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November 7, 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 an original and six copies of rebuttal comments in response to the Department of Commerce's September 9, 2003 notice regarding the treatment of Section 201 duties and countervailing duties in antidumping proceedings. These rebuttal 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 Canada;

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

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]

These comments are filed in a timely manner pursuant to the Department's notice extending the time for submitting rebuttal comments until November 7, 2003.

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

Respectfully submitted,

Elliot J. Feldman
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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.

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

November 7, 2003

I. Introduction

The U.S. Department of Commerce (the "Department") issued a *Federal Register* notice 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.[1] 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)") for discussion of 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") submitted comments to the Department on October 9,

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[1] 68 Fed. Reg. 53104 (September 9, 2003).

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

2003 supporting 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.

The Coalition for Fair Lumber Imports (the "Coalition"), United States Steel Corporation ("U.S. Steel"), and USEC Inc., (collectively the "Dewey Group")[3] all submitted comments similar to one another, arguing for a change in the Department's practice to permit the deduction of CVD duties from EP or CEP. The Industry Associations and Companies submit these rebuttal comments in response to the arguments made by the Dewey Group.

II. The Law Does Not Require, Nor Does It Allow, Deduction Of CVD Or 201 Duties

Congress expressed its intent as to how EP or CEP should be adjusted to account for the payment of CVD duties when, as part of the Trade Agreements Act of 1979, it amended Section 772 of the Tariff Act of 1930. Congress added to Section 772 the provision that is now found at 19 U.S.C. §1677a(c)(1)(C). That provision requires the Department to increase EP or CEP by "the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy."[4]

The Dewey Group claims that subsection (c)(1)(C) shows that CVD duties implicitly are deductible under (c)(2)(A).[5] Subsection (c)(1)(C), however, does not

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[3] The Coalition is represented by Dewey Ballantine, LLP. U.S. Steel also is represented by Dewey Ballantine LLP and by Skadden, Arps, Slate, Meagher & Flom, LLP. USEC Inc. submitted comments under its own name, but those comments mirrored those of the Coalition and U.S. Steel. Thus, for convenience in referring to their submissions, the Industry Associations and Companies refer to these three parties in these rebuttal comments collectively as the "Dewey Group."

[4] The language of the modern statute is virtually identical to the language in the 1979 amendment, which required an increase by "the amount of any countervailing duty imposed on the merchandise under subtitle A of this title or section 303 of this Act to offset an export subsidy." *See* Section 772(d)(1)(D) of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 182.

[5] *See* Coalition Comments at 12; U.S. Steel Comments at 15; USEC Comments at 5-6.

support this view. Had Congress intended only to exclude CVD duties for export subsidies from an implicit deduction of CVD duties under (c)(2)(A), then it would have written subsection (c)(1)(C) quite differently. Rather than provide for an *increase* of EP or CEP in the amount of the CVD duties for export subsidies, Congress would have exempted such duties from the general deduction that the Dewey Group reads into (c)(2)(A).

The legislative history of the Trade Agreements Act of 1979 explains why Congress chose to increase, rather than exempt, CVD duties for export subsidies in (c)(1)(C) when Congress amended Section 772 of the Tariff Act of 1930:

> Additionally, the addition for countervailing duties assessed on the same merchandise to offset subsidies is clarified to apply only to subsidies which are classified as export subsidies.
> * * *
> The purpose of the amendment regarding additions to purchase price and exporter's sales price with respect to countervailing duties also being assessed because of an export subsidy is designed to clarify that such adjustment is made only to the extent that the exported merchandise, and not the other production of the foreign manufacturer or producer or other merchandise handled by the seller in the foreign country, benefits from a particularl [*sic*] subsidy. The principal behind adjustments to the price paid in these instances is to achieve comparability between the price [*sic*] which are being compared. Where the situation is the same, e.g., both the merchandise examined for the purpose of determining "purchase price" and such or similar merchandise examined for the purpose of determining "foreign market value" benefit from the same subsidy, *then no adjustment is appropriate.*[6]

