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The Honorable James J. Jochum
Assistant Secretary for Import Administration
Attn: Import Administration
Central Records Unit, Room 1870
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: Initial Comments in Response to Request for Public Comments**

Dear Assistant Secretary Jochum:

USEC Inc. and its wholly-owned subsidiary United States Enrichment Corporation (collectively "USEC") submit the following comments to the U.S. Department of Commerce (the "Department") in response to the Department's request for comments regarding the status of countervailing duties in antidumping calculations under Section 772(c)(2)(A) of the Tariff Act of 1930, as amended (19 U.S.C. § 1677a(c)(2)(A) (2000)).[1] USEC submits these comments to request that the Department, in its calculation of dumping margins for U.S. sales, adjust U.S. price

[1] Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, 68 Fed. Reg. 53,104 (Dep't Commerce Sept. 9, 2003).

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by deducting the amount of any countervailing duty deposits imposed to offset non-export subsidies, as mandated by 19 U.S.C. § 1677a(c)(2)(A).[2]

I. INTRODUCTION

USEC is the sole producer of enriched uranium in the United States and the world's leading supplier of enriched uranium fuel for commercial nuclear power plants. Uranium enrichment is a key step in the production of nuclear fuel used by nuclear power plants around the world to generate electricity. USEC operates the only uranium enrichment facility in the United States, a gaseous diffusion plant in Paducah, Kentucky. In addition, USEC's plant in Portsmouth, Ohio will host the company's American Centrifuge Demonstration Facility, which is the next important step in USEC's planned deployment of the United States's next generation uranium enrichment technology.

USEC is also the executive agent of the U.S. government for the Megatons to Megawatts program, a 20-year, $8 billion, commercially funded nuclear nonproliferation initiative of the U.S. and Russian governments. This unique program is recycling 500 metric tons of bomb-grade uranium taken from dismantled Russian nuclear warheads (the equivalent of 20,000 warheads) into uranium fuel, used by USEC's customers to generate electricity.

In December 2000, to respond to injurious dumping and subsidies by two European producers of low enriched uranium ("LEU") (Eurodif, a French government-owned company, and the British-Dutch-German consortium known as Urenco), USEC petitioned the Department to investigate unfairly traded imports of LEU from France, Germany, the Netherlands and the

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[2] USEC notes that the question of the appropriate treatment of countervailing duties imposed to offset non-export subsidies under 19 U.S.C. § 1677a(c)(2)(A) is an important issue currently confronted by the Department in the pending antidumping duty administrative review of low enriched uranium from France, Case No. A-427-818.

United Kingdom. In February 2002, as a result of the ensuing investigations, the Department imposed countervailing duty orders on imports of LEU from all four countries, as well as an antidumping order on imports from France.[3]

USEC believes that, having determined that imports of LEU should be subject to countervailing duties, the Department should adjust U.S. price in future administrative reviews in the French antidumping case (and potentially in the Urenco antidumping cases, should the Department's final negative determination in those cases be overturned as a result of USEC's pending appeal of that determination), by deducting the amount of any countervailing duty deposits imposed to offset non-export subsidies, when calculating the margin of dumping. The failure to make such an adjustment would understate the true cost of selling LEU in the United States, and thereby permit these foreign producers of LEU to mask the extent of their price discrimination in this market.

II. ARGUMENT

Antidumping duties are calculated by determining the amount by which the U.S. price for the foreign merchandise is below the normal value of the merchandise.[4] To make this comparison, the price for the good in the "home" market and the price in the U.S. market must be compared at the same level of trade. For example, the cost of transporting a product to the U.S. mar-

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3 A negative final determination in the Department's antidumping investigation of low enriched uranium from Germany, the Netherlands and the United Kingdom is currently being appealed to the Court of International Trade.

4 See 19 U.S.C. § 1677(a)(2)(a) (2000).

ket, the insurance on such a sale, and other fees incurred are subtracted from the gross U.S. price so as to permit a fair comparison with the foreign "normal value."[5]

To properly compare U.S. price to the normal value, the Department must adjust U.S. price to reflect any countervailing duties or duty deposits imposed during either the period of investigation or the period of review. Such an adjustment should be made because: 1) it is required by law; 2) it reflects the real cost of selling into the U.S. market; 3) it is consistent with Customs' treatment of duties; 4) it is consistent with the statutory treatment of duties by our major trading partners; 5) the Department's reasoning for not treating antidumping duties "as a cost" simply does not apply to countervailing duties; and 6) it is the only approach consistent with finding a "fair price" for the goods and with Congress' repeated admonition that unfair trade be offset to the maximum extent permitted by law.

