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October 9, 2003

BY HAND DELIVERY

Public Document

The Honorable James J. Jochum
Assistant Secretary for Import Administration
United States Department of Commerce
Central Records Unit
Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, D.C. 20230

Attn.: Section 201 Duties

Dear Assistant Secretary Jochum:

Please find here an original and six copies of initial comments in response to the Department of Commerce's September 9, 2003 notice (68 Fed. Reg. 53104) regarding the treatment of Section 201 duties and countervailing duties in antidumping proceedings. These comments are submitted on behalf of the British Columbia Lumber Trade Council and its constituent associations[1]; the Free Trade Lumber Council; the Ontario Forest Industries Association; the Ontario Lumber Manufacturers Association; the Québec Lumber Manufacturers Association; Abitibi-Consolidated Company of

[1] The Coast Forest & Lumber Association and the Council of Forest Industries.

Canada; Buchanan Lumber Sales Inc. and its affiliated mills, exporters and importers; Canfor Corporation; Slocan Forest Products Ltd. and Slocan Group; Tembec Inc.; Tolko Industries Ltd.; Weldwood of Canada Limited; and West Fraser Mills Ltd.[2]

Should you have any questions about the attached comments, please contact the undersigned.

Respectfully submitted,

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Counsel to the Free Trade Lumber Council; the Ontario Forest Industries Association; the Ontario Lumber Manufacturers' Association; and Tembec Inc.

[2] We are counsel to the Free Trade Lumber Council; the Ontario Forest Industries Association; the Ontario Lumber Manufacturers' Association; and Tembec Inc. Counsel for all other companies or associations listed have authorized submission of these comments also on their behalf.

Comments Regarding Deduction Of Countervailing Duties And Section 201 Duties From Export Price Or Constructed Export Price Used In Antidumping Duty Calculations

October 9, 2003

I. Introduction

The U.S. Department of Commerce (the "Department") issued a *Federal Register* notice[1] on September 9, 2003 requesting comments on the appropriateness of deducting Section 201 duties ("201 duties") and countervailing duties ("CVD duties") from gross unit price in order to determine the applicable export price ("EP") or constructed export price ("CEP") used in antidumping duty ("AD duty") calculations. Specifically, the Department directed comments to Section 772(c)(2)(A) and Section 772(d) of the Tariff Act of 1930 ("19 U.S.C. §1677a(c)(2)(A)" and "19 U.S.C. § 1677a(d)") in discussing the appropriateness of such deductions. The British Columbia Lumber Trade Council and its constituent associations[2]; the Free Trade Lumber Council; the Ontario Forest Industries Association; the Ontario Lumber Manufacturers Association; the Québec Lumber Manufacturers Association; Abitibi-Consolidated Company of Canada; Buchanan Lumber Sales Inc. and its affiliated mills, exporters and importers; Canfor Corporation; Slocan Forest Products Ltd. and Slocan Group; Tembec Inc.; Tolko Industries Ltd.; Weldwood of Canada Limited; and West Fraser Mills Ltd. (collectively, the "Industry Associations and Companies") submit the following comments in response to the Department's notice.

[1] 68 Fed. Reg. 53104 (September 9, 2003).
[2] The Coast Forest & Lumber Association and the Council of Forest Industries.

The Industry Associations and Companies support the current practice of the Department, which is that CVD and 201 duties are not deducted from EP or CEP in the calculation of AD margins. U.S. law and WTO Agreements do not allow for such a deduction. Any change in policy, regulation, or statute to permit such a deduction would be fraught with legal and administrative difficulties.

II. Deduction Of CVD And 201 Duties From EP Or CEP Would Be Contrary To U.S. Law

The Department's well-established practice is not to deduct trade remedy duties from EP and CEP in the calculation of dumping margins. This practice is consistent with the letter and spirit of U.S. trade laws and the WTO Agreements. The Department should maintain this practice.

The statute providing for calculation of EP and CEP does not allow deduction of CVD and 201 duties paid, reflecting the policy that CVD and 201 duties should be assessed only once on subject merchandise to remedy trade distortions, and not assessed a second time (or "double-counted") through an AD margin.[3] This principle also is articulated explicitly in Article VI(5) of the GATT: "No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization."