Thus, Congress expressly intended what the words expressly say: no adjustment (including, therefore, no deduction) would be appropriate for CVD duties imposed to offset a "domestic" or "non-export" subsidy because both the merchandise for the

[6] S. Rep. No. 96-249, at 93-94 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 479-480 (emphases added).

purpose of determining "purchase price" (*i.e.*, EP or CEP) and "foreign market value" (*i.e.*, normal value) benefit from the same subsidy. Export subsidies, by contrast, benefit only the merchandise sold in the export market and an adjustment must be made to export price in order to "achieve comparability" (*i.e.*, a fair comparison) with the price in the foreign market. The only adjustment for CVD duties authorized by Congress was to increase EP or CEP where the duties were intended to offset an export subsidy. The Department's current practice is consistent with the plain language of the statute, and Congressional intent.

The Dewey Group quotes extensively from the legislative history of the 1921 Antidumping Act, but is unable to produce any statement by Congress from that legislative history, or anywhere else in current law, that explicitly defines "costs, charges or expenses" or "United States import duties" to include CVD or 201 duties. U.S. Steel argued previously to the Court of International Trade ("CIT") that the legislative history of the 1921 Antidumping Act supported an interpretation of "United States import duties" to include trade remedy duties.[7] The CIT found the argument "not persuasive, especially in light of {U.S. Steel's} admission that the legislative history is silent as to the definition of 'United States import duties.'"[8] Neither U.S. Steel nor the Coalition has been able to improve here the argument that already failed at the CIT.

The Dewey Group argues that 19 U.S.C. §1677a(c)(2)(A) unambiguously requires the deduction of CVD and 201 duties from EP or CEP, but is imprecise about

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[7] *U.S. Steel Group v. United States*, 15 F. Supp. 2d 892, 899-900 (CIT 1998), *rev'd on other grounds*, 225 F.3d 1284 (Fed. Cir. 2000).

[8] *Id.* at 900, n.8.

which specific terms in the statute compel that conclusion. The statute provides for reducing EP or CEP 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....[9]

The Dewey Group would have to show that CVD or 201 duties are either "costs, charges, or expenses," on the one hand, or "United States import duties," on the other. The phrase "United States import duties" is distinguished in the statute from "costs, charges, or expenses," and it does not have the same meaning as those items.[10] Although the Dewey Group argues that the "plain language" of subsection (c)(2)(A) "mandates" the deduction of CVD duties from EP or CEP, the Dewey Group does not specify which of the two phrases – "costs, charges or expenses;" or "United States import duties" – give rise to that imagined mandate. In some sections of its comments, the Dewey Group considers CVD duties unambiguously to be "United States import duties," and in other sections, CVD duties apparently are unambiguously "costs, charges or expenses."[11]

CVD and 201 duties are neither "costs, charges or expenses," nor "United States import duties." The Dewey Group is correct that the statutory language is not

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[9] 19 U.S.C. §1677a(c)(2)(A) (emphasis added).

[10] The phrase "costs, charges, or expenses," could be read together as a non-exclusive list of similar items. But the phrase "United States import duties" is separated by the word "and" from "costs, charges, or expenses," and therefore has its own meaning. The Coalition tries to gloss over this distinction by misquoting the statute as requiring "the Department to identify and adjust for 'additional costs, charges, *expenses or* United States import duties.'" Coalition Comments at 8 (emphasis added).

[11] Compare Coalition Comments 16-17 with 22, 25; U.S. Steel Comments 21 with 25; USEC Comments 6 with 7.

ambiguous, but not in the way the Dewey Group would like. There is, however, ambiguity. It resides in the Dewey Group's indecision as to which aspect of the statute is supposed to be providing the authority it claims to find for deductibility.