Under the Department's current practice, U.S. price is not adjusted to account for the amount of any countervailing duty imposed to offset a non-export subsidy. This practice is inconsistent with the statute and precludes the Department from making a "fair comparison" of U.S. price and normal value. Law, economics, and sound policy require that the Department conform its practice to the requirements of the statute.

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5 See 19 U.S.C. § 1677(7)(c)(2)(A); Preliminary Results of Antidumping Duty Administrative Review: Structural Steel Beams from the Republic of Korea, 68 Fed. Reg. 53,129, 53,132 (Sept. 9, 2003) (adjustments under subsection (c)(2)(A) include "foreign inland freight," "foreign brokerage and handling expenses (i.e., loading and unloading charges, wharfage and lashing expenses, brokerage fees, and port renovation expenses), international freight, marine insurance, other U.S. transportation expenses (i.e., U.S. wharfage, brokerage, and handling charges), and U.S. customs duty").

A) Deduction Required by Law

In an investigation or an administrative review, the Department determines the U.S. price to be used in its fair value comparison pursuant to 19 U.S.C. § 1677a and 19 C.F.R. §§ 351.401-402 (2002). 19 U.S.C. § 1677a(c)(2)(A) (Section 772(c)(2)(A) of the Act) (hereinafter "subsection (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 . . . ."[6]

The plain and unambiguous language of the statute dictates that countervailing duties must be considered as costs, charges, expenses, or United States import duties incident to bringing subject merchandise to the place of delivery in the United States under subsection (c)(2)(A). The statute's language reflects the reality that certain expenses of selling and transport to the United States are "included" in the U.S. price. A valid comparison of normal value and U.S. price is not possible absent accounting and properly adjusting for such expenses. Failure to account for expenses incurred to sell merchandise in the United States, expenses in the form of countervailing duties, understates the true measure of dumping occurring if the selling price has not been increased to account for the additional expenses incurred. Consequently, the Department must adjust U.S. price to reflect the cost incurred by a foreign producer because of the imposition of such duties.

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6 Paragraph (1)(C) of the provision, referenced by 19 U.S.C. § 1677a(c)(2)(A), requires that the Department increase the 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).

Further, the broader context of the statute as a whole demonstrates that countervailing duties imposed to offset non-export subsidies are to be deducted pursuant to subsection (c)(2)(A). Section 772(c)(2)(A) expressly provides that countervailing duties imposed to offset export subsidies are not to be deducted from the U.S. price. By imposing this distinction in the statute, Congress plainly intended that countervailing duties imposed to offset non-export subsidies were to be deducted pursuant to Section 772(c)(2)(A). Excluding countervailing duties imposed to offset export subsidies from the downward adjustment required by subsection (c)(2)(A) would be superfluous unless countervailing duties generally were intended to be deducted.

Accordingly, the Department has improperly adopted an interpretation of the statute, which renders superfluous another portion of the same provision. See Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 837 (1988). In addition, the "familiar canon" of *expressio unius est exlusio alterius* demonstrates that because only countervailing duties imposed to offset export subsidies were specifically excluded from the expenses to be deducted pursuant to subsection (c)(2)(A), it is reasonable to conclude that Congress did not intend to prohibit deduction of countervailing duties imposed to offset non-export subsidies. See BMW Mfg. Corp. v. United States, 241 F.3d 1357, 1361 (Fed. Cir. 2001).

In contrast, the Department's conclusion that subsection (c)(2)(A) is limited to "regular" or "normal" customs duties is unsupported by the statute. See Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 48,465, 48,469 (Sep. 13, 1996). Nothing in the current or prior statutes indicates that Congress intended for the term "United States import duties" to be so narrowly construed. Indeed, the Department has, contrary to its assertions with respect to antidumping and countervailing duties, previously interpreted subsection (c)(2)(A) to encompass duties beyond "regular"

or "normal" customs duties. See Antidumping: Fuel Ethanol from Brazil; Final Determination of Sales at Less than Fair Value, 51 Fed. Reg. 5,572 (Feb. 1986)

B) Deduction Required to Reflect the Real Cost of Selling Into the United States

More generally, 19 U.S.C. § 1677b(a) requires the Department to make "a fair comparison . . . between the export price or constructed export price and normal value." A "fair comparison" requires that, inter alia, the Department account for all expenses and costs incurred incident to bringing subject merchandise into the United States. Countervailing duty deposits are indistinguishable from other costs or expenses incurred incident to bringing subject merchandise into the United States for which the Department does adjust. Foreign producers selling products affected by countervailing duties on a delivered basis in the United States must pay to the Bureau of Customs and Border Protection ("Customs") the amount of the countervailing duties as a condition of that merchandise entering the United States. There is an actual transfer of cash from the foreign producer to Customs, and the foreign producer does not have access to or legal control over the funds paid to Customs. As such, these payments are real expenses that are borne by the foreign producer and affect the net return to that producer of that sale. To the extent that the foreign producer increases his price to cover his expenses, including countervailing duties, dumping margins are not created or exacerbated. To the extent, however, that the foreign producer does not increase his price to cover all expenses, including countervailing duties, that difference will become part of the dumping margin calculated. That result is consistent with the overall structure of the antidumping law.

