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October 9, 2003

BY HAND DELIVERY

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

Attention: Section 201 Duties

Re: Comments on Proposal Regarding Treatment of Section 201 Duties and Countervailing Duties in Antidumping Proceedings

Dear Assistant Secretary Jochum:

We, the undersigned attorneys, submit these comments in response to the Department of Commerce's notice dated September 9, 2003, requesting comments from interested parties on a proposal to deduct countervailing duties and section 201 duties from U.S. price in calculating antidumping margins. We appreciate the opportunity to submit these comments. Our comments are being filed on behalf of the undersigned individuals only, and do not reflect the views of the law firm of Miller & Chevalier. These views are also independent of those of any clients of our firm.[1]

Each of the undersigned has extensive experience working with U.S. trade remedy laws. All of us have acted as private attorneys representing parties in dozens of proceedings, sometimes on behalf of petitioners, more often on behalf of respondents. Some in our group were at one time government officials charged with administering our trade remedy laws, and have been participants in the negotiations of applicable multilateral agreements. Some have served as counsel in some significant cases before both the U.S. Department of Treasury (which administered these laws before 1980) and the U.S. Department of Commerce ("Commerce"). Several have published articles reflecting our deep interest in the subject.

[1] Note that Miller & Chevalier represents Weyerhaeuser Company in a pending antidumping and countervailing duty proceeding which could be affected by this proposed treatment. Weyerhaeuser has an interest in the outcome. Weyerhaeuser has submitted its own comments.

In our view, the proposal to deduct countervailing duties and section 201 duties from United States price in a dumping margin calculation is contrary to the letter, intent, and policy of our trade remedy laws, contrary to long-standing Department practice, contrary to our international agreement obligations, and contrary to U.S. trade policy initiatives to reduce world trade barriers. This measure, if implemented, would be viewed as a protectionist barrier erected by the United States in the guise of an antidumping calculation modification. We do not believe that such a modification can be justified as necessary to ensure that imports entering the United States are "fairly traded." In fact, the measure is a form of "double-dipping." The United States imposes countervailing duties to eliminate the preferential impact of subsidies determined to exist, and now proposes to adjust U.S. price in a dumping context by the amount of the same countervailing duty.

Further, the proposal would deduct section 201 duties from U.S. price. However, duties imposed under section 201 bear no relation to unfair trade remedies. They are merely designed to allow an industry time to recover from import surges. It is difficult to see how the proposal will result in the desired "level playing field" on which imports compete fairly with U.S. production, when adoption of this proposal would cause a double adjustment in favor of petitioning U.S. industries. In short, we believe the proposal, if implemented, would be contrary to current law and bad policy.

We urge the Department to retain its current practice, and not to adopt the proposed change to deduct countervailing duties and section 201 duties from U.S. price in antidumping proceedings.

I. The Proposal Is Contrary To Current Law Governing the Treatment of Countervailing Duties in Antidumping Cases

We do not believe that the proposed treatment to subtract countervailing duties in antidumping cases can be reconciled with current U.S. law. In fact, the statute requires the opposite treatment.

As the Department knows, by statute both export price (EP) and constructed export price (CEP) must be calculated by reducing the gross unit price by the amount of certain expenses incident to delivering the merchandise in the U.S. The deductions from price also include certain import duties. Countervailing duties, however, are specifically excluded from those import duties that may be deducted. 19 U.S.C. § 1677a(c)(2)(A) provides that export price and constructed export price may be reduced by:

> (A) 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), the exception cited in the statute, includes an adjustment to price for countervailing duties. Paragraph (1)(C) states quite clearly that export price and constructed export price should be *increased* by the amount of any countervailing duty imposed. It states:

> The price used to establish export price and constructed export price shall be —
>
> (1) increased by —
>
> . . . (C) 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). The statute is unambiguous. Commerce's proposed treatment to reduce export price and constructed export price by the amount of any countervailing duties imposed is contrary to what current law requires. Any such interpretation would undoubtedly be susceptible to a challenge in the Court of International Trade or in a binational panel proceeding under NAFTA or a WTO dispute resolution panel.

II. Commerce's Long-standing Practice is Not to Deduct Countervailing Duties From the EP or CEP in Calculating Dumping Margins

Consistent with the statutory scheme, the Commerce Department's own regulations provide that in making adjustments to U.S. price or normal value, the Department may not double-count adjustments. 19 C.F.R. § 351.401(b)(2). Clearly, up to now, the Department has taken the position that it may not deduct countervailing duties precisely because it would double count the adjustment as admonished in the legislative history.

Indeed, Commerce's current practice has been routinely upheld by U.S. courts. *See, e.g., Hoogovens Staal B.V. v. United States*, 4 F. Supp. 2d 1213, 1220-23 (CIT 1998) (upholding "Commerce's long-standing policy and practice [of not treating] antidumping or countervailing duties as import duties or costs" under Section 772); *U.S. Steel Group v. United States*, 15 F. Supp. 2d 892, 899 (CIT 1998), *rev'd on other grounds*, 225 F.3d 1284 (Fed. Cir. 2000) ("*U.S. Steel* "); *Bethlehem Steel Corp. v. United States*, 27 F. Supp. 2d 201, 208 (CIT 1998); *AK Steel Corp. v. United States*, 988 F. Supp. 594 (CIT 1997), *aff'd*, 1999 U.S. App. LEXIS 15023 (Fed. Cir. July 6, 1999).

