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The Honorable David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
14th Street & Pennsylvania Avenue, NW
Washington, DC 20230

Re: *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise*

Dear Assistant Secretary Spooner:

On behalf of the Rebar Trade Action Coalition (and its individual members Nucor Corp., Commercial Metals Co., and Gerdau Ameristeel Inc.), we respond to the Department's request for comments regarding whether and under what circumstances it should consider granting market-economy treatment to individual respondents in antidumping cases involving China. *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. 29,302 (May 25, 2007).

The Department has no legal authority to grant market-economy treatment to individual Chinese companies or enterprises. This proposal represents such a substantial change to our trade remedy laws that we believe only Congress could make such a change. Moreover, as explained in greater

detail below, adopting such a practice would seriously weaken our trade laws and would harm U.S. companies and workers. Graduating individual companies is simply a "back-door" method of graduating China to market-economy status as a whole.

I. U.S. Law Does Not Envision or Permit a "Market-Oriented" Analysis of Individual Chinese Companies

Commerce's proposal to grant market-oriented status to individual Chinese companies is contrary to the U.S. trade laws, as demonstrated by the statutory scheme itself. Section 773 of the Trade Act (19 U.S.C § 1677a) sets forth the methods for calculating normal value in antidumping investigations, and subsection (c) specifies the calculation methods that Commerce shall use for nonmarket economy countries. The law focuses solely on market economy and nonmarket economy countries, as opposed to companies or enterprises. There are no fewer than six references to "nonmarket economy countries" and "market economy countries" in this section of the statute, but none to "market economy companies." There is no indication whatsoever that Congress intended to allow exceptions for individual companies within a nonmarket economy country.

The very definition of "nonmarket economy country" provided in the statute reflects the fact that all sales within such a country are tainted, such that a normal value cannot be calculated for purposes of the antidumping law. The definition reads:

> The term "nonmarket economy country" means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that

> sales of merchandise in such country do not reflect the fair value of the merchandise.[1]

As this statutory language indicates, if Commerce determines that a country is a nonmarket economy country pursuant to the statute, then sales (that is, all sales) of merchandise in that country are tainted and cannot be used to calculate a dumping margin.

There is no indication in the statute or the legislative history that individual companies within a nonmarket economy country can or should receive any form of differential treatment.

II. At the Time China Received Permanent Normal Trade Relations, Neither the United States nor China Envisioned Exceptions to NME Status for Individual Companies

When China joined the World Trade Organization and was granted permanent normal trade relations (PNTR), it agreed in its Protocol of Accession to be treated as a non-market economy for up to 15 years after joining the WTO (until the year 2014). The Protocol of Accession, like U.S. law, does not envision any exceptions for individual companies or enterprises. To the contrary, the Protocol's language even clearly indicates that exceptions may be made on an industry basis, but not for companies or enterprises. Section 15 of the Protocol states:

> (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

[1] 19 U.S.C. § 1677 (18)(A) (emphasis added). Notably, 19 U.S.C. § 1677 (18)(C) also refers to determinations with respect to a foreign country as a nonmarket economy country.

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.

Protocol and Decision of the Accession of The People's Republic of China to the World Trade Organization, WT/l/43223 (Nov. 2001) (emphases added).[2] Commerce's proposal would negate the agreement in China's Protocol of Accession to treat China as an NME for up to 15 years, and would be contrary to the Protocol's specific focus on industries, as opposed to individual companies or enterprises.[3] Congress relied on the language of this negotiated agreement when it approved permanent normal trade relations (PNTR) for China. Any action by Commerce to grant market economy status to individual companies would be a significant trade concession to China well beyond anything negotiated by the countries in the Protocol.

Congress did not intend that Commerce should make wholesale exceptions to the non-market economy treatment of China. In fact, Congress

[2] Available at http://www.lawinfochina.com/WTO/Legal2/102.doc.

[3] The focus on industries is consistent with the one exception to NME status available in the trade laws, whereby Commerce can permit market economy treatment if an industry is determined to be a "market-oriented industry" (MOI). This exception was created not by law or regulation, but by Commerce's own practice. However, in the 15 years since this exception was created, Commerce has never found a Chinese industry to be "market oriented."

has clearly expressed its intent that there should be no weakening of the trade remedy laws, pursuant to its granting of trade promotion authority.[4]

Any decision to begin treating individual Chinese companies as market-based would be extremely harmful to U.S. industries that use the trade remedy laws. Individual "market-oriented" Chinese companies would be very likely to obtain much lower antidumping margins than their NME counterparts. Any change in practice by Commerce would more than negate any benefit to U.S. companies by Commerce's recent preliminary decision to begin applying the countervailing duty (CVD) laws to China.