Were the Dewey Group's interpretation of (c)(2)(A) correct, it would then conflict with another part of the statute. Deduction of the CVD duties from EP or CEP would violate (c)(2)(B), which does not allow a deduction for "export taxes, duties, or other charges levied on the export of merchandise to the United States" imposed by the exporting country to offset the countervailable subsidy received.[12] 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. The Department may not construe (c)(2)(A) in a way that would contradict the Congressional intent expressed in (c)(2)(B) that offsets to countervailable subsidies may not be deducted in calculating EP or CEP.

The Department must give effect to the unambiguously expressed intent of Congress when applying a statute.[13] Congressional intent may be discerned by employing "traditional tools of statutory construction," including legislative history.[14] The legislative history to (c)(1)(A) reveals that Congress intended an adjustment to EP or CEP for CVD duties only when those duties were imposed to offset export subsidies.

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[12] *See* 19 U.S.C. §§ 1677a(c)(2)(B) and 1677(6)(C). These provisions prohibit the deduction of export taxes designed to offset both domestic and export subsidies, underscoring the clear Congressional intent that no deduction to U.S. price be made in either the domestic or export subsidy setting. The sole distinction between the two settings is that the statute requires that CVD duties imposed for export subsidies be added to U.S. price.

[13] *See Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

[14] *Timex V.I. Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998).

The Department's current practice conforms with Congressional intent.[15] There is no legal basis for changing it.

III. The Dewey Group Mischaracterizes The "Real Cost" Of Selling Into The U.S. Market

The Dewey Group argues that CVD duties should be deducted from EP or CEP as expenses incurred in selling in the United States. The litmus test that the Dewey Group offers for the "real cost" of selling into the U.S. market is: "Absent payment, such merchandise could not and would not enter the United States."[16] This view does not conform to the law, however, as it ignores many types of payments or expenses that, while bearing some remote connection to the subject merchandise, are not deductible from EP or CEP.

For example, CVD duties imposed to offset export subsidies would be deductible from EP or CEP under the Dewey Group's test, even though the law requires an adjustment to increase EP or CEP by the amount of those duties. Special packing costs, separate from the price of the merchandise, also would be deductible under the Dewey Group's test, even though the law requires an adjustment increasing EP or CEP by the amount of such costs.[17] AD duties,[18] legal fees,[19] and export taxes to offset

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[15] The Dewey Group points to *Fuel Ethanol from Brazil*, 51 Fed. Reg. 5,572 (Feb. 1986), as a unique example of the Department deducting "special customs duties" from U.S. price. *See* Coalition Comments at 19; U.S. Steel Comments at 22; USEC Comments at 7. The "special customs duties," however, were added to the HTS schedule by Congress and more closely resembled normal customs duties than a trade remedy imposed by the Department.

[16] Coalition Comments at 21; U.S. Steel Comments at 24-25.

[17] *See* 19 U.S.C. §1677a(c)(1)(A) providing for an increase to EP or CEP in the amount of "when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States."

[18] *See e.g.*, *AK Steel Corp. v. United States*, 988 F. Supp. 594, 607 (CIT 1997).

[19] *See Daewoo Electronics Co. v. United States*, 712 F. Supp. 931, 947 (1989), *rev'd on other grounds*, 6 F.3d 1511 (Fed. Cir. 1993).

countervailable subsidies[20] all would be considered by the Dewey Group as part of the "real cost" of selling in the United States. Some of these items also may be considered "expenses" for accounting or corporate income tax purposes, but the law does not allow deduction of any such items from EP or CEP as part of the Department's dumping calculations.

IV. The Department's Procedures Account For Customs' Methodologies And All AD Duties Are Collected

The Dewey Group argues that differences between the way that the Bureau of Customs and Border Protection ("Customs") and the Department treat CVD duties causes a shortfall in AD duty collection. This argument is incorrect. It reflects a misunderstanding of the way the Department interacts with Customs to collect trade remedy duties.