[3] As the Department and the courts have noted, a deduction of CVD duties from EP or CEP would result in double counting because the importer already paid the CVD duties under the CVD order and would be paying them a second time under the AD order were they deducted from EP or CEP. *See e.g., Certain Cut-To-Length Carbon Steel Plate From Germany: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 18390, 18395 (April 15, 1997); *U.S. Steel v. United States*, 15 F. Supp. 2d 892, 899 (CIT 1998), ("[I]mpermissible double-counting would still result even if antidumping and countervailing duties were defined as falling within 'additional costs, charges, and expenses,' instead of 'United States import duties.'"), *rev'd on other grounds*, 225 F.3d 1284 (Fed. Cir. 2000).

The text of the AD statute; the legislative history; the Department's implementing regulations regarding adjustments to EP and CEP; and judicial interpretations of the statute all confirm that deduction of CVD and 201 duties from EP and CEP would be unlawful. Such a deduction would require legislation to change current law with respect to the calculation of EP and CEP. In addition, conforming amendments would be required to other provisions of the AD statute, the CVD statute, and to Section 201 of the Trade Act of 1974. Such amendments, unless they exempt Canada and Mexico, could be reviewed by a NAFTA binational panel for their consistency with WTO agreements and the purposes of NAFTA. Even were all of the amendments to be passed, the deduction provisions would not survive scrutiny by the WTO.

A. Deduction Of CVD And 201 Duties Would Be Contrary To The AD Statute

1. Statutory Provisions For Calculating EP And CEP Do Not Permit Deduction Of CVD And 201 Duties

The Department's request for comments referred to 19 U.S.C. §§ 1677a(c)(2)(A) and 1677a(d) in discussing a policy change to deduct CVD and 201 duties from EP and CEP. Neither of those provisions allows for the deduction of CVD or 201 duties from EP or CEP.

Subsection (c)(2)(A) allows the Department to reduce EP or CEP only 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….[4]

[4] The statutory exception in paragraph (1)(C) is limited to an adjustment to increase EP or CEP by the amount of any CVD duty paid on an export subsidy.

CVD or 201 duties are not "additional costs, charges or expenses," nor are they "United States import duties." Congress rejected the view that trade remedy duties should be treated as costs to be deducted from EP or CEP, providing instead a statutory mechanism for conducting duty absorption inquiries in administrative reviews: "This new provision of law is not intended to provide for the treatment of antidumping duties as a cost."[5]

The Department, citing the above-quoted language and other portions of the legislative history, has recognized that Congress did not intend for AD or CVD duties to be deducted as a cost from EP or CEP:

> [T]he treatment of AD and CVD duties (already paid or to be assessed) as a cost to be deducted from the export price is an issue that was arduously debated during passage of the URAA [Uruguay Round Agreements Act] and ultimately rejected by Congress. See, H.R. 2528, 103rd Cong., 1st Sess. (1993). Alternatively, Congress directed the Department to investigate, in certain circumstances, whether AD duties were being absorbed by affiliated U.S. importers. 19 U.S.C. 1675(a)(4). Thus, Congress put to rest the issue of AD and CVD duties as a cost. Statement of Administrative Action at 885 ("The duty absorption inquiry would not affect the calculation of margins in administrative reviews. This new provision of the law is not intended to provide for the treatment of antidumping duties as a cost."); *see also* H. Rep. No. 103-826(I), 103rd Cong., 2nd Sess. (1994) at 60.[6]

Congress' use of the general terms "costs, charges or expenses" in subsection (c)(2)(A) cannot be interpreted to include CVD duties because such an interpretation would nullify the express Congressional directive in subsection (c)(1)(C) requiring the Department to increase EP and CEP by the amount of any CVD duty

[5] H.R. Rep. No. 103-826(I) at 60,61 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3832-33.
[6] *Certain Cut-to-Length Carbon Steel Plate From Germany: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 18390, 18395 (April 15, 1997).

imposed to offset an export subsidy. A fundamental rule of statutory construction is that a statutory provision should never be interpreted so as to nullify another provision of the same statute.[7]

Deducting CVD duties as a cost in calculating AD duties also would be contrary to the Congressional intent behind the directive that an export tax, duty or other charge "specifically intended to offset the countervailable subsidy received" should not be deducted from EP or CEP. 19 U.S.C. §§ 1677a(c)(2)(B) and 1677(6)(C). This provision expresses unambiguous Congressional intent that offsets to countervailable subsidies may not be deducted in calculating EP or CEP.

