November 7, 2003

Total Pages: 32

PUBLIC DOCUMENT

DELIVERY BY HAND

The Honorable James J. Jochum
Assistant Secretary for Import Administration
Attn: Import Administration
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U.S. Department of Commerce
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

Attn: Becky Erkul, Office of Policy
Import Administration

Re: Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties: Rebuttal Comments

Dear Assistant Secretary Jochum:

United States Steel Corporation ("U.S. Steel") submits the following rebuttal comments to the U.S. Department of Commerce (the "Department") regarding whether the Department should adjust U.S. price by the amount of any countervailing duties ("CVDs") imposed to offset domestic subsidies under 19 U.S.C. § 1677a(c)(2)(A).[1] U.S. Steel has filed rebuttal comments

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1 Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, 68 Fed. Reg. 53,104 (Sept. 9, 2003); Antidumping Proceedings--Treatment of Section 201 Duties and Countervailing Duties; Extension of Time for Rebuttal Comments, 68 Fed. Reg. 60,079 (Oct. 21, 2003).

regarding the appropriate treatment of Section 201 duties under separate cover.[2] As evidenced by the comments filed with the Department, the Department's calculation of dumping margins should include an adjustment to U.S. price by the amount of any CVDs or CVD deposits imposed to offset non-export subsidies where such duties are included in the price.

Executive Summary

U.S. Steel reiterates its request that the Department correct its current practice of not adjusting U.S. price by the amount of any CVD imposed to offset a domestic subsidy where the cost of the CVD is included in such price. The Department's practice must be corrected, and the arguments of parties opposing a change in the Department's practice must be rejected because:

- The plain language and structure of Section 772 of the Tariff Act of 1930, as amended, make clear that Congress intended that the amount of any CVD imposed to offset a domestic subsidy be deducted from U.S. price, where such amount is included in the price, when determining the existence and magnitude of dumping;
- CVDs are plainly duties (and costs) incurred incident to bringing subject merchandise into the United States;
- Where Congress specifically excluded CVDs imposed to offset export subsidies from the price reductions required by Section 772(c)(2)(A), it can only mean that CVDs imposed to offset non-export subsidies are proper price reductions under the provision, otherwise Congress' act is impermissibly rendered superfluous;
- Contrary to the contention of some parties, the 1921 Antidumping Act's use of the term "United States import duties" did not contemplate only "regular," "normal," or "ordinary" customs duties;
- Similarly, the claim that the Statement of Administrative Action ("SAA") addressed the question of the appropriate treatment of CVDs under Section 772(c)(2)(A) is wrong. In fact, the only portions of the SAA cited by parties relate solely to the treatment of antidumping duties;
- It is entirely appropriate for the Department to make the mandated adjustment of Section 772(c)(2)(A) using CVD deposits, as such deposits are

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2 See Rebuttal Comments of United States Steel Corporation to U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, (Nov. 7, 2003).

    - (1) sufficiently definitive to be accounted for as costs in the Department's calculations;
    - (2) commercially treated as costs incident to bringing merchandise to the United States;
    - (3) indistinguishable from other costs which are not "known" with complete finality at the time of adjustment; and
    - (4) treated by other federal agencies as costs;

- It is the Department's practice, which it has defended in court, to use deposit amounts to make an upward adjustment (if a CVD deposit requirement is imposed to offset an export subsidy) under Section 772(c)(1)(C);

- The inconsistency of the Department's practice and Customs' practice is irrational and significantly undermines the effectiveness of the trade remedy laws because less is collected in antidumping duties than the amount of dumping found;

- Properly accounting for CVDs under Section 772(c)(2)(A) does not constitute "double-counting" because

    - (1) CVDs do not address all unfair trade practices;
    - (2) an adjustment is only made where the U.S. sales price is inclusive of the CVD (e.g., where the sales terms are delivered, duty-paid);
    - (3) accounting for the amount of the CVD included in the price is no more "double-counting" than accounting for any movement expense included in the price; and
    - (4) an adjustment to U.S. price for the amount of a CVD does not in any way impact the CVD rate;

- Contrary to the contention of some parties, where the exporter accounts for the additional cost incurred by the imposition of the CVD in its U.S. sales price, no dumping will be found even if the Department properly deducts for CVDs; and

- The deduction of CVDs imposed to offset non-export subsidies is fully consistent with the United States' international obligations and the laws of our major trading partners.

Finally, the change in the Department's practice can and should take effect immediately.

I. THE STATUTE REQUIRES THE DEPARTMENT TO ADJUST U.S. PRICE BY THE AMOUNT OF ANY CVD IMPOSED TO OFFSET A NON-EXPORT SUBSIDY

Section 772(c)(2)(A) requires the Department to reduce the U.S. price by,

> except as provided in paragraph (1)(C), the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States . . .

Paragraph (1)(C), referenced in the above excerpt, requires that the Department increase U.S. price by "the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy . . . ." 19 U.S.C. § 1677a(c)(1)(C) (emphasis added).[3]

The plain and unambiguous language of the statute dictates that CVDs must be considered costs, charges, expenses, or United States import duties incident to bringing subject merchandise to the place of delivery in the United States.[4] Moreover, Congress' action in amending the language of Section 772 in the Trade Agreements Act of 1979 demonstrates that the legislature understood that U.S. price was to be adjusted by the amount of any CVD imposed. Specifically, in 1979 Congress expressly amended the statute to exclude CVDs imposed to offset

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[3] The legislative history to the Trade Agreements Act of 1979 explains the purpose underlying the addition of Section 772(c)(1)(C) to the statute. See S. Rep. No. 96-249 (July 1979) at 94 (Trade Agreements Act of 1979). Specifically, the Senate Finance Committee noted that an upward adjustment to U.S. price is required where a foreign producer has benefited from an export subsidy because of the differential effect of such a subsidy on U.S. and home market prices, respectively. The Committee further explained that an upward adjustment is not required where the foreign producer has benefited from a domestic subsidy, because the subsidy would have the same impact on both U.S. and home market prices. Id.

[4] See Public Comments of United States Steel Corporation to U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 10-14 (Oct. 9, 2003) ("U.S. Steel Initial Comments").

export subsidies from the adjustments made under the provision.[5] Had Congress meant for countervailing duties not to be included among the downward adjustments within the phrase "any additional costs, charges, or expenses, and United States import duties . . . ." of Section 772(c)(2)(A), there would have been no reason to exclude one type of CVD (those imposed to offset export subsidies, as opposed to those imposed to offset non-export subsidies) from the reach of the provision. The exclusion of CVDs imposed to offset export subsidies from the downward adjustment would be superfluous unless CVDs generally were intended to be deducted under the provision. As noted previously, the Department's tortured interpretation of this statutory modification turns logic on its head and does not withstand scrutiny. See U.S. Steel Initial Comments at 17.

