

# **Risks, Rewards, and Results: U.S. Companies in China and Chinese Companies in the United States**

Testimony before the U.S.-China Economic and Security Review Commission  
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## **Introduction**

This testimony addresses an important question posed by the Commission: Are Chinese companies in the United States reshaping the U.S. competitive landscape? This testimony focuses on two ways in which Chinese companies investing in the United States are reshaping the competitive landscape or threaten to do so if policy action is not taken.

First, there are a number of Chinese investments in the United States that appear designed to allow Chinese firms whose products have been dumped into the U.S. market and subsidized by the Government of China to nonetheless access the U.S. market for those products. By producing, or at least finishing, those products in the United States through a corporate presence here, those products are no longer subject to duties to offset the dumping and subsidization that has been found. The result may be continued injury to competing domestic producers and workers, with no effective means of redress.

Second, Chinese firms – whether majority owned by the Government of China or otherwise influenced by Chinese Government policies – may operate in the United States for strategic purposes rather than on purely commercial terms. These firms may engage in anticompetitive conduct, such as predatory pricing, discriminatory sourcing arrangements, or seeking control over access to resources and technology, in furtherance of their strategic goals. However, because U.S. antitrust law operates on the assumption that firms are rational, profit-maximizing actors, it may be insufficient to counteract such behavior. In addition, while recent reforms to the investment screening process used by the Committee on Foreign Investment in the United States (“CFIUS”) are aimed at strengthening oversight of such investments, it remains to be seen how effectively those reforms will be implemented. Additional reforms may be required to ensure the United States does not lose its competitive edge in important technologies.

This testimony concludes with preliminary policy recommendations to address these challenges.

## **Investments by Firms found to Export Dumped or Subsidized Goods to the United States**

In recent years, massive Chinese overcapacity in a broad array of sectors has resulted in surging exports to the United States. In many cases, domestic industries and workers have joined

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<sup>1</sup> This testimony reflects the personal views of the author and not necessarily the views of her firm or the firm’s clients.

together to petition for relief from these unfairly traded imports. Petitioners must demonstrate not only that such imports are being dumped below normal value and/or subsidized by the Government of China, but also that such imports have caused, or threaten to cause, material injury to the domestic industry producing the domestic like product in the United States.<sup>2</sup>

Petitioning for relief is no small matter. Industries must gather the information to demonstrate dumping, subsidization, and injury, and the resulting parallel investigations by the U.S. Department of Commerce (“Commerce”) and U.S. International Trade Commission (“Commission”) generally take about thirteen months to conclude. If Commerce finds dumping and/or subsidization, and if the Commission also finds material injury or threat thereof, antidumping and/or countervailing duty orders are imposed on imports of the product concerned. The duties are designed to offset the dumping and/or subsidization that is found in order to restore conditions of fair trade to the market and allow domestic producers and workers to compete.

In the past ten years, orders have been imposed on nearly 70 separate products from China, in industries ranging from iron and steel to wood and paper products, chemicals, rubber products, green energy goods, and a broad array of other manufactured items.

U.S. Antidumping and Countervailing Duty Orders Issued on Goods from China, 2008 – 2018<sup>3</sup>

<b>Product</b>	<b>AD</b>	<b>CVD</b>	<b>Order Date</b>
1,1,1,2 Tetrafluoroethane (R-134a)	X		04/19/2017
1-Hydroxyethylidene-1, 1-Diphosphonic Acid (HEDP)	X	X	05/18/2017
Aluminum Extrusions	X	X	05/26/2011
Aluminum Foil	X	X	04/19/2018
Ammonium Sulfate	X	X	03/09/2017
Amorphous Silica Fabric	X	X	03/17/2017
Biaxial Integral Geogrid Products	X	X	03/03/2017
Boltless Steel Shelving Units Prepackaged for Sale	X	X	10/21/2015
Calcium Hypochlorite	X	X	01/30/2015
Carbon and Alloy Steel Cut-to-Length Plate	X	X	03/20/2017
Carbon and Certain Alloy Steel Wire	X	X	1/8/2015
Carton-Closing Staples	X		05/08/2018
Cast Iron Soil Pipe Fittings	X	X	08/31/2018
Chlorinated Isocyanurates	X		11/13/2014
Circular welded austenitic stainless pressure pipe	X	X	3/19/2009

<sup>2</sup> See 19 U.S.C. §§ 1671(a) and 1673(a).