The United States imposes CVD duties specifically to offset countervailable subsidies received. There would be no basis for the Department to draw a distinction between duties imposed by the United States that are "specifically intended to offset a countervailable subsidy received" and similar duties imposed for the exact same reason by a foreign government. Two canons of statutory construction applicable here are that a statute must be construed as a whole and that the more specific language controls over more general language.[8] Therefore, the Department may not interpret general language in Section 1677a(c)(2)(A) in a way that would

[7] *See e.g., Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (referring to the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative."); *see also Sutherland Statutory Construction* § 46.06 at 119-120 (5th ed. 1992)).

[8] *See e.g., Sutherland Statutory Construction* § 46.05 at 103-105 (5th ed. 1992); *see also American Postal Workers Union v. United States Postal Service*, 707 F.2d 548 (D.C. Cir. 1983) ("Purely as a matter of statutory construction, the specific provision in section 1005(d) for civil service retirement coverage controls the general reference to "compensation, benefits, and other terms and conditions of employment" in section 1005(f). *See generally* 2A C. Sands, *Statutes and Statutory Construction* § 46.05, at 57 (4th ed. 1973).")

contradict Congressional intent as expressed in specific language in Section 1677a(c)(2)(B).

Congress has used the term “United States import duties” to apply only to ordinary customs duties, and not to duties imposed as trade remedies. The Department recognized and applied this interpretation in *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 18404, 18421 (April 15, 1997):

> The term "United States import duties" first appeared in section 203 of the 1921 Act (42 Stat. 12). However, neither the 1921 Act nor its legislative history defined the term. The Senate Report accompanying the legislation, however, uniformly refers to antidumping duties as "special dumping dut[ies]," and uniformly refers to ordinary customs duties as "United States import duties." The rigorous use of these distinct terms indicates that the new "special dumping duties" (payable only to offset dumping) were considered to be distinct from the existing "United States import duties" (payable, ad valorem, upon importation).

Other statutory provisions in the trade law reinforce this interpretation. Section 1677h provides that:

> For purposes of any law relating to the drawback of customs duties, countervailing duties and antidumping duties…shall not be treated as being regular customs duties. 19 U.S.C. § 1677h.

Section 1677a also shows that CVD duties could not be considered “import duties,” without frustrating the purpose of that statute. Subsection (c)(1)(C) of the statute requires the Department to *increase* EP or CEP by the amount of any CVD duty imposed on the subject merchandise to offset an export subsidy.[9] Were the Department to deduct CVD duties from its EP or CEP

[9] *See* 19 U.S.C. § 1677a(c)(1)(C).

calculations, the result would be the exact opposite of what the statute requires whenever any of the CVD duties might be imposed to offset an export subsidy.

Like CVD and AD duties, 201 duties "are not normal customs duties."[10] The Department has recognized that 201 duties derive from a special calculation of the amount necessary to "facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."[11] Section 201 duties are given special treatment by the Harmonized Tariff Schedule of the United States as they appear in a separate schedule for temporary duties at subchapter III of chapter 99.[12] The Department has recognized that treating 201 duties as import duties would, in effect, double count (*i.e.*, double the impact of) the section 201 remedy.[13]

Congress' construction of the statutory terms in §1677a(c)(2)(A) to exclude trade remedy duties is logical and consistent with the remedial purposes of the trade law.[14] AD, CVD and 201 duties are unlike costs or customs duties, because such remedial duties are assessed to offset a particular trade distortion (*i.e.*, dumping, a countervailable subsidy or the effect of a surge of imports). To treat CVD or 201 duties as costs or customs duties, for the purposes of AD margin calculations, would unlawfully punish importers by "double-counting" the duties payable to remedy a

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[10] *See* Recommendation Memorandum from Gary Taverman to Bernard Carreau regarding Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: *Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago,* (A-274-804) August 13, 2002 at 3.
[11] *Id. quoting* 19 U.S.C. § 2253(a)(1)(A).
[12] *Id.*
[13] *Id.*
[14] *See NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1990) ("As this court has stated, the antidumping laws are remedial not punitive. *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103-1104 (Fed. Cir. 1990). The affected U.S. industry is not entitled to a remedy in excess of the difference between foreign market value and U.S. price.")

particular trade distortion. Importers would have to pay the normal dumping margin, increased by the amount of the CVD or 201 duties, in addition to the duties paid separately under CVD or 201 orders.

