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BY HAND DELIVERY

James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: *Treatment of Countervailing Duties in Antidumping Proceedings – Comments by West Fraser Mills Ltd.*

Dear Assistant Secretary Jochum:

This letter is submitted on behalf of West Fraser Mills Ltd. ("West Fraser"), a Canadian and U.S. producer of forest products, in response to the Department's request for public comments on the appropriateness of deducting countervailing duties from gross unit price in determining the applicable U.S. export price ("EP") or constructed export price ("CEP") used in antidumping duty calculations. For the reasons stated below, the Department should adhere to its current practice of not deducting countervailing duties, either estimated or assessed, from U.S. gross unit prices in calculating EP or CEP.

I. The Department Does Not Have The Statutory Authority To Deduct Countervailing Duties In Calculating EP And CEP.

As Commerce itself has recognized, the Department does not have statutory authority to deduct countervailing duties in calculating net U.S. prices. *See Antidumping Duties; Countervailing Duties: Proposed Rule*, 61 Fed. Reg. 7,308, 7,332 (Feb. 27, 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."). Several factors underlie this conclusion.

First, the language and legislative history of the statute show that Congress did not intend for the Department to deduct countervailing duties from gross prices in determining EP or CEP. Section 772(c)(2)(A) of the Trade Act of 1930 provides that the price used to establish EP and CEP shall be reduced by the amount of "United States import duties" included in the price. Although the statute does not expressly define the term "United States import duties," the legislative history makes clear that Congress intended this term to cover only ordinary customs duties, and not remedial duties such as antidumping and countervailing duties, which are specifically referred to elsewhere in the Act. As the Department has explained:

> 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).
>
> This conclusion is reinforced by the fact that section 211 of the 1921 Act (42 Stat. 15), provided that, for the limited purpose of duty drawback, "the special dumping dut[ies] * * * shall be treated in all respects as regular customs duties." *See* S. Rep. No. 16, 67th Cong., 1st Sess., at 4 (1921). If "special dumping duties" really were considered to be just one type of "United States import duty," this special provision would have served no purpose. That "special dumping duties" are distinct from normal import duties also is apparent from

> the fact that section 202(a) of the 1921 Act (42 Stat. 11) provided that "special dumping duties" may be applied to "duty-free" merchandise. In this context, "duty-free" meant "free from *ordinary* import duties." If "duty-free" meant "free from *any* duties," that would include antidumping ("AD") duties and countervailing duties ("CVDs"). Plainly, however, "duty-free" was understood to mean "free from ordinary customs duties." Although the Congress in 1921 did not explicitly stipulate that the new "special dumping duty" should not be calculated so as to include itself, the most reasonable explanation is that Congress would have considered it absurd to spell out such a self-evident proposition.

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

Other language in Section 772(c)(2) reinforces this conclusion. Subparagraph (B) of Section 772(c)(2) provides that the amount of any export tax or duty included in the starting price is *not* to be deducted if that tax or duty is specifically intended to offset a countervailable subsidy. From an antidumping perspective, an export tax intended to offset a countervailable subsidy is functionally the same as a countervailing duty levied by the United States, and nothing in the statute indicates that Congress intended for the calculation of EP and CEP to vary based on such a distinction. Indeed, to read the statue as authorizing the deduction of countervailing duties in calculating EP and CEP would mean that a respondent's dumping margin would vary, perhaps significantly, based simply on which country (the exporting country or the United States) actually collected the countervailing tax. Such an anomalous interpretation would not be reasonable. See *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

Second, the conclusion that the Department does not have statutory authority to deduct countervailing duties is underscored by proposals now before Congress to provide just that authority. In particular, Senate Bill 219 and House Bill 491 would amend Section 772(c)(2)(A) of the Act by inserting the parenthetical "(including countervailing duties imposed under this Act)" after the phrase "United States import duties." These proposals show that, had Congress intended for countervailing duties included in U.S. prices to be deducted in

calculating EP and CEP, it certainly could have included language to this effect in the statute. That Congress has *not* included such language, however, shows that the no such authority to deduct countervailing duties currently exists.[1]