Since China's accession, Commerce has consistently and correctly found that China remains a non-market economy (NME). Commerce reiterated this finding in August 2006, in an 80-page analysis made in the *Lined Paper School Supplies* investigation, which carefully documents how China's economy is still government controlled. In particular, Commerce went through each of the six criteria included in the statute and made the following findings:

- **Currency rates:** China still maintains significant restrictions on both the interbank foreign exchange market and on capital account transactions, interfering with the normal effect of markets on currency rates.[5]

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[4] *See* 19 U.S.C. § 3802 (b)(14) ("The principal negotiating objectives of the United States with respect to trade remedy laws are— (A) to preserve the ability of the United States to enforce rigorously its trade laws, including the antidumping, countervailing duty, and safeguard laws . . .")

[5] *See* Memorandum from Shauna Lee-Alaia et al., Office of Policy, Import Administration, to David M. Spooner, Assistant Sec'y, Import Administration, re: Anti-Dumping Investigation of Certain Lined Paper Products from the Peoples Republic of China ("China") – China's status as a non-market economy ("NME") at 9 – 13 (Aug. 30, 2006) ("China as NME Memorandum").

- **Wage rates:** China still suffers from a lack of independent unions, prohibits the right to strike, and significantly restricts labor mobility.[6]

- **Joint ventures and investment**: China still manages foreign investment to a significant degree, by guiding foreign direct investment (FDI) toward favored export-oriented industries and specific regions, shielding certain domestic firms from competition, and relying on industry-specific FDI rules and regulations.[7]

- **Government ownership or control of means of production:** China continues to exert direct state control over many areas of the economy, especially in core industries. Private land ownership is prohibited, and property rights remain poorly defined and weakly enforced.[8]

- **Government control over resource allocation:** "The PRC government, at all levels, remains deeply entrenched in resource allocation," particularly with regard to investment.[9]

- **Other factors:** "China faces a myriad of major challenges in overcoming institutional weaknesses regarding rule of law, property rights, and bankruptcy."[10]

In short, Commerce concluded, after an exhaustive study conducted less than a year ago, that despite some reforms, "market forces in China are not yet sufficiently developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis."[11]

All of this evidence, individually and collectively, indicates that there is no statutory basis under the antidumping law for a finding that individual

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6 *See* China as NME Memorandum at 13 – 22.

7 *See id.* at 22 – 33.

8 *See id.* at 33 – 46.

9 *Id.* at 3 & 77; *see also id.* at 46 – 77.

10 *Id.* at 3 & 79; see also id. at 77 – 80.

11 *Id.* at 4, 5, 6 & 82.

Chinese companies are "market-oriented," so that the statutory provisions regarding non-market economy countries would not apply.

III. Commerce's Proposal Has No Legal or Factual Basis and Would be Extremely Harmful

Given the plain language of the statute, the China Protocol of Accession, and the clear findings of the Department, the Rebar Trade Action Coalition strongly believes that any decision to begin treating individual Chinese companies as market-based would have no legal or factual basis whatsoever, and would be extremely harmful.

A. Commerce's Proposal Would Be Impossible to Administer in Practice, and Would Certainly Result in Legal Challenges

As a practical matter, any decision to begin treating individual Chinese companies as market-based would be extremely difficult if not impossible to administer in practice.

The likely result of such a change is that for every antidumping case against China, most if not all Chinese producers would claim that they were "market-oriented" enterprises, and thus exempt from the NME antidumping calculation. This would require Commerce to investigate and rule on the merits of these claims for a very large number of companies. There is no readily identifiable standard for judging whether a Chinese producer is "market-oriented." At the very least, Commerce would need to undertake an analysis similar to that outlined in the statute for the country's NME status as a whole. These claims, and their subsequent analysis, would quickly overwhelm the Department staff and add significantly to the cost of a case for domestic industry petitioners as well. At a time when the resources of Commerce's International

Trade Administration are already stretched (to the point where Commerce is declining to conduct numerous verifications of various foreign respondents), there is simply no reason to add complex, burdensome procedures not required by our trade laws.