The Department has recognized the distinct nature of trade remedy duties in connection with the double-counting problem:

> It is the Department's longstanding position that AD and CVD duties are not a cost within the meaning of section 772(d). [*sic*] AD and CVD duties are unique. Unlike normal duties, which are an assessment against value, AD and CVD duties derive from the margin of dumping or the rate of subsidization found. Logically, AD and CVD duties cannot be part of the very calculation from which they are derived. This logical rationale for the Department's interpretation of the statute is consistent with prior decisions of the CIT. See Federal-Mogul, supra, 813 F. Supp. at 872 (deposits of antidumping duties should not be deducted from USP because such deposits are not analogous to deposits of "normal import duties").
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> […]
>
> Such double counting, i.e., including the same unfair trade practice twice in a single calculation, is unjustifiable. Only in the limited circumstances regarding reimbursement, as provided for in §353.26 of the Department's regulations, is it appropriate to deduct any amount of antidumping duties.

Certain Cut-To-Length Carbon Steel Plate From Germany, 62 Fed. Reg. 18390, 18395. Section 201 duties are similar to AD and CVD duties in that they represent a temporary remedy intended to address a serious, but temporary injury, and likewise should not be double-counted.[15]

Section 1677a(d), which allows adjustments to CEP for various selling expenses, cannot be used as authority for deducting CVD or 201 duties. CVD and 201

[15] *See* Recommendation Memorandum from Gary Taverman to Bernard Carreau regarding Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: *Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago,* (A-274-804) August 13, 2002 at 3.

duties are not "selling expenses." They arise by virtue of importation, regardless whether the merchandise is sold. CVD and 201 duties are distinct from such selling expenses, just as they are distinct from "additional costs, charges or expenses" and from "import duties."

2. The Department's Regulations Support The Current Practice

The Department's regulations state that, in making adjustments to EP, CEP, or normal value, the Department may not double-count adjustments.[16] This regulation, created pursuant to the statute, ensures accurate accounting and results in fair comparisons.

3. Judicial Precedent And Agency Practice Do Not Allow Deduction Of CVD Or 201 Duties From EP Or CEP

The Department has a long-standing practice of not deducting trade remedy duties under 19 U.S.C. § 1677a. The U.S. Court of International Trade ("CIT") has upheld consistently the Department's practice. The CIT, in *Bethlehem Steel v. United States*, held that "Commerce's rationale for not deducting antidumping duties under § 1677a(c) is a permissible construction of the statute."[17] The facts in *Bethlehem Steel* were very similar to a preceding case, *AK Steel Corp. v. United States* ("*AK Steel*"). The CIT, in *AK Steel*, upheld as reasonable the Department's interpretation of the term "United States import duties" to exclude AD and CVD duties.[18] The Court recognized the Department's longstanding policy to not deduct these duties and,

[16] *See* 19 C.F.R. § 351.401(b)(2)(2003)("The Secretary will not double-count adjustments."). Article 2.4, note 7 of the WTO Antidumping Agreement also admonishes administering authorities not to "duplicate adjustments."
[17] *See Bethlehem Steel v. United States*, 27 F. Supp. 2d 201, 208 (CIT 1998)("Bethlehem Steel").
[18] *See AK Steel v. United States*, 988 F. Supp. 594, 607 (CIT 1997)("The statute does not define the term United States import duties. In the absence of such a definition, the Court will uphold Commerce's reasonable interpretation.")

because the Department offered a rational explanation for this policy consistent with Congressional intent, upheld the Department's determination. In *Hoogovens Staal BV v. United States*, 4 F. Supp 2d. 1213 (CIT 1998), the CIT declared:

> Commerce's longstanding policy and practice is not to treat estimated or final antidumping or countervailing duties as import duties or costs under 19 U.S.C. § 1677a(d). The Court has held that Commerce is 'correct not to deduct [from U.S. price] cash deposits of estimated antidumping duties owed' under 1677a(d).[19]