Third, it is highly significant that Congress had never changed the Department's established practice of not deducting countervailing duties. As the Department itself has recognized, "[i]n the hundreds of antidumping duty administrative reviews that Commerce has conducted since 1980, the Department has never deducted AD duties or CVDs from the starting price in the United States . . . . Congress has been well aware of this situation, and, despite numerous revisions of the antidumping law since 1921, has never amended the law to change this result." *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea*, 62 Fed. Reg. 18,404, 18,421-22 (April 15, 1997). In fact, the issue of whether countervailing duties should be deducted in calculating U.S. prices "is an issue that was arduously debated during passage of the URAA and ultimately rejected by Congress." *Certain Cut-to-Length Carbon Steel Plate from Germany*, 62 Fed. Reg. 18,390, 18,395 (April 15, 1997). This history further confirms that Commerce's current practice is fully in accord with Congressional intent, and that a reversal of this practice would require Congressional authorization. *See United States v. Hermanos*, 209 U.S. 337, 339 (1908) ("[T]he reenactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction.").[2]

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[1] These proposals also indicate that Congress is well-aware of the Department's current practice, and that any change in that practice is appropriately left in the hands of Congress.

[2] *See also*, *e.g.*, *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974) ("This longstanding administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched."); *United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956) ("Against the Treasury's prior long-standing and consistent administrative interpretation its more recent *ad hoc* contention as to how the statute should be construed cannot stand.").

II. It Would Be Impossible For The Department To Deduct Countervailing Duties In A Consistent And Timely Manner.

Finally, even if the antidumping statute allowed the Department to deduct countervailing duties in calculating EP and CEP, the United States' retroactive assessment systems would make it impossible to make this adjustment in a consistent and timely manner.

Because the countervailing duties that are eventually assessed may vary significantly from the amount of estimated duties, it is well-established that the Department could only adjust for final (*i.e.*, assessed) countervailing duty amounts in making its antidumping calculations. It has been the Department's practice with respect to countervailing duties imposed to offset export subsidies to adjust U.S. prices upward only if final countervailing duties have been definitively assessed. *See Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 57 Fed. Reg. 38,668, 38,672 (Aug. 26, 1992) ("[S]uch an adjustment can only be made to offset countervailing duties imposed, *i.e.*, assessed at the time of liquidation (and not to offset a cash deposit for estimated countervailing duties)."); *see also Serampore Ind. Ltd. v. Commerce*, 11 CIT 866, 870-73 (1987). The Department could not reasonably adopt a different practice with respect to countervailing duties that are deducted, rather than added, to U.S. prices. *See Federal Mogul Corp. v. United States*, 17 CIT 88, 108 (1993) ("[T]he ITA was correct not to deduct cash deposits of estimated antidumping duties, which may not bear any relationship to the actual dumping duties owed, from USP.").

However, because final assessment of countervailing duties would occur only *after* the time for appeal has run, or an appeal is actually completed, the Department could not adjust for countervailing duties in a consistent and reasonable manner in antidumping reviews. For example, where antidumping and countervailing reviews proceed in parallel, the Department would be unable to account for countervailing duties in its antidumping calculations when the countervailing duty review is appealed. In that case, the appeal would delay final assessment of countervailing duties until long after the statutory deadline for the final antidumping determination. In comparison, where no countervailing duty review is requested, the Department could account for countervailing duties because those duties would be assessed

(and not subject to change) by the time the antidumping review is completed. West Fraser believes that such a basic inconsistency in the application of an important methodology, which could dramatically change the margin calculations of similarly-situated respondents, would be fundamentally unsound and at odds with the fair and a reasonable administration of the antidumping laws.[3]

Of course, the Department cannot await completing an antidumping review until a final assessment of countervailing duties for the same period has been made. Although waiting may better ensure a consistent application of the Department's methodology across reviews and among respondents, this alternative is prohibited by the statutory deadlines governing when an antidumping review must be completed.

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For the reasons stated above, West Fraser believes that it would be both legally and practically impossible for the Department to reverse its longstanding practice of not deducting countervailing duties in calculating EP and CEP. Should you have any questions regarding this submission, please contact the undersigned.

Respectfully submitted,

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[3] Deducting countervailing duties also would impede the ability of foreign producers to avoid dumping, since countervailing duty assessment rates often could not be predicted with enough precision to make necessary pricing adjustments.