It is incorrect to presume that Commerce could simply calculate a "market-oriented" company's antidumping margin using its established methodologies. For example, even if a seller of goods in China were treated as "market oriented," this ignores the fact that its suppliers and customers are not market oriented, so that prices for production inputs and finished Chinese selling prices are still distorted. Indeed, this is just one example of why no accurate margin calculation would be possible.

Commerce's proposed practice could also result in differential treatment of similarly situated Chinese companies, which would likely result in court and WTO appeals. If Commerce were to find that some Chinese companies are market-oriented while others are not, there is no practical way that Commerce could "mix" its market economy and NME methodologies within a single antidumping case. Differential treatment of Chinese companies within the same case would be quickly challenged as a violation of the WTO obligations of the United States.

In short, we strongly believe that Commerce's proposal would create an administrative nightmare and drag Commerce into an unnecessary legal quagmire.

B. Chinese Subsidiaries of U.S. and Multinational Enterprises Should Not Receive Special Treatment

We anticipate that one or more U.S. companies, or multinational enterprises, with Chinese operations may submit comments in favor of Commerce's proposal. However, even Chinese subsidiaries of U.S. multinationals must be treated like all other non-market economy companies for purposes of the antidumping law. Treating Chinese subsidiaries as "market-oriented" would ignore the fact that these subsidiaries operate in highly distorted economic conditions, as discussed above.

Commerce itself has repeatedly found that foreign direct investment in China remains heavily influenced by subsidies granted by the national and provincial governments. China has conceded as much in its subsidies notification to the World Trade Organization, and Commerce has initiated subsidy investigation on numerous of these subsidy programs in the ongoing CVD investigation of *Coated Free Sheet Paper from China*. The array of subsidies is pervasive, including but not limited to cash grants; land grants; capital infusions; transfers of ownership on non-commercial terms; conversion of debt to equity; preferential loans and credit; debt forgiveness; tax incentives and exemptions; export subsidies; domestic preference subsidies; and raw material, transportation, and energy subsidies.

Therefore, subsidiaries that decided to relocate in China did so in large part because of the subsidies available to foreign direct investors. Indeed, we submit that if Commerce were to consider extending "market-oriented" treatment to individual Chinese companies, it could only do so after receiving

proof that such companies do not enjoy the benefit of any countervailable subsidies. Accordingly, Commerce would essentially be required to self-initiate and complete a full countervailing duty investigation of any Chinese company requesting market-oriented treatment. We urge that, in the unlikely event that Commerce chooses to allow a "market-oriented enterprise" exception to the NME methodology, this requirement of a full CVD investigation be included as a part of this exception.

On a more fundamental level, any subsidiary which decided to relocate to China did so despite the knowledge that China would remain subject to the non-market economy provisions of the antidumping law for up to 15 years. Commerce's proposal would merely reward companies that have moved their manufacturing and their workforce to China, taking full advantage of Chinese subsidies and ultimately increasing our manufacturing trade deficit.

This is perhaps the most disturbing aspect of Commerce's proposal, because it essentially incentivizes U.S. companies who choose to move offshore, and penalizes those who choose to maintain manufacturing facilities in the United States. We have no idea why the Commerce Department would wish to adopt such a policy or to aid and abet the transfer of U.S. manufacturing operations overseas. Moreover, we believe that Commerce does not have the authority to adopt such a sweeping rewrite of our trade remedy laws without authorization from Congress.

From a factual perspective, we also emphasize that pervasive misallocation of resources in China entangles even U.S.-owned subsidiaries,

and permeates their operations. There is no legitimate way to disaggregate how a foreign subsidiary benefits from the Chinese command economy's control of:

- Currency
- Labor costs
- Energy and raw material costs
- Port and transportation systems
- Banking, loans, and investment
- Environmental policies (or lack thereof)

Therefore, even apart from those benefits which may constitute countervailable subsidies, it is impossible to distinguish the role of the Chinese and provincial governments from the operation of individual companies – including foreign-owned enterprises – in China. To attempt this would be a fool's errand, and there is no reason why Commerce should undertake it.

For all of these reasons, Commerce should not adopt any policy or procedure that would allow for market-economy treatment of individual Chinese companies. Should you have any questions regarding this submission, please do not hesitate to contact us.

Respectfully submitted,

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