The Court added that "an antidumping order is designed to raise the price of dumped goods to a fair level in the import market. It is not a normal import duty or an extra 'cost' or 'expense' to the importer – it is an element of a fair and reasonable price."[20] The CIT, in holding consistently that the Department's practice to not deduct AD or CVD duties as a cost or expense from U.S. price is in accordance with the law, has made it clear that deducting these duties would lead to unfair price comparisons in violation of the law. The Department explained in *Certain Cold-Rolled Carbon Steel Flat Products From Korea: Final Antidumping Duty Administrative Review*, 63 Fed. Reg 781, 787 (January 7, 1998):

> The fallacy of petitioners' argument for treating antidumping duties as a cost is that antidumping duties, although paid by an importer, are not selling expenses, nor are they normal customs duties. Antidumping duties are unique in that they represent antidumping duty margins--a measure of price discrimination between FMV and USP. The statutory remedy for such unfair price discrimination is to assess antidumping duties against the imported merchandise in an amount equal to the amount by which the FMV exceeds the USP for the merchandise. 19 U.S.C. 1673. To then subtract this amount from USP in order to recalculate a supra-antidumping duty margin would be creating additional price discrimination that did not exist. This is the same as saying that dumping margins must be adjusted

[19] *See Hoogovens Staal BV v. United States*, 4 F. Supp 2d. 1213, 1220 (CIT 1998) (citing *Federal–Mogul Corp. v. United States*, 813 F. Supp. 856, 872 (1993)).
[20] *Id.*

> to account for dumping margins. Such double counting of antidumping duties is contrary to the Act, which is designed to comport with Article 8 [par.] 2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ("GATT") 1994 in that the duty collected must not exceed the margin of dumping.
>
> *We also disagree with petitioners' extension of their argument to Dongbu's countervailing duty deposits* on the basis that the amounts deposited are "conclusive" since no party has requested an administrative review. Even though the countervailing duty order is currently on appeal to the Court of International Trade and liquidation of these entries has been suspended pending the outcome of that appeal, *we still would not deduct the actual duties from USP for the reasons outlined above.* [emphasis added]

4. Other Provisions Of The AD Statute Do Not Permit Deduction Of CVD Or 201 Duties From EP Or CEP

The Department calculates AD duties "in an amount equal to the amount by which the normal value exceeds the export price (or constructed export price) for the merchandise." 19 U.S.C. § 1673. As discussed earlier in these comments, the calculation of EP or CEP does not allow for an adjustment to deduct CVD or 201 duties. Therefore, the Department may not impose AD duties calculated by deducting such duties from EP or CEP.

Congressional intent prohibiting double-counting of CVD and 201 duties in the AD margin also can be found in other provisions of the AD statute. Section 1677b(a) requires that "a fair comparison shall be made between the export price or constructed export price and normal value." A fair comparison could not be made where a cost adjustment to EP or CEP misrepresents the price at which the foreign producer or exporter sold the product . To deduct CVD or 201 duties from EP or CEP 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.[21]

The statute's requirement that there be a fair comparison between the EP or CEP and normal value mirrors the requirement found in Article 2.4 of the WTO's Agreement on Implementation of Article VI of GATT (the Antidumping Agreement), and deduction of CVD or 201 duties from EP or CEP would similarly violate that WTO provision.

B. Deduction Of CVD And 201 Duties Would Be Contrary To Other Statutory Provisions Regarding Calculation Of CVD And 201 Duties

1. Importers Would Pay Duties Twice To Offset The Same "Net Countervailable Subsidy"

Deduction of CVD duties from EP or CEP would "double count" the remedy intended to offset the countervailable subsidy. Importers would be required to pay an AD duty increased by the amount of any CVD duties in addition to the actual CVD duties themselves. CVD duties to offset countervailable subsidies would therefore be paid twice—once under the Department's CVD order and again under the AD order—to offset the same net countervailable subsidy. This result would conflict directly with 19 U.S.C. § 1671(a)(2)(B), which states that "there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, *equal to the amount of the net countervailable subsidy.*"[22] (Emphasis added.) A deduction of

[21] Accordingly, 19 C.F.R. § 351.402(f) allows the Department to deduct post-sale rebates from the foreign producer to the importer as a reimbursement for the importer's payment of CVD or AD duties. This regulation is consistent with using the actual price paid by the importer and presents no concern with double-counted remedies.