By not recognizing its obligation to adjust U.S. price for the amount of any CVD imposed to offset a non-export subsidy, the Department has improperly adopted "an interpretation of a congressional enactment which renders superfluous another portion of that same law."[6] This is unreasonable.[7] "{E}ffect must be given, if possible, to every word, clause, and sentence of a statute."[8] Thus, the statute mandates that the Department adjust U.S. price for the amount of any CVD imposed to offset a domestic subsidy.[9]

Nevertheless, certain parties opposed to a correction of the Department's current practice (hereinafter "opposing parties") assert that the Department is prohibited from making such an adjustment. The opposing parties claim that (1) adjustments for duties under Section

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5 See id. at 15-17.

6 See, e.g., Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 837 (1988).

7 See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 698 (1995).

8 See 2A Sutherland Statutory Interpretation § 46:06 (N. Singer, 6th ed. 2000).

9 See U.S. Steel Initial Comments at 10-24.

772(c)(2)(A) of the Tariff Act of 1930 are limited to "normal" or "ordinary" customs duties; (2) the structure of the statute demonstrates that CVDs are not to be accounted for; (3) Congress precluded such an adjustment through the Statement of Administrative Action ("SAA") of the Uruguay Round Agreements Act ("URAA"); (4) the Department is now legally prohibited from correcting its practice; and (5) even if the Department may adjust for CVDs, it may not make such an adjustment based on the amount of CVD deposits. As explained below, each of these arguments lacks merit and does not relieve the Department of its obligations to conform its practice to the statute's mandate.

A. The Statute Does Not Limit "United States Import Duties" To "Ordinary" or "Normal" Customs Duties

Many opposing parties rely upon the Department's legal analysis of the legislative history of the Antidumping Act of 1921 (the "1921 Act") to assert that the statute precludes the deduction of CVDs imposed to offset domestic subsidies from U.S. price.[10] In this analysis, the Department has asserted that Congress used the term "United States import duties" in the statute only to refer to "ordinary" customs duties.[11] This conclusion is based on a contrast of the use of

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[10] See, e.g., Public Comments from West Fraser Mills Ltd. (Gibson, Dunn, & Crutcher LLP) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 2-3 (Oct. 9, 2003) ("West Fraser Initial Comments"); Public Comments from Corus Group plc (Steptoe & Johnson LLP) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 3 (Oct. 9, 2003) ("Corus Group Initial Comments"); Public Comments from British Columbia Lumber Trade Council (Baker & Hostetler) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 6 (Oct. 9, 2003) ("British Columbia Lumber Trade Council Initial Comments"); and Public Comments from EUROFER (IAS) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 4 n.9 (Oct. 9, 2003) ("EUROFER Initial Comments").

[11] See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 62 Fed. Reg. 18,404, 18,421 (Apr. 15, 1997).

the phrase "United States import duties" with the phrase used to designate antidumping duties: "special dumping dut{ies}."[12]

However, this legal analysis is flatly incorrect. First, the 1921 Act distinguished at least three phrases (not two) to describe various types of duties -- "special dumping dut{ies}," "regular customs duties," and "United States import duties." Section 211 of the 1921 Act states that for the purpose of duty drawback, "special dumping dut{ies} . . . shall be treated in all respects as regular customs duties." In Section 211, Congress specifically referred to "ordinary" or "normal" customs duties, by the use of the phrase "regular customs duties." The phrase "regular customs duties," however, does not appear in Sections 203 and 204 of the 1921 Act which define "purchase price" and "exporter's sales price," respectively. Instead, Sections 203 and 204 use a third phrase, "United States import duties." Thus, Congress used three distinct phrases in the 1921 Act -- "special dumping dut{ies}," "regular customs duties," and "United States import duties" -- not two as previously argued. In other words, if Congress meant "regular customs duties" in Sections 203 and 204, it could have and would have used the same phrase used in Section 211. Thus, "United States import duties" must be understood to mean something other than "special" duties or "regular" duties; the only interpretation consistent with sound logic and the text is that it includes both.

Second, Congress also used the phrase "United States import duties" in Section 302 of the 1921 Act in describing certain deductions to be made to "export value" for Customs' valuation purposes. Employing the Department's understanding of this phrase, under Section 302 of the 1921 Act, a Customs official would only deduct the amount of "normal" or "ordinary" customs duties, and not CVDs, from the export value for valuation purposes. As previously

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12 Id.

noted, this would have meant that Customs would have imposed duties upon duties, a state of affairs that the statute clearly attempted to avoid.[13] The Department's legal analysis does not address Section 302 of the 1921 Act in any respect.

Third, the legal analysis proffered is focused solely on antidumping duties and completely ignores CVDs, though CVDs were imposed by law as of the enactment of the 1921 Act.[14] Even if opposing parties were otherwise correct, the phrase "special dumping dut{ies}" was used to define antidumping duties, but no similar identifying phrase was used to distinguish CVDs in the 1921 Act. As CVDs were "duties" that were imposed under existing law at the time of the 1921 Act,[15] "special dumping dut{ies}" could be imposed "in addition to" any CVD imposed. Thus, the Department's juxtaposition of the use of the terms "special dumping dut{ies}" and "United States import duties" is irrelevant with respect to CVDs.

B. The Statute's Structure Demonstrates That a Reduction of U.S. Price in the Amount of Any CVD Imposed to Offset a Non-Export Subsidy Is Required Regardless of the Treatment of Export Taxes

Opposing parties have asserted that Sections 772(c)(1)(C) and (c)(2)(B) of the Act preclude the Department from correcting its current practice. Contrary to these claims, the interplay of these two provisions in fact further demonstrates that the Department has failed to meet its statutory obligations by refusing to adjust U.S. price by the amount of any CVD imposed to offset a non-export subsidy.

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13 See U.S. Steel Initial Comments at 14.

14 See United States v. European Trading Co., 27 C.C.P.A. 289, 297 (Cust. & Pat. App. 1940).

15 While not specifically mentioned, the 1921 Act clearly contemplated CVDs, referring to them by use of the term "duties" in Section 202(a). The legislative history further explained that "special dumping dut{ies}" were to be imposed "in addition to the duties imposed by existing law . . . ." See S. Rep. No. 67-16, at 10 (1921).

One opposing party asserts that all CVDs (regardless of whether they are imposed to offset export or non-export subsidies) "are specifically excluded from those import duties that may be deducted" under Section 772(c)(2)(A), because the provision excludes CVDs described in Section 772(c)(1)(C).[16] The opposing party further asserts that Section 772(c)(1)(C) requires that U.S. price be increased "by the amount of any countervailing duty imposed."[17] The opposing party, however, is plainly wrong. While Section 772(c)(2)(A) clearly precludes a reduction in U.S. price in the amount of any CVD imposed to offset an export subsidy, no such exclusion is granted for CVDs imposed to offset a non-export subsidy. As the Embassy of India points out, the statute clearly differentiates between CVDs imposed to offset export subsidies and CVDs imposed to offset non-export subsidies.[18] Moreover, as noted above, the existence of the exclusion language pertaining to CVDs imposed to offset export subsidies in Section 772(c)(2)(A) clearly evidences the fact that other types of CVDs (i.e., CVDS imposed to offset non-export subsidies) are included in the "costs, charges or expenses and United States import duties" discussed in that provision. Opposing parties in fact have it precisely backwards: Section 772(c)(2)(A) does not preclude the deduction of CVDs imposed to offset non-export subsidies, it mandates such a deduction.