In the *U.S. Steel* case, the Department of Commerce argued persuasively that the exclusion of countervailing duties from deductible import duties is necessary in order to give

effect to § 1677(c)(1)(C) which specifically increases the gross unit price by the amount of the CVD. 15 F. Supp. 2d at 899. Commerce argued that:

> the addition required by § 1677a(c)(1)(C) . . . . of export-subsidy countervailing duties to the price in the United States cannot be deprived of its logical effect by an offsetting deduction, and this is the sole reason for the reference to export subsidies in § 1677a(c)(1)(C).

Id. The court sustained Commerce's decision not to deduct countervailing duties from export price. Further, the court rejected a distinction the petitioners attempted to make between countervailing duties imposed to offset export subsidies and countervailing duties assessed to offset non-export subsidies. The court stated:

> [T]he distinction that Domestic Producers attempt to make between the export and non-export countervailing duties is not a viable one. The double counting concern is still relevant if Commerce decides to deduct non-export countervailing duties. Logically, the deduction of a countervailing duty, whether export or non-export, from the U.S. price used to calculate the antidumping margin would result in a double remedy for the domestic industry. Commerce has already corrected for the subsidies on the subject merchandise in the countervailing duty order, thereby granting the domestic industry a remedy. To deduct such countervailing duties from U.S. price would create a greater dumping margin, in effect a second remedy for the domestic industry. Therefore, Commerce's rationale for not deducting countervailing duties is reasonable as applied to both export and non-export countervailing duties.

Id. at 900.

The position adopted by the Department of Commerce in *U.S. Steel Group* is the logical and appropriate construction of the two related portions of § 1677(c): (1)(C) and (2)(A). The published Notice of the Department provides no justification for reversing this longstanding practice.

Current law and interpretations by Commerce do provide one limited exception to the treatment of countervailing duties. Under Commerce regulations, and subject to certain qualifications, Countervailing duties may be deducted from U.S. price "where the exporter or producer: (A) Paid [the countervailing duty] directly on behalf of the importer; or (B) Reimbursed [the countervailing duty] to the importer." 19 C.F.R. § 351.402(f)(1) (previously 19 C.F.R. § 353.26); *see also Color Television Receivers from the Republic of Korea: Final Results of Antidumping Administrative Review*, 61 Fed. Reg. 4,408, 4,410 (1996) (recognizing that antidumping duties are only deducted in the situation where exporters pay or reimburse these duties, as outlined in 19 C.F.R. § 351.402 [then 19 CFR section 353.26] also applicable to

countervailing duties). This exception is limited to narrowly drawn circumstances where some form of circumvention is evident. It is the narrow exception, not the rule.[2]

III. The Proposal Is Contrary to the Intent of U.S. Trade Remedy Laws

According to the Statement of Administrative Action ("SAA") that accompanied the submission of the Uruguay Round Agreements to Congress for implementation, U.S. anti-dumping and countervailing duty laws are special rules, sanctioned by international agreement, to offset "unfair" practices in international trade. Similarly, "safeguard" duties are special and temporary additional duties (or other restrictions, such as import quotas) imposed on imports to shelter a domestic industry of the importing country from "serious injury" created by surges of imports -- even if the imports are fairly priced and traded -- to facilitate adjustment of the industry of the importing country. Each of these remedies is a narrow provision intended to remedy discrete problems and represents a purposefully limited derogation from the regime of bound tariffs that underlies the GATT and the WTO Agreements.

In particular, the intent of the countervailing duty law is to remedy a perceived "unfair" benefit or advantage that a foreign producer attains when a foreign government bestows a subsidy on a specific company or industry. In trade policy parlance, the term often used is achieving a "level playing field." The countervailing duty is imposed to offset the competitive advantage provided by the subsidy, thereby ensuring that imports produced or exported by a beneficiary of a specific subsidy are "fairly traded" and a competitive "level playing field" is maintained for U.S. producers. Once the countervailing duty is imposed, the imports are, by definition, fairly traded.

The proposal to deduct countervailing duties in a dumping calculation does not offset a subsidy or ensure imports are fairly traded; the countervailing duty already has achieved that objective. It does have the effect of increasing or even creating a dumping margin where one might not have existed prior to the deduction. This is no longer an offset to ensure fairly traded imports. It is a punitive and unwarranted adjustment. The trade remedy laws were never intended to be punitive.

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[2] In drafting the Uruguay Round Agreements Act, legislators suggested this limited exception as consistent with their intent that where the gross unit price is reduced by reimbursed dumping duties, that price would also be reduced by reimbursed countervailing duties.. *See* S. Rep. No. 103-412, at 64 (1994); *see also Color Television Receivers from the Republic of Korea: Final Results of Antidumping Administrative Review*, 61 Fed. Reg. 4,408, 4,410 (1996) (recognizing that antidumping duties are only deducted in the situation where exporters pay or reimburse these duties, as outlined in 19 C.F.R. § 351.402 [then 19 CFR section 353.26] also applicable to countervailing duties).