[22] The reference to "any other duty imposed" indicates that CVD duties are not in lieu of already established duties. For example, a CVD duty does not supplant existing customs duties.

CVD duties from EP or CEP would impose CVD duties in excess of the amount of the net countervailable subsidy, in violation of the statute.

2. Importers Would Pay 201 Duties In Excess Of Those Set By The President

Deduction of 201 duties from EP or CEP would "double count" the safeguard remedy and would "exceed the amount necessary to prevent or remedy the serious injury" in violation of statute.[23] When the International Trade Commission makes an affirmative finding of serious injury, or the threat thereof, to domestic industries from a surge in imports, the President of the United States has discretion to determine the appropriate manner and level of relief to help the domestic industry adjust to import competition.[24] The proposal to deduct 201 duties from EP and CEP would have the Department interfering with and undermining the President's careful weighing of competing national interests that is mandated by Section 201 of the Trade Act of 1974.

The President decides the appropriate type and amount of relief to provide under Section 201 by taking into account a wide range of policy interests, including the efforts of the domestic industry to make a positive adjustment to import competition; "the short- and long-term economic and social costs of the actions … relative to their long-term economic and social benefits;" "the effect of the implementation of actions … on consumers and on competition in domestic markets for articles;" and "the national security interests of the United States."[25] The Department would encroach upon the

[23] 19 U.S.C. §2253(e)(2). In many instances, the deduction would also violate the statutory prohibition on any remedy that "would increase a rate of duty to (or impose a rate) which is more than 50 percent *ad valorem* above the rate (if any) existing at the time the action is taken." 19 U.S.C. §2253(e)(3).
[24] *See* 19 U.S.C. § 2253(a)(1).
[25] *See* 19 U.S.C. § 2253(a)(2)(F) and (I).

President's authority, responsibilities and discretionary judgment unlawfully by multiplying 201 duties through the dumping margin calculations.

C. The Department Could Not Lawfully Implement A CVD/201 Deduction Policy Without Congressional Action

1. The Department May Interpret Statutes Only In Accordance With Congressional Intent

The Department does not have discretion to interpret statutes inconsistently with Congressional intent.[26] The legislative history to the Uruguay Round Agreements Act demonstrates that Congress did not intend for AD or CVD duties to be treated as a cost to be deducted from EP or CEP.[27] The Department has relied on the legislative history to reject prior proposals that the Department deduct CVD duties in the calculation of EP or CEP.[28]

The Department repeatedly has interpreted the provisions of 19 U.S.C. § 1677a as not authorizing the deduction of CVD duties from EP or CEP.[29] The Court of International Trade has affirmed this conclusion on more than one occasion.[30]

Section 1677a and other trade laws reflect Congressional intent that trade remedies counterbalance trade distortions without providing double remedies for

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[26] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984); *Timex V.I. Inc. v. United States,* 157 F.3d 879, 882 (Fed. Cir. 1998).

[27] In authorizing the Department to conduct a duty absorption inquiry upon administrative review, Congress emphasized that "[t]his new provision of law is not intended to provide for the treatment of antidumping duties as a cost." H.R. Rep. No. 103-826(I), at 60-61 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3832-33.

[28] *See Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands*, 62 Fed. Reg. 18476, 18486; *Certain Cut-to-Length Carbon Steel Plate From Germany: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 18390, 18395 (April 15, 1997).

[29] *See Certain Cold-Rolled Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 781 (February 27, 1998); *Antidumping Duties; Countervailing Duties; Proposed Rule*, 61 Fed. Reg. 7308, 7332 (1996) ("As with antidumping duties, the statute authorizes no adjustment to export price (or constructed export price) for countervailing duties imposed to offset other types of subsidies.").

[30] *See Hoogovens Staal v. United States*, 4 F. Supp. 2d 1213 (CIT 1998); *Bethlehem Steel v. United States*, 27 F. Supp. 2d 201 (CIT 1998).

domestic producers.[31] This intent accords with the United States' obligations under the WTO Agreements. Were the Department to decide that CVD and 201 duties should be deducted from EP and CEP, it would have to seek amending legislation from Congress. Statutory amendments would be necessary not only to § 1677a, but also to any other trade statutes that restrict trade remedy duties to offset (but not exceed) the corresponding trade distortion.