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[16] See Public Comments from Miller & Chevalier to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 3 (Oct. 9, 2003) ("Miller & Chevalier Initial Comments").

[17] Id. at 4 (emphasis added).

[18] See, e.g., Public Comments from Embassy of India to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 2-4 (unnumbered) (Oct. 9, 2003) ("Embassy of India Initial Comments") (noting that the Department has not distinguished between domestic and export subsidies in its request for comments, but that the statute clearly does).

Alternatively, several opposing parties have asserted that because the statute specifically instructs that export taxes, duties and other charges imposed by the export country to offset a countervailable subsidy are not to be deducted from U.S. price under Section 772(c)(2)(B), the statute does not permit the Department to reduce U.S. price by any CVD imposed to offset a domestic subsidy.[19] This argument, however, proves too much. First, while observing that the statute specifically exempts export taxes imposed to offset a subsidy from deductions made to U.S. price, opposing parties are incapable of pointing to similar language with respect to CVDs imposed to offset domestic subsidies. An application of the "familiar canon" of *expressio unius est exclusio alterius* holds that where Congress has provided an exemption for export taxes imposed to offset a subsidy, but not CVDs imposed to offset a domestic subsidy, it is reasonable to conclude that Congress did not intend to provide such an exclusion.[20]

Further, there is a symmetry and consistency between Section 772(c)(2)(A) and Section 772(c)(2)(B). The former provision requires the Department to reduce U.S. price by the amount of any duties or costs imposed by the importing country which would not be present in home market sales of the same merchandise, and the latter requires the Department to reduce U.S. price by the amount of any additional duties or costs imposed by the exporting country which would not be incurred for home market sales of the same merchandise.

In sum, the appropriate treatment, for the purposes of dumping calculations, of various forms of measures imposed to offset countervailable subsidies was made clear by the statute after the enactment of the Trade Agreements Act. First, under Section 772(c)(1)(C), the amount of any CVD imposed to offset an export subsidy was to be added to U.S. price and, pursuant to

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[19] See West Fraser Initial Comments at 3; British Columbia Lumber Trade Council Initial Comments at 5.

[20] See BMW Mfg. Corp. v. United States, 241 F.3d 1357, 1361 (Fed. Cir. 2001).

Section 772(c)(2)(A), the amount of any such CVD was not to be deducted from U.S. price where that amount was "included" in the price. Second, under Section 772(c)(2)(B), export taxes, duties and other charges imposed by the export country to specifically offset a countervailable subsidy are not to be deducted from U.S. price. Third, export taxes or duties imposed by the exporting country for reasons other than to specifically offset a subsidy (such as to discourage export of a valuable commodity in order to encourage further processing in the country of origin) are to be deducted because such taxes or duties are expenses incident to selling in the United States. Thus, only CVDs imposed to offset non-export subsidies remain. Such CVDs are dealt with only in Section 772(c)(2)(A). Pursuant to this provision, the statute requires that the amount of such CVDs be deducted from U.S. price.

C. The Uruguay Round Agreements Act Did Not Prohibit An Adjustment to U.S. Price For Any CVD Imposed

Certain opposing parties rely on the Department's misguided prior assertion that Congress addressed the issue of whether to deduct the amount of any CVD imposed from U.S. price in the URAA.[21] There is, however, no basis for this assertion.[22] The cited provision of the SAA discusses only whether antidumping duties were to be treated as costs under the statute.[23] Thus, whatever the relevance of the provision, the SAA does not address whether CVDs are to be treated as costs. The SAA therefore has no bearing on the question of whether the statute requires an adjustment to U.S. price for the amount of any CVD imposed.

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[21] See, e.g., Public Comments from O'Melveny & Myers LLP to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 7 (Oct. 9, 2003) ("O'Melveny & Myers Initial Comments"); Certain Cut-to-Length Carbon Steel Plate from Germany, 62 Fed. Reg. 18,390, 18,394-395 (Apr. 15, 1997) (Final Results of Antidumping Administrative Review).

[22] See U.S. Steel Initial Comments at 23-24.

[23] See URAA SAA, H.R. Doc. No. 103-316, at 885.

D. The Department Is Not Legally Prohibited From Correcting its Current Practice

Certain opposing parties have argued that the Department may not change its current, incorrect practice with respect to the treatment of CVDs absent a change in law or factual circumstances.[24] This is an inaccurate statement of law.

Well-established principles of administrative law provide that an administrative agency has the authority to change or revoke its policies and practices if a reasonable explanation is provided for such a change.[25] A court's review of an agency's change of position or practice will center on whether the action was arbitrary and capricious.[26] A change is arbitrary only if "the factual findings underlying the reason for change are not supported by substantial evidence," or the reasoning is "inconsistent with the statutory mandate, or, to a lesser extent, if the reasoning (or lack thereof) violates general principles of administrative law . . . or offends standards of procedural fairness implied in the statute."[27] Thus, the courts will uphold a change in the Department's practice unless that change is "shown to be unreasonable."

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24 See Public Comments from Instituto Brasiliero de Siderugica (Willkie Farr) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 3-4 (Oct. 9, 2003) ("Instituto Brasiliero de Siderugica Initial Comments"); Public Comments from Korea Iron & Steel Association ("KOSA") (Kaye Scholer LLP) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 5 (Oct. 9, 2003) ("KOSA Initial Comments"); West Fraser Initial Comments at 4.

25 See Rust v. Sullivan, 500 U.S. 173, 186-87 (1991); NTN Bearing Corp. v. United States, 903 F. Supp. 62, 67 (Ct. Int'l Trade 1995).

26 See Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42-43 (1983).

27 See Associacion Colombiana de Exportadores de Flores v. United States, 6 F. Supp.2d 865, 880 n.20 (Ct. Int'l Trade 1998) (citations omitted).

The Department has previously recognized that even where its practice has been affirmed by the courts, it is not precluded from following a new, reasonable policy.[28] Moreover, the fact that the Department requested public comments on this issue makes clear that the Department understands that it has the discretion to correct its current practice.[29] The Department has, therefore, taken extraordinary steps to ensure that, should it choose to correct its practice, a change in the agency's practice would be supported by a reasonable explanation.