There is no logical basis for accounting for freight or insurance expenses in an antidumping analysis but disregarding countervailing duties. Each is an expense of selling in the United States and each is a reduction of the total amount of cash available to the foreign producer. In

fact, foreign producers impacted by such countervailing duty orders generally treat the duty deposits as costs or expenses incurred incident to bringing the subject merchandise into the United States. Absent a downward adjustment to U.S. price for the amount of any countervailing duty deposit imposed to offset a non-export subsidy, a "fair comparison" of U.S. price and normal value is not possible.

C) **The Department's Practice is Inconsistent With Customs' Treatment of Duties**

The Department's practice is inconsistent with Customs' statutorily mandated method of valuing merchandise pursuant to 19 U.S.C. § 1401a. Under § 1401(a), Customs determines the dutiable value of merchandise by deducting any antidumping duty or countervailing duty that may be included in the price. See Headquarters Ruling Letter 543963 (Sep. 11, 1987); Headquarters Ruling Letter 544552 (Sep. 20, 1990); Headquarters Ruling Letter 544596 (Nov. 23, 1990); and Headquarters Ruling Letter 544722 (Jun. 4, 1991). Doing so derives the value of the merchandise alone, i.e., the proper basis for calculating the duties owed. Thus, if certain merchandise were imported on a duty-paid basis with a value of $100 and that merchandise were also subject to a countervailing duty deposit of $10, Customs would deduct the amount of the countervailing duty deposit from the duty-paid value to establish a "transaction" value of $90 upon which duties would be assessed. In contrast, in its dumping calculation, the Department does not currently take account of the countervailing duty. Thus, if normal value were $110 under the same fact scenario, the Department would find a dumping margin of ten percent (110-100/100 = 0.10). The actual antidumping duty amount collected by Customs, however, would be less than the amount of the price discrimination in the market measured by the Department. Customs would assess the ten percent antidumping duty on $90, collecting only $9, as opposed to the $10 of dumping found by the Department.

The Department's practice is inconsistent with Customs' valuation and, as a result, provides importers with an unfair advantage. As noted, the absolute amount of the dumping calculated by the Department is greater than the absolute amount collected by Customs because, although the percentage applied by the two agencies is identical, the absolute value of the bases are different. The conflict in agency practice means that antidumping duties imposed or collected will never sufficiently address the level of price discrimination occurring in the market. If, on the one hand, Customs were to alter its practice to conform to the Department's practice, its collection of duties would be based on a figure that encompassed both the value of the merchandise as well as any countervailing duties included in the price. Customs would impose duties on duties, which would clearly be wrong. On the other hand, if the Department were to alter its practice to conform to Customs' practice, the true measure of dumping would be accurately determined (110-90/90 = 0.22 or 22%). In addition, there would little chance for a disparity between the amount of dumping calculated and the amount collected by Customs because the value base used in each analysis would be consistent and identical.

D) <u>The Department's Practice Is at Variance With the Laws of Our Major Trading Partners</u>

Accounting for countervailing duties imposed to offset non-export subsidies in calculating the U.S. Price is fully consistent with the United States' international obligations, and it is also consistent with the laws of our major trading partners. The laws of the European Union, Canada and Mexico each require the deduction of import and other duties, and taxes. <u>See</u> Council Regulation (E.C.) No. 384/96 of 22 December 1995, Articles 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). 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." Special Import Measures Act, CH. S-15, Article 25(1)(c)(i) (1997). The laws of our major trading partners, then, belie any claim that adjustments for countervailing duties imposed to offset non-export subsidies is inconsistent with the United States' international obligations.

E) The Department's Rationale For Not Accounting For Antidumping Duties Is Irrelevant to its Treatment of Countervailing Duties

In the past, the Department has explained its failure to adjust the U.S. Price for duties imposed to offset non-export subsidies by claiming, in part, that to do so either results in (1) a "double remedy" for the domestic industry (U.S. Steel Group v. United States, 22 C.I.T. 670, 678, 15 F. Supp. 2d 892, 899 (1998), rev'd on other grounds, 225 F.3d 1284 (Fed. Cir. 2000)) or (2) the introduction of a "recursiveness" problem into the calculation of duties (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; Final Results of Antidumping Duty Administrative Reviews, 63 Fed. Reg. 2,558, 2,571 (Jan. 15, 1998)). These arguments have no merit with respect to the treatment of countervailing duty deposits.