<sup>3</sup> In some cases the CVD order on a certain product was issued earlier than the AD order. In such cases, the later date of the AD order is listed.

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<b>Product</b>	<b>AD</b>	<b>CVD</b>	<b>Order Date</b>
Circular welded carbon quality steel line pipe	X	X	5/13/2009
Circular welded carbon quality steel pipe	X	X	07/22/2008
Citric acid and certain citrate	X	X	5/29/2009
Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses	X	X	11/17/2010
Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel	X	X	06/11/2018
Cold-Rolled Steel Flat Products	X	X	07/14/2016
Corrosion-Resistant Steel Products	X	X	07/25/2016
Crystalline Silicon Photovoltaic Cells	X	X	12/07/2012
Crystalline Silicon Photovoltaic Products	X	X	02/18/2015
Drawn Stainless Steel Sinks	X	X	4/11/2013
Electrolytic manganese dioxide	X		10/07/2008
Fine Denier Polyester Staple Fiber	X	X	07/20/2018
Forged Steel Fittings	X	X	11/26/2018
Hardwood Plywood Products	X	X	01/04/2018
High Pressure Steel Cylinders	X	X	06/21/2012
Hydrofluorocarbon Blends	X		08/19/2016
Kitchen Appliance Shelving and Racks	X	X	9/14/2009
Laminated woven sacks	X	X	08/07/2008
Large Residential Washers	X		02/06/2017
Light-walled rectangular pipe and tube	X	X	08/05/2008
Lightweight thermal paper	X	X	11/24/2008
Magnesia Carbon Bricks	X	X	9/21/2010
Melamine	X	X	12/28/2015
Monosodium Glutamate	X		11/26/2014
Multilayered Wood Flooring	X	X	12/08/2011
Narrow Woven Ribbons With Woven Selvedge	X	X	9/1/2010
New Pneumatic Off-the-Road Tires	X	X	09/04/2008
Non-Oriented Electrical Steel	X	X	12/03/2014
Oil Country Tubular Goods	X	X	5/21/2010
Passenger Vehicle and Light Truck Tires	X	X	08/10/2015
Polyethylene terephthalate film, sheet, and strip	X		11/10/2008
Polyethylene Terephthalate Resin	X	X	05/06/2016
Potassium Phosphate Salts	X	X	7/22/2010
Prestressed Concrete Steel Rail Tie Wire	X		06/24/2014
Prestressed Concrete Steel Wire Strand	X	X	7/7/2010
Raw flexible magnets	X	X	09/17/2008

<b>Product</b>	<b>AD</b>	<b>CVD</b>	<b>Order Date</b>
Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe	X	X	11/10/2010
Seamless Refined Copper Pipe and Tube	X		11/22/2010
Small diameter graphite electrodes	X		02/26/2009
Sodium Hexametaphosphate	X		03/19/2008
Sodium nitrite	X	X	08/27/2008
Stainless Steel Flanges	X	X	08/01/2018
Stainless Steel Sheet and Strip	X	X	04/03/2017
Steel Grating	X	X	7/23/2010
Steel nails	X		08/01/2008
Steel threaded rod	X		4/14/2009
Steel wire garment hangers	X		10/06/2008
Stilbenic Optical Brightening Agent	X		05/10/2012
Tool Chests and Cabinets	X	X	06/04/2018
Tow Behind Lawn Groomer	X		8/3/2009
Uncoated Paper	X	X	03/05/2016
Uncovered innerspring units	X		02/19/2009
Utility Scale Wind Towers	X	X	02/15/2013
Xanthan Gum	X		07/19/2013

In many cases the rates of dumping and subsidization that are found are very high, with duties on some Chinese producers and exporters reaching triple digits. When Chinese producers are no longer allowed to export products to the United States at prices that reflect un-remedied dumping and subsidization, many find they can no longer compete in the U.S. market. In some cases, Chinese producers have opted to invest in the United States to produce the product that was found to be unfairly traded in order to continue accessing the U.S. market.