Further, contrary to the assertion of some opposing parties, the fact that Congress is considering certain bills that would amend the statute, has no bearing on whether the Department may correct its practice on its own. Opposing parties assert that Congress' consideration of the issue means that a change in practice is precluded, absent a legislative mandate directing such a change.[30] But this conclusion does not follow. Congress' consideration of the issue means nothing more than that certain legislators are sufficiently concerned that the agency has not administered the statute in conformity with Congressional intent. This does not, in any way, mean that the Department's discretion to correct its practice has been abrogated. Nor do the

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28 See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan, 63 Fed. Reg. 2,558, 2,571 (Jan. 15, 1998) (Final Results of Administrative Review).

29 See Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, 68 Fed. Reg. 53,104 (Sept. 9, 2003).

30 See West Fraser Initial Comments at 3-4; Public Comments from Changwon & Dongbang (Akin Gump) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 2 n.2 (Oct. 9, 2003) ("Changwon & Dongbang Initial Comments"); Public Comments from Hysco (Akin Gump) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 2 n.2 (Oct. 9, 2003) ("Hysco Initial Comments").

proposed bills relieve the Department of its responsibility to review its procedures to ensure that the administration of the statute is in conformity with Congress' intent.[31]

E. The Department May Reduce U.S. Price By the Amount of Any CVD Duty Deposit Imposed Pursuant to Section 772(c)(2)(A)

U.S. Steel has previously demonstrated that an adjustment to U.S. price for any CVD deposit amount included in the U.S. price is legal, fair, and economically sound.[32] Certain opposing parties, however, claim that the Department is prohibited from adjusting for deposit amounts and may only make adjustments for final (i.e., assessed) CVD amounts.[33] These opposing parties assert that the Department is limited to using assessed CVD amounts because of (1) the Department's "well-established" rules, and (2) the Department's practice of adjusting U.S. price upward pursuant to Section 772(c)(1)(C).[34]

As demonstrated below, neither argument justifies limiting the Department to the use of only assessed CVD amounts in adjusting U.S. price. In fact, if anything, the second argument proffered by opposing parties establishes that the Department may use CVD deposit amounts to adjust U.S. price.

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[31] One opposing party asserts that the proposed bills further demonstrate that the phrase "United States import duties" was never meant by Congress to encompass CVDs. See West Fraser Initial Comments at 4. As demonstrated above, however, this is an absurd argument. In 1979, Congress specifically amended the provision to prevent deduction of CVDs imposed to offset export subsidies, evincing a clear understanding that the phrase "United States import duties" encompassed CVDs. The Department's failure to abide by Congressional intent cannot be understood as having effectively changed the statute.

[32] See U.S. Steel Initial Comments at 29-34.

[33] See West Fraser Initial Comments at 5; British Columbia Lumber Trade Council Initial Comments at 19.

[34] See West Fraser Initial Comments at 5.

1. CVD Deposits Are Costs Incurred Incident to Bringing Subject Merchandise From the Country of Export to the United States

Certain opposing parties assert that "it is well-established that the Department can only adjust for final (i.e., assessed) countervailing duty amounts in its antidumping calculation."[35] These arguments ignore the fact that the amount of any "normal" duties may not be "known" when an antidumping rate is established and that the Department's "well-established" practice adjusts U.S. price (such as those adjustments for warranty expenses) based on amounts that are not specifically "known" at the time the adjustment is made.[36]

This argument also ignores that both affected exporters and importers, and other federal agencies treat CVD deposits as a cost incident to bringing subject merchandise into the United States. For instance, Energizer Battery explains the impact of deposit amounts on importers:

> Within the context of the U.S. anti-dumping duty deposit system, remains the constant fact that businesses have strong profit incentives to know the whole cost of imported goods, including all taxes, fees, and duties at the time of entry.[37]

Accordingly, as a commercial matter, importers have strong incentives to treat CVD deposits made at the time of entry as costs incurred incident to selling subject merchandise into the United States. In addition, a review of the public financial reports of foreign producers affected by CVD deposits demonstrates that such deposits are commercially considered costs incident to bringing subject merchandise into the United States.[38] More recent financial reports further demonstrate

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[35] See West Fraser Initial Comments at 5; see also British Columbia Lumber Trade Council Initial Comments at 19.

[36] See U.S. Steel Initial Comments at 31-34.

[37] Public Comments from Energizer Battery Manufacturing, Inc. (Sonnenberg & Anderson) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 4-6 (Oct. 8, 2003) (emphasis added).

[38] See U.S. Steel Initial Comments at 25-26.

this principle. For instance, Slocan Forest Products Limited recently reported that it "expensed" the amount of CVD deposits made in the 3rd quarter of 2003.[39]

Further, treating CVD deposits as costs is consistent with the Bureau of Customs and Border Protection's ("Customs") practice regarding such deposits. As detailed below, Customs' deducts the amount of any CVD deposit paid from the dutiable value of subject merchandise, noting that deposits constitute "paid" amounts which are to be deducted from the price of the merchandise for valuation purposes.[40] Customs specifically distinguished situations where the importer elected to bond, noting that in those circumstances the bond would not be currently payable and, as such, would not be deducted from price.[41] Unlike a bond, however, CVD deposit amounts are transfers out of an importer's bank account actually paid to Customs and thus do not appropriately constitute part of the dutiable value of merchandise. Thus, Customs, like foreign producers and U.S. importers, also recognizes that CVD deposits are costs incident to bringing merchandise into the United States.

2. The Department's Practice of Adjusting U.S. Price Under Section 772(c)(1)(C) Establishes That CVD Deposits May Be Used to Adjust U.S. Price Under Section 772(c)(2)(A)

Certain opposing parties assert that the Department's administration of the adjustment to U.S. price mandated by Section 772(c)(1)(C) where a CVD has been imposed to offset an export subsidy demonstrates that the Department does not have the discretion to use deposit amounts to

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39 See Slocan Forest Product Ltd., Third Quarter Report 2003 at 9 (unnumbered). See also Widman's Market Barometer at 4 (Oct. 29, 2003) (analyzing the net mill returns to Canadian softwood lumber producers on U.S. sales by reducing the U.S. sales price by the amount of the CVD and AD duty deposits imposed).

40 See Questions and Answers: Canadian Softwood Lumber, U.S. Customs Service (Jan. 24, 2002), at 4, available at: <www.cbp.gov/ImageCache/cgov/content/import/add_5fcdv/lumber_2epdf/v1/lumber.pdf>.

41 Id.

adjust U.S. price under Section 772(c)(2)(A).[42] The opposing parties have it precisely backwards. In fact, the Department's stated position regarding the implementation of Section 772(c)(1)(C) demonstrates that the agency may and should deduct CVD deposits under Section 772(c)(2)(A). One opposing party declares: "{t}he Department could not reasonably adopt a different practice with respect to countervailing duties that are deducted, rather than added, to U.S. prices."[43] U.S. Steel wholeheartedly concurs.