Adjusting for the amount of any countervailing duty deposits incurred is no more double-counting than adjusting for any other costs, charges, expenses or United States import duties incurred by a foreign produced incident to selling a product in the United States. The rationale of the statute is that prices should bear and account for all expenses. If a seller sets prices to cover all expenses and otherwise does not sell for export at a lower price than in the home market, no dumping will be found. An accurate analysis of the existence and magnitude of dumping, how-

ever, requires that the normal value and the U.S. price be placed on a comparable footing, i.e., at the factory gate. Direct expenses incurred by either sale must be deducted. A delivered normal value must be adjusted for home market freight, for example, and a delivered U.S. price must be adjusted for foreign inland freight and international freight. If the U.S. price also included countervailing duty deposits, however, under the current Department analysis no adjustment would be made despite the fact that the countervailing duty deposits are an expense of selling in the United States and despite the fact that not adjusting for the difference in expenses of selling in the two markets would leave the prices being compared on different bases. Recognizing and accounting for countervailing duty deposits in an antidumping calculation is no more double-counting than is recognizing and accounting for ocean freight or marine insurance, for example.

In addition, "recursiveness" is not a problem with respect to countervailing duty deposits. As a threshold matter, adjusting for the amount of the antidumping duty in an antidumping duty calculation is argued to be "recursive" because deducting the amount of the antidumping duty affects (and increases) the margin of dumping which in turn affects (and increases) the antidumping duty, and so on. Put another way, if one of the determinants of the antidumping margin is the antidumping margin itself, then the Department will be faced with an unsolvable equation and an impossible task.[7] Whatever the merits of that argument with respect to antidumping duties, where the U.S. Price is adjusted to account for countervailing duties to offset a non-export subsidy, no issue of "recursiveness" is implicated. The antidumping duty does not impact the coun-

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[7] That is, if the value of the antidumping margin ("X") is determined, in part, by the deduction of the antidumping margin ("X") from gross U.S. price ("USP"), then the agency will be faced with a calculation of the following sort: X = (Normal Value) - (U.S. Price - X)/(U.S. Price -X). This is an equation to which there is no solution, as X is both a dependent and independent variable.

tervailing duty rate (i.e., there is no adjustment to the countervailing duty rate based on the antidumping duty). The countervailing duty rate will remain the same as that used to initially adjust U.S. price. The effect of the deduction of a countervailing duty on the antidumping calculation is no different than the effect of the deduction of freight or other recognized expense. Thus, no problem of "recursiveness" is presented.

In sum, the Department's concerns regarding "double-counting" and "recursiveness" do not apply to the adjustment of U.S. price to reflect the amount of any countervailing duty deposit imposed to offset a non-export subsidy.

F) Deductions of Countervailing Duties Imposed to Offset Non-Export Subsidies Must Be Made to Insure that Unfair Trade is Offset to the Maximum Extent Permitted By Law

The Department's failure to adjust U.S. price for countervailing duties permits subsidized foreign producers to continue selling in the U.S. market at an unfairly low price but avoid antidumping disciplines. This is patently inconsistent with Congress' repeated admonition that unfair trade practices be offset to the fullest extent possible in order to prevent harm to the domestic industry. Moreover, a failure to appropriately account for countervailing duties imposed to offset non-export subsidies is inconsistent with the President's expressed desire to insure a level playing field for domestic industries.[8]

III. CONCLUSION

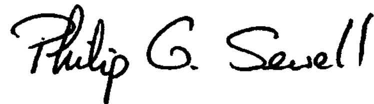
[8] See President's Remarks on Labor Day, Ohio Operating Engineers, Richfield Training Center, Richfield, Ohio, Sept. 11, 2003, available at: http://www.whitehouse.gov/news/releases/2003/09/print/20030901.html

> One way to make sure that we -- the manufacturing sector does well is to send a message overseas -- say, look, we expect there to be a fair playing field when it comes to trade. See, we in America believe we can compete with anybody, just so long as the rules are fair, and we intend to keep the rules fair.

For all of the foregoing reasons, the Department must, consistent with subsection (c)(2)(A), adjust U.S. price downward to account for the amount of any countervailing duty or duty deposit imposed on the subject merchandise to offset a non-export subsidy in its calculation of dumping margins for U.S. sales.

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

Respectfully submitted,



Philip G. Sewell
Senior Vice President