With respect to 201 duties, the clear intent of the law is to provide temporary relief from import surges. There is no need for any finding of an unfair trade practice, no suggestion that a foreign producer has received a subsidy or engaged in unfair pricing. The relief granted in a section 201 duty is designed specifically to give a U.S. industry time and market conditions to try to recover from the import surge. Indeed, the International Trade Commission is required to collect data on adjustment actions taken by the U.S. industry as part of its investigation, and the U.S. industry is encouraged to submit an adjustment plan. The level of duties adopted under section 201 to facilitate that adjustment are proposed by the Commission and must be approved by the President. Never in history has it been suggested that after such extended and presumably carefully considered calibration of the level of duties appropriate to the situation, should Commerce then double that duty in the context of an antidumping proceeding regarding the same merchandise.

The intent of the section 201 law is achieved as soon as the temporary duty is imposed. No further adjustment to prices or other duties is warranted to achieve relief from imports. By deducting section 201 duties in an antidumping investigation, however, Commerce would effectively use a temporary emergency measure as leverage to increase margins in an antidumping case. Again, this is a punitive and unwarranted adjustment. In fact, it has the effect of potentially prolonging the period of relief granted to a U.S. industry, because the dumping investigation could be conducted and dumping deposits/duties applied *after* the period for applying section 201 duties has expired. It is dubious that the safeguard statute was intended to be manipulated in this way.

IV. The Proposal, If Adopted, Would Breach The International Obligations Of The United States

In the Uruguay Round, the United States was a leader in drafting and securing acceptance of the international codes on antidumping and countervailing duties and safeguard measures. These were high priorities of this country to assure "fair trade" among the WTO's now 140+ members. The proposal would be contrary to express provisions of each of these Agreements.

Article VI(5) of the GATT specifically prohibits contracting parties from double counting countervailing duties in a dumping calculation. Article VI(5) provides:

> 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.

By deducting countervailing duties from U.S. price in a dumping calculation, Commerce would be doing exactly what Article VI(5) prohibits.[3]

Similarly, the Agreement on Subsidies and Countervailing Measures includes a precise footnote 30 describing a countervailing duty as a "special duty levied for the purpose of offsetting any subsidy bestowed . . . upon the manufacture, product or export of any merchandise." Article 19.4 further provides that "No countervailing duty shall be levied . . . in excess of the amount of the subsidy found to exist." If the countervailing duty so calculated and levied is then also made a part of the dumping margin in an antidumping proceeding, the practical effect will be a double countervailing duty based on the subsidy at issue. The Department may not impose a countervailing duty beyond that required to offset the amount of the subsidy determined.

The Agreement on Safeguards specifies that safeguard measures are to be imposed "only to the extent necessary to prevent serious injury or remedy serious injury and to facilitate adjustment." Art. 5.1. They are, further, limited in time to the period that the injury is abated or four years (or, if extended, eight years). Arts. 7.1, 7.3. As the level of duties that may be imposed as a "safeguard" is not specified, they may be set at arbitrary levels that have no recent relationship to the prices at which the subject goods are shipped to the United States or sold in this country. Their inclusion in the calculation of antidumping margins would effectively double their effect but would have no relationship to either the price-correction purpose of an antidumping duty or the adjustment facilitation period contemplated by the agreement on Safeguards. Adding safeguard duties to the size of dumping margins would subvert the intentions of both the Safeguards Agreement and the Antidumping Code.

Conclusion

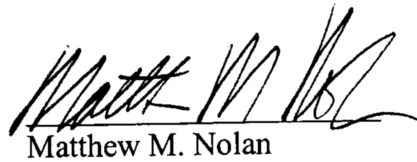
We respectfully submit that proposed treatment of countervailing duties and section 201 duties in an antidumping proceeding is contrary to the letter and intent of current law, contrary to the Department's consistent past practice (as validated by the courts), and contrary to our international obligations. Given these conclusions, we would expect any such change in treatment to result in numerous complaints before the Court of International Trade, the WTO,

[3] The Court of International Trade confirmed this interpretation in the *U.S. Steel* case cited earlier. In that case, the Court cited GATT Article VI(5) and stated: "As the U.S. antidumping laws are generally intended to be GATT consistent, Commerce's desire to avoid double remedies is legitimate." 15 F. Supp. 899, FN 7.

and NAFTA. In our view the United States could not sustain its position. Accordingly, we urge the Commerce Department to refrain from adopting this proposal.

Very truly yours,

Robert Herzstein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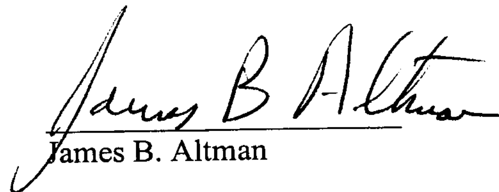
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