Specifically, the Department has recently asserted before the Court of International Trade that it has the discretion to adjust U.S. price pursuant to Section 772(c)(1)(C) where the countervailing duty imposed was "not yet finally assessed."[44] Accordingly, the Department currently does make an adjustment to U.S. price for CVD deposits (as opposed to final assessed CVDs) and has defended its ability to do so. As West Fraser has correctly pointed out, if the Department has the discretion to adjust U.S. price upwards for a countervailing duty deposit imposed to offset an export subsidy under Section 772(c)(1)(C), then the Department also has the discretion to adjust U.S. price downwards for a countervailing duty deposit imposed to offset a domestic subsidy under Section 772(c)(2)(A).

As West Fraser recognizes, there is simply no logical, statutory, or policy basis to read Section 772(c)(1)(C) as pertaining to deposits, and read Section 772(c)(2)(A) as pertaining to

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42 See West Fraser Initial Comments at 5; British Columbia Lumber Trade Council Initial Comments at 19.

43 See West Fraser Initial Comments at 5.

44 See DuPont Teijin Films USA, LP v. United States, Slip. Op. 03-79 at 10 n.11 (July 9, 2003) (Ct. Int'l Tr.). The court did not pass on this claim, holding that the issue was not ripe for review, and instead remanded the Department's determination for reconsideration.

assessed duties only.[45] In fact, any such statutory interpretation is blatantly unreasonable: the Department uses a deposit rate when to do so works against petitioners, but refuses to do so in a parallel context when it supports more effective antidumping remedies.

II. THE INCONSISTENCY OF THE DEPARTMENT'S PRACTICE WITH CUSTOMS' DUTY CALCULATION METHODOLOGY REQUIRES THAT THE DEPARTMENT'S PRACTICE BE CHANGED

Opposing parties did not address the inconsistency of the Department's practice with Customs' practice regarding the valuation of merchandise, nor are parties likely to address this point in rebuttal submissions. Nevertheless, any opponent of a correction of the Department's practice must address the consequences of the Department's current practice. Restated briefly, the Department's current practice means that wherever a CVD and an AD are simultaneously imposed, the dumping occurring in the market will be only partially offset by the margins established by the Department. As has been previously demonstrated, this leads directly to inequitable results for the adversely affected domestic industry.[46]

While the Department's practice is at odds with its statutory obligations, Customs' interpretation of the statute cannot be assailed. Indeed, the principle that the dutiable value of merchandise should not include CVD amounts is an internationally agreed upon principle of valuation methodologies. The Customs Valuation Encyclopedia, published by the U.S. Customs Service, notes that the deduction of CVDs is required by the GATT Valuation Agreement. See Customs Valuation Encyclopedia, U.S. Customs Service at 127-128 (Jan. 2001). As noted in the

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45 See West Fraser Initial Comments at 5.

46 See U.S. Steel Initial Comments at 34-39.

Encyclopedia, the Customs Cooperation Council ("CCC")[47] Technical Committee Advisory Opinion 3.1 states that:

> Since the duties and taxes of the country of importation are by their nature distinguishable from the price actually paid or payable, they do not form part of the Customs value.

Id. at 128. CCC Technical Committee Advisory Opinion 9.1 further notes that "countervailing duties should be deducted under Article 5.1(a)(iv) as Customs duties and other national taxes." Thus, Customs' practice faithfully reflects an international consensus that when the amount of a CVD is included in the export price, the CVD is not a part of the Customs value and is a cost incurred incident to bringing subject merchandise into the country of importation.

III. PROPERLY ACCOUNTING FOR COUNTERVAILING DUTIES IN U.S. PRICE WOULD NOT RESULT IN A DOUBLE REMEDY OR DOUBLE COUNTING

Opposing parties supplement their flawed legal analyses in opposition to a correction of the Department's current practice with arguments premised upon fundamental misunderstandings of how the United States' antidumping laws operate. Specifically, opposing parties claim that should the Department reduce U.S. price for the amount of any CVD imposed to offset a non-export subsidy it would constitute "double-counting." For the reasons provided below, these claims are unfounded.

First, contrary to the assertion of certain parties, the imposition of a CVD does not address all unfair trade practices. For example, one opposing parties claims that "{o}nce the

[47] The CCC was the predecessor to the World Customs Organization ("WCO"). The WTO's Valuation Agreement mandates the WCO to administer the Agreement through its Technical Committee on Customs Valuation. The responsibility of the Technical Committee, which meets twice a year, is to ensure uniformity in the interpretation and application of the Agreement at the technical level.

countervailing duty is imposed, the imports are, by definition, fairly traded."[48] This argument is telling: This is a restatement of the alleged "double-counting" argument that lies at the base of opposing parties' objections and the Department's current practice. Yet, the claim is simply false, and it is premised upon a confused understanding of U.S. trade remedy laws. A CVD does not address any dumping that may be occurring in the U.S. market. CVDs and AD duties address distinct unfair trade practices -- the first addresses artificial cost advantages provided by a government, and the latter addresses unfair pricing. Plainly CVDs and ADs may be imposed simultaneously on the same merchandise to offset distinct unfair trade practices. To assert that a product which is not subsidized or on which the subsidy has been offset is "by definition, fairly traded" is simply false.

Second, the numeric examples which have been offered purporting to show that an adjustment for the amount of a CVD imposed to offset a domestic subsidy would constitute "double-counting" are premised upon an assumption that such a deduction would automatically be made wherever a CVD has been imposed. In fact, under the statute the Department would only make such an adjustment where the amount of the CVD is included in the U.S. price, i.e., where the terms of sale are duty-paid, or where the export price must be constructed. In these circumstances, a deduction for the amount of the CVD imposed simply accounts for the additional cost incurred by the producer in bringing subject merchandise into the United States.

Many opposing parties appear not to understand that the Department is obligated to reduce U.S. price by the amount of any CVD imposed to offset a domestic subsidy only where (1) the CVD is imposed to offset a non-export subsidy, and (2) the terms of sale of the subject merchandise obligate the seller (or a related importer) to pay the costs of the CVD (or CVD

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48 See Miller & Chevalier Initial Comments at 5.

deposit) imposed. Accordingly, opposing parties overstate claims that a correction of the Department's current practice would automatically increase dumping margins. If the Department corrects its practice, a dumping margin would not be impacted if a CVD was imposed to offset an export subsidy. Nor would a dumping margin be impacted if the terms of sale of merchandise subject to a CVD imposed to offset a non-export subsidy did not obligate the seller to pay the costs of the CVD. In neither case would a downward adjustment to U.S. price be made and, accordingly there could be no upward effect on the dumping margin calculated.