The Department calculates a separate assessment rate for Customs to yield the full amount of AD duties relative to the entered value data used by Customs.[21] Therefore, the fact that valuation methodologies used to derive entered value for customs duty purposes vary from the calculations the Department uses to calculate duty rates has no adverse impact on Customs' ability to collect the full amount of AD duties required by the Department.

The Department calculates dumping margin deposit rates by dividing the total AD duties due (*i.e.*, in a total dollar amount) by the total net value of all U.S. sales.

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[20] *See* 19 U.S.C. § 1677a(c)(2)(B) and19 U.S.C. §1677(6)(C).

[21] *See* 19 C.F.R. §351.212(b). ("[T]he Secretary normally will calculate an assessment rate for each importer of subject merchandise covered by the review. The Secretary normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes. The Secretary then will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise.")

Customs, however, does not have information on the total net value of foreign producers' U.S. sales. Customs has only the entered value of the merchandise that importers are required to report. Thus, the deposit rates are used only as an estimate of duties due. Were Customs to assess this dumping margin percentage (total duties due/total net value of all U.S. sales) to the entered values of the subject merchandise, Customs might then not collect the correct amount of duties due.[22]

To avoid this problem and ensure full collection of AD duties due, the Department calculates a separate assessment rate during an administrative review.[23] The Department obtains information on the total entered value for the period of review to calculate the assessment rate. The numerator for calculating the assessment rate still reflects the total amount of duties to be collected, but the denominator is the total entered value of the merchandise.[24] The Department gives the assessment rate (total duties due/total entered value of merchandise) to Customs to apply to the entered value of the subject merchandise and to collect (or "assess") the duties.

The Dewey Group's oversimplified characterization of Customs' calculation of "dutiable value" omits important distinctions illustrating why the two types of calculations cannot be compared reasonably. Customs uses several different

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[22] Customs might collect too few duties, but it might also collect too many. Entered value often may be a higher value than the net price calculated by the Department because it may include domestic freight and other expenses that might not be deducted in accordance with Customs' rules and regulations for reporting entered value.

[23] *See* Department of Commerce Antidumping Manual at Chapter 18, p. 16. ("Our standard language in FR notices ('(i)ndividual differences between U.S. price and normal value may vary from the percentage listed above") is another way we alert the public that the rate in the FR may not be the rate we instruct customs to use to collect the final duty amount.")

[24] *See id.* at 11. ("Percentage instructions for appraisement are based on entered value. The percentage amount is calculated by dividing duties due by the total entered value of the sales we analyzed. We ask for this information in the questionnaire we send at the outset of the AR.")

valuation methodologies, some of which vary from the methodology used in the Dewey Group's hypothetical example. Customs would deduct CVD duties intended to offset export subsidies just as it would any other CVD duties, whereas the Department is required to increase export price by the amount of such duties. The Department's calculations in a dumping investigation are based on sales data from respondent companies; Customs has no access to such data. The differences between Customs valuation calculations and the Department's dumping margin calculations are intentional, and present no risk to the collection of all AD duties owed.

V. Deduction Of CVD Or 201 Duties Raises The Same Concerns As Deduction Of AD Duties

According to the Dewey Group's broad reading of (c)(2)(A), the Department would have to deduct AD duties just as it would have to deduct CVD duties from EP or CEP. The Department cannot, therefore, adopt the view that the law requires deduction of CVD duties from EP or CEP, while ignoring the fundamental problems with deducting AD duties from EP or CEP.

The CIT has ruled consistently that estimated AD and CVD duties (*i.e.*, cash deposits) may not be deducted from EP or CEP:

> Commerce's long-standing 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, which may not bear any relationship to the actual dumping duties owed" under § 1677a(d).[25]

[25] *Hoogovens Staal BV v. United States*, 4 F. Supp. 2d 1213, 1220 (CIT 1998); *see also Federal Mogul Corp. v. United States*, 813 F. Supp. 856 (CIT 1993); *PQ Corp. v. United States*, 652 F. Supp. 724 (CIT 1987).