In 2007, for example, Tianjin Pipe Corporation (“TPCO”), a state-owned company and the largest pipe producer in China, commissioned a feasibility study on building a seamless pipe mill in the United States, fearing that its exports may soon be the target of antidumping and countervailing duty investigations.<sup>4</sup>

- In 2009, the domestic industry and workers producing oil country tubular goods (“OCTG”) filed petitions alleging that pipe from China was being dumped and subsidized and injuring the U.S. industry. In late 2009 and early 2010, antidumping and countervailing duties were imposed. Commerce found that TPCO benefited from

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<sup>4</sup> Paulson Institute, “Pipe Dreams: How a Chinese State Company Sought to Ride the U.S. Energy Boom,” Paulson Papers on Investment (Nov. 2014).

countervailable subsidies at a rate of 10.36 percent and was dumping OCTG into the U.S. market at a dumping margin of 29.94 percent.<sup>5</sup>

- In 2009, the domestic industry and workers also filed petitions on seamless line pipe from China. In 2010, antidumping and countervailing duty orders were imposed. Commerce found that TPCO benefited from countervailable subsidies at a rate of 13.66 percent and was dumping seamless pipe into the U.S. market at a dumping margin of 48.99 percent.<sup>6</sup>

TPCO announced it would build a \$1 billion-plus, 1.6 million square foot pipe plant in Texas in 2009, and phase one of its construction was completed in 2014.<sup>7</sup> In the first phase, TPCO took plain-end pipe (so-called “green pipe”) and merely turned it into finished casing pipe at its end finishing facility.<sup>8</sup> Phase two of its investment is the construction of a rolling mill that will use raw steel billets to produce the plain-end pipe being fed into its end finishing facility, but that phase is not expected to be operational until this year.<sup>9</sup>

The investment poses several potential competitive challenges to domestic steel pipe producers and their workers.

First, to the extent that TPCO is importing partially finished pipe that is not subject to antidumping and countervailing duties and finishing that product in the United States into product that would otherwise be covered, it may continue to be distorting the U.S. market with dumped and subsidized goods and injuring U.S. producers with no effective remedy.

U.S. law does contain a provision designed to prevent such circumvention, but it only applies in limited circumstances.<sup>10</sup> The provision only applies if the process of assembly or completion in

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<sup>5</sup> *Certain Oil Country Tubular Goods From the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination*, 74 Fed. Reg. 64,045 (Dep’t Commerce Dec. 7, 2009); *Certain Oil Country Tubular Goods from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 Fed. Reg. 20,335 (Dep’t Commerce April 19, 2010).

<sup>6</sup> *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 75 Fed. Reg. 57,444 (Dep’t Commerce Sept. 21, 2010); *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances, in Part*, 75 Fed. Reg. 57,449 (Dep’t Commerce Sept. 21, 2010).

<sup>7</sup> Paulson Institute, “Pipe Dreams: How a Chinese State Company Sought to Ride the U.S. Energy Boom,” Paulson Papers on Investment (Nov. 2014).

<sup>8</sup> TEDA TPCO America Corporation, “Project Introduction,” available on-line at: <http://tpcoamerica.com/about-us/project-introduction/>.

<sup>9</sup> *Id.*

<sup>10</sup> 19 U.S.C. § 1677j(a).

the United States is “minor or insignificant” and the value of the imported parts or components is a “significant” portion of the total value of the finished merchandise. To determine whether the process is minor or insignificant, Commerce is directed to consider the level of investment and research and development in the United States, the nature of the production process, the extent of domestic production facilities, and whether the value of domestic processing represents a small portion of the value of the finished merchandise. In addition, Commerce is directed to consider sourcing patterns, whether the finisher in the United States is affiliated with the foreign part or component producer, and whether imports of the parts or components have increased after the initiation of the investigation on the finished merchandise.

The relative value of the parts or components and the finished product may be distorted by unfair trade practices, falsely inflating the significance of the domestic processing and preventing a finding for circumvention. For example, it is likely that the government subsidies the benefitted finished products also apply to components produced in China, and dumping may occur as well. In such a case, the value of the parts or components would be artificially reduced, making the domestic processing appear more significant as a portion of total finished product value than it actually is. Reforms to the statute or clarification of Commerce practice in this regard could help better prevent such circumvention.