However, where the terms of sale are delivered duty paid ("DDP"),[49] or where the terms of sale otherwise obligate the seller (or related importer) to pay for any CVD imposed to offset a non-export subsidy, the Department is required to adjust for such a CVD by deducting its amount from U.S. price. Indeed, the concept of DDP is that the seller (or related importer) takes responsibility for the cost of any CVD imposed. As such, this additional cost incident to bringing subject merchandise to the United States becomes part of the U.S. price of that merchandise, but is not part of the normal value to which U.S. price will be compared.[50]

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49 The International Chamber of Commerce defines DDP in International Commercial Terms ("INCO Terms") as:

> {T}he seller delivers the goods to the buyer, cleared for import, and not unloaded from any arriving means of transport at the named place of destination. The seller has to bear all the costs and risks involved in bringing the goods thereto including, where applicable, any "duty" (which term includes the responsibility for and the risks of carrying out of customs formalities and the payment of formalities, customs duties, taxes and other charges) for import in the country of destination.

Incoterms 2000: ICC Official Rules for the Interpretation of Trade Terms, International Chamber of Commerce, the world business organization (Sept. 1999) at 121 (footnote omitted).

50 Certain parties appear to suggest that the simple (and obvious) fact that deduction of CVDs from U.S. price would increase the calculated margin of dumping whenever the cost of the CVD was not reflected in the price necessarily means that such activity is

(footnote continued)

One opposing party asserts that an adjustment for CVD or 201 duties is inappropriate because such an adjustment would "distort the dumping margin to make it appear as though the foreign producer or exporter sold the subject merchandise at a price lower than the actual transaction price."[51] That party misunderstands the operation of this adjustment. A deduction for the amount of any CVD imposed to offset a domestic subsidy would be made only where the terms of sale were "duty-paid" and included the amount of the CVD imposed. Further, even under its current practice of administering Section 772(c)(2)(A), the Department deducts freight, selling expenses, and any "regular" customs duties paid from U.S. price for "duty-paid" sales. This does not "make it appear" that the price is lower than it really is; it reflects that actual price and real costs.

Third, should the Department correct its practice and adjust U.S. price for the amount of any CVD imposed to offset a non-export subsidy where the CVD is included in such price, no "double-counting" would occur. Instead, the Department would appropriately be taking into account an additional cost to the exporter in bringing subject merchandise to the United States, as it is required to do under Section 772(c)(2)(A).[52]

For their part, opposing parties simply assert that, because a correction of the Department's practice would lead to higher dumping margins, such an adjustment would constitute "double-counting."[53] As demonstrated above, a "higher" dumping margin would only result if an exporter's pricing decisions for the U.S. market failed to reflect the cost of the CVD

(footnote continued)

illegal and inappropriate. Such tautological arguments are plainly wrong and cannot be taken seriously by the Department.

[51] See British Columbia Lumber Trade Council Initial Comments at 11-12.

[52] See U.S. Steel Initial Comments at 43-50.

[53] See O'Melveny & Myers Initial Comments at 1.

where the amount of the CVD was included in the exporter's U.S. price, just as would occur with any other cost increase.

At the same time, other opposing parties have asserted that "logically" the deduction of any CVD, whether imposed to offset an export or domestic subsidy, would result "in a double remedy for the domestic industry."[54] But the impact of a CVD imposed to offset an export subsidy is distinct from the impact of a CVD imposed to offset a non-export subsidy. In the case of the former, an export subsidy theoretically impacts a foreign producer's export price only and does not impact the producer's home market sales price. Accordingly, a CVD imposed to offset the subsidy is intended to raise the U.S. price to a level equivalent to that of the producer's home market sales. Under these circumstances, a reduction in U.S. price of the amount of the CVD imposed would mean that the U.S. price would artificially be lowered below the home market sales price (because the export subsidy had no impact on the home market sales price). Antidumping duties would be imposed to address the same behavior that led to the imposition of a CVD in the first place. Congress' desire to avoid such "double-counting" explains why it specifically excluded CVDs imposed to offset export subsidies from the scope of adjustments under Section 772(c)(2)(A).

In the case of a CVD imposed to offset a domestic, non-export subsidy, however, the situation is quite different. Home market and U.S. prices are equally affected by a domestic, non-export subsidy, so no dumping is created by the subsidy (unlike the case with an export subsidy). The imposition of a CVD to offset the domestic subsidy, however, differentially affects the export price -- in a way that must be taken into account when measuring the amount of price differentiation between the markets. Far from being "double-counting," the treatment of

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[54] See Instituto Brasiliero de Siderugica Initial Comments at 3.

a CVD imposed to offset a domestic, non-export subsidy as a cost differentially borne when exporting the subject merchandise is eminently reasonable and, indeed, mandated by the statute. As a result, Congress clearly distinguished the two circumstances in the statute.[55]

Finally, some opposing parties have accused petitioners of "manipulating" certain calculations in rebutting the "double-counting" arguments.[56] These opposing parties correctly observe that an "exporter's price to its customers generally reflects all costs and expenses, plus a mark-up for profit, the starting point for an antidumping analysis is the gross unit price to an unaffiliated customer."[57] These opposing parties, however, conclude from this that the domestic industry's analysis is "inherently flawed," because petitioners have used "gross unit price plus the cost of" any additional duties imposed.[58] Again, however, a deduction to U.S. price would only be made where a CVD imposed to offset a non-export subsidy was included in such price, i.e., where the terms of sale are "duty-paid." In these circumstances, the gross unit price would include the amount of the CVD imposed -- no addition of the CVD is necessary to arrive at the appropriate "starting" price for the Department's dumping analysis. Indeed, it is precisely this point that demonstrates that such an adjustment would not constitute "double-counting."

Here, the statute clearly requires an adjustment for the amount of any CVD imposed. Such an adjustment makes eminent sense. The day prior to the imposition of a CVD, the exporter's "duty-paid" price is the transaction price of the merchandise plus the deposit amount of any "regular" customs duty in place. On the day of the imposition of a CVD, the exporter's "duty-paid" price is the transaction price of the merchandise plus the deposit amount of any

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55 See Section I, supra; U.S. Steel Initial Comments at 28.

56 See Changwon & Dongbang Initial Comments at 11; Hysco Initial Comments at 11.

57 Id. at 11-12.

58 Id.

"regular" customs duty in place and the deposit amount of the CVD imposed. Thus, the gross unit price is the "duty-paid" price, and it is this price which the Department must adjust by deducting the amount of both "regular" customs duties and CVDs imposed to offset non-export subsidies in accordance with Section 772(c)(2)(A).

Opposing parties nevertheless state that the domestic industry's analysis "assume{s}" that exporters can pass along the costs of the additional duties imposed, "when, in fact, the market usually determines U.S. prices."[59] However, whether or not the exporter can pass along this particular cost (or any other cost) or not is irrelevant to the Department's dumping analysis. If, for example, during an administrative review period an exporter's freight costs increased, that additional cost must be reflected in the exporter's U.S. sales price. For purposes of determining whether dumping is occurring the Department cannot allow "market conditions" to excuse an exporter from reflecting the full costs of its U.S. sales in its "duty-paid" price where a CVD has been imposed to offset a non-export subsidy.