Petitioners in *AK Steel*, recognizing the CIT precedents that denied the deduction of cash deposits, argued that the CIT had implicitly endorsed the deduction of actual AD and CVD duties. The CIT rejected that argument.[26]

The deduction of estimated or actual CVD duties from EP or CEP presents "double counting" problems similar to those presented by the deduction of AD duties. The Dewey Group is correct when it states that AD duties and CVD duties are imposed for fundamentally different reasons and serve fundamentally different purposes.[27] Each duty is a remedy that addresses its own trade distortion. For that reason, the remedies should be kept separate from each other in the Department's analyses, except for the statutory obligation to increase EP or CEP by the amount of CVD duties imposed to offset export subsidies.

Deducting CVD duties from EP or CEP leads to a double-counting of the legal remedy for a countervailable subsidy because the duties on the same subject merchandise would be paid once under the CVD order, and again under the AD order. Thus, AD duties would be charged to offset the effect of a countervailable subsidy even though CVD duties would be paid also to offset the same trade distortion. The domestic industry therefore would receive a double remedy for the countervailable subsidy.[28]

The CIT has considered and rejected arguments that CVD duties are somehow immune from the double-counting problems that AD duties, or CVD duties to offset export subsidies, present:

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[26] *AK Steel Corp v. United States*, 988 F. Supp. 594, 608 (CIT 1997).

[27] *See* Coalition Comments at 39; U.S. Steel Comments at 44.

[28] Similarly, deduction of 201 duties would lead to a double remedy for safeguard relief.

Domestic Producers respond expressly for the first time in their reply brief that Commerce's rationale does not apply to the treatment of countervailing duties imposed to offset non-export subsidies. The Domestic Producers assert that domestic subsidies are not presumed to have any particular price effect, and are not presumed to have equal price effects in the home and U.S. markets. Accordingly, Domestic Producers argue that Commerce has failed to demonstrate that the deduction of *non-export* CVD duties from U.S. price would result in a double remedy or an impermissible double-counting.

The court has upheld Commerce's interpretation that countervailing duties should not be deducted from U.S. price, based on Commerce's position against double-counting. *See A.K. Steel*, 988 F. Supp. at 607-08. Domestic Producers ask the court to make a narrow exception to this general rule and find that Commerce's interpretation and rationale are unreasonable as applied to the deduction of countervailing duties designed to offset non-export subsidies.

Based on the information presented, the 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.[29]

VI. Conclusion

The Dewey Group argues that trade distortions must "be offset to the maximum extent possible,"[30] but AD duties should not be calculated to provide domestic

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[29] *U.S. Steel Group v. United States*, 15 F. Supp. 2d 892, 900 (CIT 1998), *rev'd on other grounds*, 225 F.3d 1284 (Fed. Cir. 2000).

[30] Coalition Comments at 46; U.S. Steel Comments at 50; USEC Comments at 12.

industries with trade remedies in excess of what is permitted by law. The WTO Antidumping Agreement, SCM Agreement, Agreement on Safeguards and GATT Article VI(5) all prohibit the deduction of AD, CVD and 201 duties from EP or CEP, as indicated in the Industry Associations and Companies' October 9 Comments. The CIT has stated that, "As the U.S. antidumping laws are generally intended to be GATT consistent, Commerce's desire to avoid double remedies is legitimate."[31]

The purpose of the U.S. antidumping law is to remedy a trade distortion affecting domestic producers, not to punish foreign producers.[32] The deduction of CVD and 201 duties from EP or CEP would overreach the law and its purpose by artificially increasing dumping margins when other trade remedies are in effect. Congress stated that it did not intend CVD duties to be deducted from EP or CEP. The Department must give effect to the plain language of the statute and to Congressional intent.

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[31] *U.S. Steel v. United States*, 15 F. Supp. 2d 892, 899 n7 (CIT 1998), *rev'd on other grounds*, 225 F.3d 1284 (Fed. Cir. 2000).

[32] *See NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) ("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.")