A second, separate concern is that Chinese producers that have already been found to engage in unfair trade practices with regard to their exports to the United States may engage in similar market-distorting practices as investors in the United States. This concern is particularly acute with regard to state-owned and invested enterprises, which are fully backed by the Government of China and have the resources and support to pursue unprofitable business plans in the service of the government’s policy goals. But the concern is not limited to state-owned enterprises. Many Chinese enterprises, whether formally state-owned or not, have strong links to the government, including current or former party officials who sit on the board or in other governing positions and party committees within the corporate structure. In addition, many enterprises enjoy financing from China’s state-owned banks, which dominate the financial sector in China. These banks are required to implement the government’s policy goals, and they use their financing to do so.

Thus, a Chinese competitor investing in the United States may continue to price its products below cost in order to take market share from domestic producers. As explained in more detail in the next section, while such action would be remedied by the antidumping law in the case of imports, it may not qualify as predatory pricing under U.S. antitrust law. In addition, the Chinese investor may continue to enjoy significant subsidies from the Government of China, including through grants, loans, equity infusions, debt forgiveness, and other forms of financing. These subsidies would enable the investor to produce with much lower equity and financing costs than its American competitors, with no recourse for those competitors.

TPCO is not the only Chinese company that has been subject to antidumping or countervailing duty investigations and invested in producing that same product in the United States. In 2014, the United Steelworkers filed antidumping and countervailing duty petitions on passenger vehicle and light truck tires from China, and orders were imposed in 2015. In 2014, Chinese producer

Giti Tire Group announced plans to invest in a tire plant in the United States, and in 2017 it initiated production at its \$560 million tire plant Richburg, South Carolina.<sup>11</sup> Also in 2017, the Chinese company Triangle Tyre Co. announced it would invest \$580 million to build its first U.S. manufacturing plant, in Tarboro, N.C.<sup>12</sup>

The U.S. imposed orders on coated paper from China in 2010 and uncoated paper in 2016. In 2015, China's Sun Paper Company announced it would spend about \$1.36 billion to build a pulp mill in Arkansas in its first investment outside the country.<sup>13</sup> The plant is currently limited to making fluff pulp, which is not subject to any antidumping or countervailing duty orders. Sun Paper, however, was assigned a countervailing duty rate of 178.03 percent in the investigation on coated paper and 176.75 percent in the investigation on uncoated paper.<sup>14</sup>

### **Chinese Investments for Strategic or Policy Goals**

On August 4, 2017, China's State Council promulgated the Guiding Opinions on Further Guiding and Regulating Overseas Investment ("Guiding Opinions").<sup>15</sup> The Guiding Opinions classify outbound investments into three categories: encouraged, restricted, and prohibited. Among the encouraged categories are: (1) investments to promote export of China's excess production capacity, high-end equipment, and technology standards; and (2) investments that facilitate collaboration with foreign companies engaged in the development of high and new technology and advanced manufacturing.<sup>16</sup> Among the restricted categories are: (1) investment platforms without tangible industrial projects; and (2) investments involving outdated manufacturing equipment or technology.<sup>17</sup> Investments in the encouraged category enjoy government support regarding currency conversion, debt financing from state-owned banks, and other items.<sup>18</sup>

The policy led one law firm advising U.S. companies seeking Chinese investment to consider, among other factors, whether the Chinese investor's local government supports the project and

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<sup>11</sup> Bruce Davis, "Giti's U.S. plant begins production in S.C.," *Rubber & Plastics News* (Oct. 23, 2017).

<sup>12</sup> Stephanie Hernandez McGavin, "China's Triangle plans first manufacturing plant in U.S.," *Automotive News* (Nov. 5, 2018).

<sup>13</sup> "China's Sun Paper to build \$1.36 billion facility in U.S.," Reuters (Nov. 23, 2015).

<sup>14</sup> *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 Fed. Reg. 59,212 (Dep't Commerce Sept. 27, 2010); *Certain Uncoated Paper From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 81 Fed. Reg. 3110 (Dep't Commerce Jan. 20, 2016).

<sup>15</sup> See, e.g., "New Policies on China's Overseas Investments," WilmerHale (Sept. 1, 2017).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

whether the project will benefit domestic Chinese industry by moving manufacturing and technology to China.<sup>19</sup>

Investments made pursuant to these government policies, and with Chinese government support, raise a number of policy concerns.