2. Proposed Legislation Indicates That Congressional Authority Is Necessary To Deduct CVD Or 201 Duties

Members of both the U.S. House of Representatives and the U.S. Senate have introduced bills this year to legislate the change contemplated in the Department's request for comments as a change in policy.[32] Some of these legislators apparently consider that, to authorize the deduction of CVD or 201 duties from EP or CEP, statutory amendments are necessary, rather than a simple course correction in Department policy. Introducing S. 219, Senator Trent Lott of Mississippi stated, "And certainly the current Secretary of Commerce has been paying close attention to this issue, and I really appreciate it. But there are limits to what they can do without additional legislation that will make it clear how we will deal with these countervailing duties. So that is why this legislation has been introduced."[33]

3. Statutory Amendments To Trade Laws Are Subject To Consultation And Review Under NAFTA Chapter 19

Should the United States amend its AD laws to allow for deductions of CVD duties from EP or CEP, it could give rise to certain obligations under NAFTA.

[31] For example, as discussed above, §1677a(c)(2)(B) prohibits the Department from reducing U.S. price by the amount of any export tax intended to offset a countervailable subsidy received. CVD duties imposed by the United States should be treated no differently in this regard than remedial export taxes.
[32] *See e.g.*, S.136, S.219, H.R.491, H.R.2092, and H.R.2365.
[33] *See* 149 Cong. Rec. S.1671 (January 28, 2003).

Under NAFTA Article 1902.2, where a NAFTA member country amends its antidumping or countervailing duty law, it must specify in the amendment that it applies to goods from other NAFTA members. Were the amendment to be designated as applicable to goods from NAFTA countries, the United States would have to notify its NAFTA partners in writing in advance of the enactment of the amendment, and consult with those countries regarding the effect of the amendment. NAFTA Article 1902.2(b) and (c). The United States also would be obligated to ensure that the amendment is consistent with GATT, the Antidumping Agreement, the SCM and other WTO Agreements, and to ensure that the amendment is consistent with the purpose of NAFTA "to establish fair and predictable conditions for the progressive liberalization of trade between the Parties … while maintaining effective and fair disciplines on unfair trade practices …." NAFTA Article 1902.2(d). Canada and Mexico would have the right, under NAFTA Article 1903, to call for a binational panel to provide a declaratory opinion as to whether the amendment is indeed consistent with the WTO Agreements and the purposes of NAFTA.

III. Deduction Of CVD And 201 Duties Would Be Inconsistent With United States Obligations Under The WTO

A. The WTO Antidumping Agreement Prohibits Deduction Of CVD Duties From EP Or CEP

Article 2.1 of the Antidumping Agreement limits the dumping margin to the difference between normal value and "the export price of the product exported from one country to another" where the export price is "less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Article 9.3 of the Antidumping Agreement states that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under

Article 2." Deduction of CVD and 201 duties would lower EP or CEP below the "export price of the product exported from one country to another." Unless the export price had been greater than the home market price by the full amount of the deduction, the CVD duty would create a dumping margin or, had one already existed, raise it by the full amount of the deduction. The proposed deduction then would be contrary to the Antidumping Agreement's requirement that the amount of the AD duty shall not exceed the margin of dumping established under Article 2.

B. Article 19.4 Of The SCM Agreement Prohibits Deduction Of CVD Duties From EP Or CEP

Article 19.4 of the SCM Agreement provides that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product." Deduction of CVD duties from EP or CEP would, in effect, double the CVD duties levied on the subsidized product.

C. Deduction Of 201 Duties From EP Or CEP Would Violate The WTO Agreement On Safeguards

Article 5.1 of the Agreement on Safeguards provides that safeguard measures shall be imposed on imports "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." Deduction of 201 duties from EP or CEP would effectively double the 201 duties levied on imports subject to both 201 and AD measures, resulting in adjustments beyond the extent that the President determined necessary to prevent or remedy injury or facilitate adjustment.