In sum, charges that a change in the Department's practice would constitute "double-counting" are unfounded. Such claims are premised upon misconceptions and distortions of how any such adjustment would actually operate in the Department's dumping analysis.

IV. A CHANGE IN THE DEPARTMENT'S PRACTICE IS FULLY CONSISTENT WITH THE UNITED STATES' INTERNATIONAL OBLIGATIONS

Certain opposing parties claim that a correction of the Department's current practice would violate this country's international obligations which would ultimately harm the United States by setting off a "domino effect" amongst our trading partners. These claims are belied by the laws of our major trading partners, and by the relevant international agreements.

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59 Id.

A. A Change in the Department's Practice Is Fully Consistent With the Relevant International Agreements

Opposing parties' arguments that a change in the Department's practice would violate the United States' international obligations are incorrect. Many of these claims are based on a confused understanding of the operation of the dumping laws. For example, while the European Union ("EU") is correct in observing that antidumping and CVD laws were designed to address distinct phenomena, the EU is simply wrong when it asserts that a change in the Department's practice regarding CVDs imposed to offset domestic subsidies would mean that the imposition of one remedy would automatically lead to the imposition of another.[60] Quite to the contrary, an adjustment to U.S. price for the amount of any CVD imposed to offset a domestic subsidy where such CVD is included in the price ensures that the CVD laws do not improperly undercut the AD laws and that each is permitted to fully address the unfair trade that each was designed to counteract.[61]

Similarly, other opposing parties assert that a change in the Department's practice would violate Article VI.5 of the GATT.[62] Yet, as the Embassy of India concedes in its statement in opposition, Article VI.5 expressly applies only to CVDs imposed to offset export subsidies.[63]

Opposing parties have further alleged that a change in the Department's practice would violate the provisions of the GATT, the Antidumping Agreement, and the SCM which limit the amount of antidumping duties that may be imposed to a level that does not exceed the margin of dumping, and limit the amount of a CVD imposed to not exceed the amount of a subsidy found

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60 See EU Initial Comments at 3.

61 See U.S. Steel Initial Comments at 43-47. As noted above, deduction of non-export CVDs would not increase or "create" dumping margins where prices cover all costs.

62 See Miller & Chevalier Initial Comments at 7.

63 See Embassy of India Initial Comments at 3.

to exist.[64] As an initial matter, a change in the Department's antidumping practices would have no bearing on the amount of the CVD duty imposed, and, as such, opposing parties arguments regarding Article VI.3 of the GATT and the SCM are irrelevant.

More importantly, each of these arguments is spurious as to dumping margins as well. A correction of the Department's current practice only impacts the dumping margin insofar as it will now take into account, and make an appropriate adjustment for, a cost that is included in a company's U.S. sales of subject merchandise, but is not included in its home market sales. Thus, consistent with the practice of our major trading partners, the dumping margin derived would still be equivalent to the antidumping duties imposed. Opposing parties, however, premise their arguments upon the conclusion that it is inappropriate to account for the imposition of CVD duties to offset non-export subsidies in a dumping calculation. This conclusion, for all the reasons provided above, is incorrect. Accounting for the cost of CVDs is entirely appropriate and indeed required in order to engage in a true fair comparison of U.S. market and home market sales.

B. A Change in the Department's Practice Would Not Result in a Domino Effect that Would Ultimately Hurt the United States

Opposing parties have asserted that a correction of the Department's current practice would trigger a series of events that would ultimately harm the United States.[65] However, the antidumping laws of the European Union, Canada, Mexico, and many other trading partners

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64 See, e.g., Corus Group Initial Comments at 5; O'Melveny & Myers Initial Comments at 10; Miller & Chevalier Initial Comments at 7.

65 See Public Comments from Embassy of Brazil to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 1 (Oct. 8, 2003); Public Comments from Japan Automobile Manufacturer's Association, Inc. to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 2 (Oct. 9, 2003).

require the deduction of import and other duties, and taxes.[66] Each of these administering laws may be read so as to permit adjustments based on the amount of the countervailing duty imposed.

Some of these laws expressly provide for the deduction of CVD duties. For example, Canada's Special Import Measures Act -- authorizing the imposition of anti-dumping and countervailing duties -- specifically requires, in certain enumerated circumstances, that the export price of the goods investigated be adjusted downward for "all costs, including duties imposed by virtue of this Act or the *Customs Tariff* and taxes."[67] Under New Zealand's antidumping laws, where the importer is the foreign producer or the sale of merchandise was not

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66 See Council Regulation (E.C.) No. 384/96 of 22 December 1995, Article 2(B)(9) (European Union) ("{t}he items for which adjustment shall be made shall include . . . any anti-dumping duties"); Special Import Measures Act, CH. S-15, Article 25 (1997) (Canada); and Foreign Trade Law Articles 50 and 54 (1995) (Mexico). See also Notifications of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements: Australia; G/ADP/N/1/AUS/2, G/SCM/N/1/AUS/2 at 33 (269TAB.2); Notifications of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements: New Zealand; G/ADP/N/1/NZL/2, G/SCM/N/1/NZL/2 at 5 (4); Decree No. 2121/94, Article 28 (Argentina) (requiring that export price be deducted by "{a}ny import duty payable in the Argentine Republic"); Decree No. 1602 (Aug. 23 1995) (Brazil) (export price is to be "livre de impostos" or "free of taxes"); Notifications of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements: South Africa; G/ADP/N/1/ZAF/1, G/SCM/N/1/ZAF/1 at 3 (defining export price as "net of all taxes"); Notifications of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements: Bulgaria; G/ADP/N/1/BGR/1, G/SCM/N/1/BGR/1 at 5 (Article 4(3)(2)) (Mar. 27, 1997) (setting out law equivalent to EC's); Notifications of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements: Costa Rica; G/ADP/N/1/CRI/1, G/SCM/N/1/CRI/1 at 4 (Art. 7) (Mar. 30, 1995) (export price is to be reduced by "all duties and taxes").

67 See Special Import Measures Act, CH. S-15, Article 25(1)(c)(i) (1997) (emphasis added) available at: <www.canlii.org/ca/sta/s-15/sec25.html>.

on an arms-length basis, the export price is reduced by "{t}he amount of any duties imposed under any Act . . ."[68] In explaining its practice, the Government of India has stated that

> The Export price of the goods allegedly dumped into India means the price at which it is exported to India. It is generally the CIF value minus the adjustments on account of ocean freight, insurance, commission, etc. so as to arrive at the value at ex-factory level.[69]

As the specific intent of India's adjustments to export price is to arrive at a price at the "ex-factory level," this would also necessarily require an adjustment for CVD duties imposed to offset a non-export subsidy where the CVD was included in the "duty-paid" price. Thus, where the Indian administering authority has been faced with merchandise sold on a "duty-paid" basis, the authority has made adjustments to the export price for movement expenses and duties paid.[70] Similarly, when constructing an export price, India requires "due allowance for costs including duties and taxes . . . ."[71]

As such, the converse of opposing parties' assertion is true. The domestic industry in the United States is disadvantaged vis-à-vis the domestic industries of our major trading partners, such as Canada, because of the Department's failure conduct its dumping analysis in a manner that fully encompasses the level of dumping occurring in the U.S. market.