First, firms that are investing in order to export China's production and technology – whether state-owned or otherwise supported by the Government of China – may have the ability and incentive to sell their products, including those made in the United States, below the cost of production. Under current U.S. antitrust law, such practices are not necessarily considered prohibited predatory pricing. Pursuant to the recoupment test, pricing is only deemed anti-competitive if the predator is likely to eventually collect enough profits to make up for the losses caused by the predatory behavior.<sup>20</sup> The test is based on the theory that a predator who could not recoup its losses would either not engage in the predatory practices to begin with or will eventually exit the market, causing no long-term damage to competitors or consumers.

A Chinese state-owned enterprise or other enterprise investing pursuant to the Chinese government's policy goals, by contrast, may be able to rely on state support to maintain losses that may never be recouped, and engage in predatory pricing in order to gain U.S. market share in the furtherance of those political or industrial policy goals. Such a firm could engage in predatory pricing behavior that causes severe damage to its U.S. competitors, but, under current law, such behavior would not be considered anticompetitive as long as the Chinese firm was not expected to recoup its losses.

Second, Chinese firms and state-owned firms in particular are known to discriminate against foreign goods and technology in strategic sectors. The Guiding Opinions appear to encourage investments that export Chinese technology standards. This is consistent with China's Indigenous Innovation and other policies that seek to promote China's own technology standards at the expense of those established in other countries. While international trade rules prohibit such discrimination in the Chinese market in many cases, there are no rules that prohibit a particular Chinese entity from discriminating against U.S. goods or technology when it invests in the United States.

Third, as noted above, another goal of the Guiding Opinions is for Chinese firms to "collaborate" with overseas companies that develop high or new technology or are engaged in advance manufacturing. Chinese investments in U.S. start-ups that produce critical and sensitive technology have reportedly risen to such a degree that they are the subject of a report by the U.S. Department of Defense.<sup>21</sup> One Silicon Valley financier reported being approached by three

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<sup>19</sup> *Id.*

<sup>20</sup> Antonio Capobianco and Hans Christiansen, "Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options," OECD Corporate Governance Working Papers No. 1 (2011) at 21.

<sup>21</sup> Paul Mozur and Jane Perlez, "China Bets on Sensitive U.S. Start-Ups, Worrying the Pentagon," *The New York Times* (March 22, 2017).



Chinese state-owned enterprises to help them invest in U.S. companies over a six-month period, remarking: “‘In all three cases, they said they had a mandate from Beijing, and they had no idea what they wanted to buy,’ he said. ‘It was just any and all tech.’”<sup>22</sup> While recent reforms to the CFIUS process increase the ability to screen Chinese investments that target critical technology, the law remains focused on national security concerns and not broader economic competitiveness concerns.

### **Policy Recommendations**

There are a number of steps policymakers should consider to ensure that Chinese investments in the United States do not undermine the economic and security goals of the country.

First, greater transparency regarding the scale and character of Chinese investment in the United States is required. This includes greater transparency about Chinese government support for overseas investment in the United States, including direct support of such investments by state-owned and invested enterprises as well as other forms of support such as grants and financing. CFIUS, for example, could expand its portfolio to cover Greenfield investments as well as joint ventures, mergers, and acquisitions. In addition, the SEC could require that any firm listed in the United States report as material information any shares held by a Chinese government entity, any current or former party officials on the firm’s board or in management positions, and any forms of government support received and on what terms, including financing from China’s state-owned policy banks.

Second, policymakers should investigate whether Chinese producers that have been found to export dumped and subsidized product in the United States are investing in the United States in a manner that continues to distort the domestic market and harm domestic producers and workers. Responses could include strengthening the antidumping and countervailing duty anti-circumvention provisions that apply to merchandise further manufactured in the United States, either through statute or practice. Policymakers should also consider whether a private right of action or other petition process may be warranted for domestic industries and workers that are harmed by anticompetitive practices that may not be actionable under existing antitrust laws. This could include a revised predatory pricing test based on cost of production elements rather than just recoupment. The tool could also address price undercutting or market share expansion facilitated by foreign government subsidies, as well as discrimination against domestic goods and technology.

Finally, policymakers should consider whether more robust monitoring and screening is needed to prevent Chinese firms from appropriating critical U.S. technologies and know-how. While the improved CFIUS process is an important first step, it could be further expanded to apply to considerations of economic security and well as national security, as is the case with investment screening mechanisms in some other countries.

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<sup>22</sup> *Id.*