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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: Rebuttal Comments

Dear Assistant Secretary Jochum:

The Coalition for Fair Lumber Imports[1] (the "Coalition") submits the following rebuttal comments to the U.S. Department of Commerce (the "Department") in the above-captioned review. Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties,

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1 The Coalition for Fair Lumber Imports is a group of U.S. lumber manufacturers and manufacturers' associations which supports an end to foreign unfair trade practices relating to lumber. Its countervailing duty and antidumping petitions against unfair imports were supported by over 270 producers representing over two-thirds of U.S. lumber production and by two unions: the United Brotherhood of Carpenters and Joiners and the Paper Allied-Industrial, Chemical and Energy Workers International Union ("PACE"). Efforts to end and offset the unfair trade have also been supported by the Forest Landowners Association and by various environmental organizations, including the Natural Resources Defense Council, the Northwest Ecosystem Alliance, and Defenders of Wildlife.

68 Fed. Reg. 53,104 (Sept. 9, 2003); Antidumping Proceedings--Treatment of Section 201 Duties and Countervailing Duties; Extension of Time for Rebuttal Comments, 68 Fed. Reg. 60,079 (Oct. 21, 2003). Based upon the comments filed with the Department, it is even more evident that, in calculating dumping margins, the Department must adjust U.S. price by deducting the amount of any countervailing duty deposits imposed to offset non-export subsidies.

Executive Summary

The antidumping law is intended to ensure that pricing in the U.S. market is fair. The goal is to permit U.S. companies to compete on a level playing field with foreign competitors. Thus, those competitors should not be permitted to sell in the United States at prices below those in their home market or below their fully allocated cost of production -- as, over time, U.S. firms operating in a functioning market cannot do so and hope to stay in business. If foreign prices fall below those levels, the law is clear, and Congress' intent is clear -- such sales should be subject to antidumping duties ("ADs"). See 19 U.S.C. § 1673 (2000).

What is remarkably absent from all of the foreign comments supporting the current policy of ignoring countervailing duties ("CVDs") on domestic subsidies in assessing antidumping duties is any serious discussion of what is, in fact, a fair price for foreign products sold in the United States when those products are subject to CVDs. The first, primary, and insurmountable, reason to change the Department's policy is that failing to include CVDs on non-export subsidies in calculating antidumping duties permits foreign producers to continue selling in the U.S. market at an unfairly low price and avoid a fair offset. This is not the level playing field sought by our laws, by Congressional intent, or by the commitment of the President.

As the Coalition previously explained, a CVD to offset a non-export subsidy stands in lieu of a cost that a fair trading market participant must pay. For example, in an open and com-

petitive market, sawmills (in the United States or, for example, non-subsidizing Canadian provinces, or third countries) must pay a fair price for timber. The price of that timber must be reflected in their costs if they are to stay in business. If a non-subsidized foreign company failed to include that cost in its price, it would be dumping. Equally, when a foreign company receives its timber for a subsidized price and pays a CVD to bring its costs into line with a fair market price, it must reflect that cost in its price or its price is not a fair price. See Section I infra; Public Comments from the Coalition for Fair Lumber Imports (Dewey Ballantine LLP) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 46-51(Oct. 9, 2003) ("Coalition's Initial Comments").

Second, the plain language of the statute and Congress' amendments in the 1979 Trade Agreements Act demonstrate that Congress intended that the Department must adjust U.S. price in the amount of any CVD imposed to offset a non-export subsidy. The legal arguments offered to the contrary are inapposite. There exists no support in the statute or legislative history for the claim that the phrase "United States import duties" as used in 19 U.S.C. § 1677a(c)(2)(A) (Section 772(c)(2)(A) of the Tariff Act of 1930, as amended) was meant to only encompass "normal" or "ordinary" customs duties. In addition, the structure of the statute demonstrates, contrary to the assertions of opposing parties, that Section 772(c)(2)(A) contemplates the reduction of U.S. price by the amount of any CVD imposed to offset a non-export subsidy where the CVD is included in such price. Where Congress intended to exclude certain measures from the adjustment provisions, it did so explicitly -- by specifically excluding CVDs imposed to offset export subsidies from Section 772(c)(2)(A) and specifically excluding export taxes imposed by the country of export to offset countervailable subsidies from Section 772(c)(2)(B). No similar exclusion was made for CVDs imposed to offset non-export subsidies. In sum, the statute requires the

change in practice advocated and, at a minimum, the Department is fully vested with the discretion necessary to correct its current practice.

Third, the Department's current practice is inconsistent with the Bureau of Customs and Border Protection's ("Customs") practice regarding the valuation of merchandise. As demonstrated in Section III infra, given Customs' valuation method, the CVD and AD rates established by the Department do not fully offset unfair trade practices in the United States. Yet, Customs' practice is in full accord with Congressional intent and with internationally agreed upon standards for valuation. The only means to correct this problem is for the Department to change its practice.