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68 See Notifications of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements: New Zealand; G/ADP/N/1/NZL/2, G/SCM/N/1/NZL/2 at 5 (4(1)(b)(i)) (emphasis added).

69 See Department of Commerce, Ministry of Commerce & Industry, Government of India, "Antidumping and Anti-subsidy Measures: Frequently Asked Questions," at Question #6, available at: <http://commerce.nic.in/faqmain.htm>.

70 See Potassium Carbonate from the European Union, China PR, Korea RP, and Taiwan Preliminary Findings, No. 14/42/2002-DGAD (Apr. 30, 2003).

71 See Department of Commerce, Ministry of Commerce & Industry, Government of India, Directorate General of Anti-Dumping and Allied Duties Annual Report 2002-2003 at Annexure 2 (includes Annexure I.5 of Indian AD law).

For all of the reasons provided here and in U.S. Steel's initial submission, it is entirely appropriate to adjust U.S. price for the amount of any CVD duties to offset non-export subsidies where they are included in such price. A change in the Department's practice is in complete conformity with the United States' international obligations. Further, the laws of other WTO Members demonstrate that an adjustment for any countervailing duties imposed to offset domestic subsidies is consistent with the United States' international obligations.[72] Moreover, the failure to treat non-export CVDs as a cost puts U.S. producers at a disadvantage compared to their foreign competitors in the efficacy of our trade regime. Finally, even if the statute were believed to be in conflict with international obligations, the Department must follow the statute's mandate.[73]

V. A CORRECTION IN THE DEPARTMENT'S CURRENT PRACTICE SHOULD TAKE EFFECT IMMEDIATELY

In the comments received by the Department, some parties argue that the Department should not immediately apply policy changes resulting from this inquiry to existing matters.[74] These arguments are unsupported and are contrary to agency practice. In accordance with the Department's past practice, any policy change regarding the calculation of duties as cost should be applied immediately to any existing matters currently before the Department.

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72 See Vienna Convention, Article 31.3.B ("General Rule of Interpretation") (providing that subsequent practice of the parties is instructive as to how an agreement is to be interpreted).

73 See 19 U.S.C. 3512(a)(1), (2)(2000); accord Suramerica v. United States, 966 F.2d 660, 668 (Fed. Cir. 1992) (giving priority to U.S. law over GATT/WTO obligations when the two cannot be fairly reconciled). See also URAA SAA at 659, 1008. The URAA SAA also states that "{t}he WTO will have no power to change U.S. law." URAA SAA at 659.

74 See Weyerhaeuser Initial Comments at 2; Instituto Brasiliero de Siderugica Initial Comments at 14; EUROFER Initial Comments at 8.

The Department has addressed the issue of so-called "retroactive" application of a methodology change to existing proceedings before the agency, and consistently determined that the practice is fair and supported by the courts. In the Issues and Decision's memorandum accompanying Porcelain-on-Steel Cookware From Mexico: Final Results of Antidumping Duty Administrative Review, 65 Fed. Reg,. 30,068 (comment 1a) (May 10, 2000), for example, the Department rejected an opposing party's claim that applying a new methodology for calculating reimbursement of antidumping duties in the 12th administrative review, which differed from the Department's practice in the 9th and 10th administrative reviews, was contrary to the Department's past practice and not legally permitted under the statue. In response, the Department stated that:

> {T}he general principle is that when, as an incident of its adjudicatory function, an agency interprets a statute, it may apply that new interpretation in the proceeding before it." See Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission, 826 F.2d 1074, 1081 (D.C. Cir. 1987), cert. denied, 485 U.S. 913 (1988). The same is true of applying a new interpretation of a regulation. Thus, the Department does not apply its new reading "retroactively" when it applies it in this final determination after adopting the new interpretation in the prior review.

Notably, the complaining party in that case also claimed that "manifest injustice" would result from the practice, as is presently claimed by certain opposing parties. The Department was not persuaded, and additionally provided court approval for its interpretation, stating that "the Court of International Trade (CIT) has held that the Department...may depart from a prior position if it 'articulates a reasoned basis' for doing so."[75]

The Department again affirmed this position in Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Final Results of Antidumping Duty Administrative Review A-583-516,

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[75] Citing Hoogovens Staal BV and Hoogovens Steel USA Inc. v. United States, 4 F. Supp. 2d 1213, 1217.

65 Fed. Reg. 81,827 (Dec. 27, 2000), citing Porcelain-on-Steel Cookware from Mexico: Final Results of Antidumping Duty Administrative Review, 64 Fed. Reg. 26,934, 26,937 (May 18, 1999).

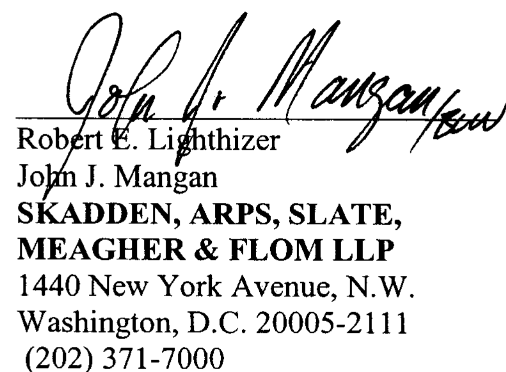
Therefore, as the Department's well settled practice to apply changes in the interpretation of a regulation to existing matters is also supported by the rulings of the CIT, the Department should implement any policy changes resulting from the present inquiry to all matters currently before the Department.

Conclusion

For each of the foregoing independent reasons, the Department must, consistent with Section 772(c)(2)(A) of the Act, adjust U.S. price downward to account for the amount of any countervailing duty deposit imposed on the subject merchandise to offset non-export subsidies in its calculation of dumping margins for U.S. sales.

Please contact any of the undersigned should you require clarification of any aspect of this submission.

Respectfully submitted,



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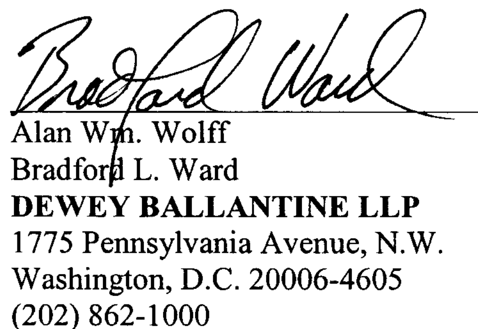

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