2001, \$150 million by Ford Motor Company in 1999-2001, \$170 million by Kraft Foods in 1998-2002, \$120 million by Metro (a European wholesaler) in 2001-2002, and \$500 million by Phillip Morris in 2000-2001. Moreover, significant new investments are planned. Hines plans

²¹ Kazak Determination at 10.

²² Kazak Determination at 14.

²³ Tr. at 63.

on investing \$100 million in 2002-2003 and Metro plans on investing as much as \$100 million in each of the years 2003-2005.

5. Entrepreneurial Activity

One of the considerations cited by the Department in the Kazak Determination was the development of market-based entrepreneurial activity.²⁴ The same can be said of Russia. As stated by Deputy Minister Sharonov,

"[a]ccording to the Russian Institution and the Civil Code, everyone in Russia has the right to engage in entrepreneurial activities, acquire and dispose of property for that purpose, and allocate profit into the development of the enterprise. In addition, the arbitrary interference of the state into the private affairs of entrepreneurs is prohibited.²⁵

6. U.S. Business Support for a Market Economy Determination

In the Kazak Determination, the Department noted in support of its market economy finding that a range of U.S. businesses operating in Kazakstan had commented in the investigation and that all appeared to be favorably disposed to the country's investment climate.²⁶ The support of AmCham with its 650, mostly U.S. company, businesses operating in Russia, and that of the U.S.-Russia Business Council with its 260 members, for a

²⁴ Kazak Determination at 15.

²⁵ Tr. at 13.

²⁶ Kazak Determination at 9.

positive market economy determination for Russia should lead to the same conclusion.²⁷

7. WTO Accession

The Department cited Kazakstan's WTO accession bid, even though accession negotiations continue, as an important market economy consideration since it is indicative of the GOK's commitment to market openness and its integration into the world market.²⁸ Thus, WTO final accession should not be a requirement for finding market economy status, as the opponents to graduation would have it.²⁹ Russia itself is walking the same path as Kazakstan in regard to WTO accession, and it is another indication of the market status of Russia's economy.

8. Corruption

The opponents to graduation argue that corruption is rampant in Russia and therefore, there is *de facto* economic distortion in the economy even in light of the *de jure* provisions that provide for economic stability.³⁰

²⁷ Note that the two company witnesses that testified before the Department in opposition to graduation only represent specialty liquor and film interests. While their issues may be important to the companies they represent, those isolated instances should not taint the overwhelming support for a market economy determination provided by AmCham, the U.S.-Russia Business Council, and Arthur Anderson -- large organizations representing broad American interests in the RF.

²⁸ Kazak Determination at 16.

²⁹ Tr. at 135.

³⁰ See e.g., Tr. at 137, 157-158.

Even assuming arguendo, that some corruption exists in the Russian economy, that is not sufficient to deny Russia market economy status. As noted by the Department in the Kazak determination:

[a]lthough we find the level of corruption to be a matter of note, it does not alter the fact that prices and costs in Kazakhstan are being generated through market forces. Moreover, we note that even in market economies, there exist varying degrees of corruption. According to one index, although Kazakhstan registers high levels of perceived corruption, it is no higher than levels for a number of market economies. . . . While there are substantial concerns about corruption in Kazakhstan, we do not find it to be a significant factor differentiating Kazakhstan from other market economies.³¹

³¹ Kazak Memo at 15 (citations omitted).

III. Conclusion

In light of the foregoing, the testimony provided at the Department's March 27, 2002 administrative hearing, and AmCham's February 7, 2002 rebuttal comments, AmCham respectfully requests that the Department determine that Russia be considered a market economy for purposes of the Tariff Act of 1930, as amended.

Respectfully submitted,

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