D. GATT Article VI(5) Explicitly Prohibits Deduction Of CVD Duties From EP Or CEP

GATT leaves no room to deduct CVD duties from EP or CEP. Article VI(5) of the GATT prohibits the investigating authority of a WTO member from double counting CVD duties through the AD margin. That provision states, "No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization." Deduction of CVD duties from EP or CEP would compensate twice for the same subsidy because importers would pay the amount of the CVD duties under both CVD and AD orders in addition to any AD duties charged on subject merchandise. The CIT has recognized and followed the policy of Article VI(5) prohibiting such a double remedy.[34]

IV. Deduction Of CVD And 201 Duties Would Distort Dumping Calculations And Impose Duties On Exports Illegally

A. Deduction Of CVD And 201 Duties Could Create Dumping Margins Where No Dumping Exists

The "double-counting" problem presented by deduction of CVD or 201 duties from EP or CEP would be particularly troubling for companies that are not dumping. For example, a company subject to an AD investigation might be determined by the Department under normal practice to have a *de minimis* dumping margin. However, were CVD or 201 duties deductible from EP or CEP, such companies could suddenly find themselves subject to AD duties. The AD rates payable by such

[34] *See U.S. Steel v. United States*, 15 F. Supp. 2d 892, 899 n7 (CIT 1998) (Citing Article VI(5) of GATT, the Court stated, "As the U.S. antidumping laws are generally intended to be GATT consistent, Commerce's desire to avoid double remedies is legitimate."), *rev'd on other grounds*, 225 F.3d 1284 (Fed. Cir. 2000).

companies would bear no relation to dumping. Instead, they would represent nothing more than a surplus CVD or 201 duty.

B. Deduction Of CVD And 201 Duties Would Create Unlawful And Unfair Duty Rates For Companies That Are Not Subject To CVD Or 201 Orders

Companies may be entitled to exclusions from CVD orders. By law, they normally are entitled to company-specific duty rates in CVD investigations. Similarly, companies may obtain product exclusions from 201 duties. And there may be additional reasons why the scope of an AD order might not overlap perfectly with the scope of a CVD or 201 order.[35] Should the CVD or 201 duties be deducted from EP or CEP, companies that find their products subject to an "all others" AD rate could be forced to pay AD duties that are calculated to account for CVD or 201 duties the companies were never obligated to pay.

C. The Timing Of Deducting CVD Duties Relative To The Calculation Of The Dumping Margin Would Create Inconsistent Assessments

The United States uses a retrospective approach to determine CVD duties actually owed. Therefore, an AD investigation could not account for duties from a concurrently proceeding CVD investigation. CVD duties could not be deducted in AD cases until the CVD rate was determined conclusively through an administrative review. Actual CVD duties that are assessed for shipments to the United States are not definitively set until the completion of the appropriate administrative review, including any appeals from those reviews, often continuing for many years after the date of shipment. Therefore, the actual CVD duties paid on that shipment cannot be

[35] For example, two NAFTA Chapter 19 Binational Panels ruling on the Department's "class or kind" analysis in CVD and AD final determinations for softwood lumber from Canada came to different conclusions as to whether certain products belonged in the same "class or kind" as other products in the scope of the CVD and AD orders.

determined until well after they would be needed for the AD administrative review of that shipment. Using the CVD duties actually paid during the AD period of review would be inconsistent with assessment requirements because those duties pertain to shipments made years before.

The retrospective administrative review procedure also allows time for foreign producers to change their pricing or a subsidizing government to change its practices to remedy the trade distortion before cash deposits are converted to duties. Foreign producers subject to a dumping order could not adjust their pricing to eliminate a dumping margin where the margin was based on the imposition of CVD duties. The foreign producer (and particularly one who had not received any subsidies) could not know, when pricing its product, what assistance the subsidizing government might provide during the fiscal year. The foreign producer would not know in advance what methodology the Department would use to assess the CVD rates, or whether it would be entitled to an individual CVD rate or an aggregate rate. CVD assessment rates could not be predicted with enough precision to enable the foreign producer to make necessary pricing adjustments to avoid dumping.

V. Conclusion

The practical difficulties, likely inequities, and legal inconsistencies that would arise from a new policy to deduct CVD or 201 duties from EP or CEP, all illustrate why U.S. statutes and the WTO Agreements do not allow for such deductions. To deduct CVD or 201 duties from EP or CEP would be inconsistent with the trade laws and their underlying purposes. The Department should maintain its longstanding practice, consistent with the plain language of the statute and regulations, upheld by the courts, not to deduct CVD or 201 duties from EP or CEP.