Fourth, arguments contending that a correction of the Department's practice would result in "double-counting" are the product of fundamental misunderstandings regarding the operation of the adjustment sought. The imposition of a CVD does not and cannot address all unfair trade practices that may be occurring in the market. The Department is obligated to view each possible incidence of unfair trade -- whether dumping or subsidization -- independently. In so doing, the Department must not allow for its analysis of one unfair trade practice to be improperly impacted by its actions to address another. An adjustment to U.S. price for the amount of any CVD imposed to offset a non-export subsidy where the CVD is included in such price assures that this effect is avoided. In short, such an adjustment is entirely appropriate and does not constitute "double-counting."

Fifth, a correction of the Department's practice is fully consistent with the United States' international obligations. As the Coalition has previously demonstrated, the laws of our major trading partners permit the adjustment of U.S. price for the amount of any CVD imposed to offset a non-export subsidy. Below, the Coalition has identified the laws of several additional trad-

ing partners which would, by their terms, permit a deduction for the amount of any CVD imposed. Moreover, such an adjustment is not prohibited by any aspect of the international obligations which the United States is a party to.

Sixth, contrary to the assertions of some opposing parties, a correction of the Department's current practice is likely to facilitate a negotiated settlement to the softwood lumber dispute. Indeed, should the Department correct its practice, it would help ensure that any settlement reached would fully address the level of unfair trade occurring in the United States market.

Seventh, a correction of the Department's current practice would not unfairly harm foreign producers, domestic importers or consumers.

Finally, should the Department use this opportunity to correct its practice, the change in practice should take effect immediately.

I. FAIR PRICING REQUIRES THAT THE PRICE OF IMPORTS REFLECT COUNTERVAILING DUTIES IMPOSED TO OFFSET DOMESTIC SUBSIDIES

Arguments submitted by parties opposed to the Department correcting its practice with respect to the treatment of CVDs imposed to offset domestic subsidies ("opposing parties") have failed to address the impact which the Department's current practice has on fair pricing in the U.S. market. As the Coalition previously observed, the purpose of the dumping laws is to ensure a fair price, consistent with the price that an equally competitive producer would have to charge in a fair, free, and competitive market. Failure to adjust the U.S. price by the amount of any CVD imposed to offset a non-export subsidy distorts the fair price, and undermines efforts to fully and effectively address the injurious effect of unfair trade.

A CVD is intended to offset the advantage provided by a domestic subsidy -- i.e., eliminating the unfair advantage (lower cost) which results from government subsidies. The purpose

of an antidumping duty is to ensure a fair price that reasonably reflects all of a seller's costs and the seller's prices in its home market. These are different laws, addressing two independent unfair acts. While a CVD imposed on subject merchandise offsets the unfair cost advantage of the domestic subsidy, an independent question remains of what is a "fair price" for those goods in the U.S. market. What is their cost of production and sale? What price places them on a level playing field vis-à-vis their unsubsidized costs?

The inequity to the U.S. producer (or, for that matter, an unsubsidized foreign producer) by the Department's current practice is manifest. A U.S. producer (or unsubsidized foreign producer) must account for all of its costs in setting its price for a sale of merchandise in the United States. In contrast, receipt of a subsidy artificially reduces the full cost of production of the merchandise; thus, in an initial investigation involving both subsidy and dumping allegations, the cost of the foreign subsidized producer is lower, and this is reflected in the dumping margins. No one is complaining about that.

Yet, once a CVD is imposed, the CVD acts as a proxy for the difference in the subsidized foreign producer's cost of production and an unsubsidized producer's cost of production. Imposition of a CVD on a subsidized foreign producer is intended to put the subsidized foreign producer, the unsubsidized foreign producer, and the U.S. producer on the same footing vis-à-vis their cost of production. And so it does when calculated properly. But what about the independent issue of price? What about the independent remedy that the law provides for pricing below fully allocated costs? U.S. sawmills, for example, must reflect the cost of timber in their price, or they go out of business. Unsubsidized foreign producers must reflect the cost of timber in their price, or they are dumping. Why does the current Department practice say that the "fair"

price for a subsidized foreign mill is lower than that for equally competitive but unsubsidized domestic or foreign mills?

As the Coalition has previously observed, in the context of softwood lumber, failure to address the cost of paying the CVD on domestic subsidies seriously disadvantages U.S. producers. See Coalition's Initial Comments at 46-51. The Coalition again proffers the following example: a U.S. Mill and Subsidized Foreign Producer are on opposite sides of the border. Both the U.S. Mill and Subsidized Foreign Producer service the same market in the United States, and they are equally competitive. All of their costs of production, except timber, are equal -- the mills' labor costs are the same, their operating costs are the same, etc. In a fair competitive market, timber fees might cost a lumber mill $150 and processing another $150; a fair price is $300. In a subsidized market, the government provides timber to the foreign subsidized mill for $100, resulting in a cost to Subsidized Foreign Producer of $250. If the Subsidized Foreign Producer sells softwood lumber in the United States for $225 and both a countervailing duty case and an antidumping duty case are brought by the U.S. Mill, the Department would find a $50 subsidy and $25 of dumping ($250 cost - $225 price). See Attachment A.

Under these circumstances, if the subsidized mill's F.O.B. U.S. port of entry sales price to a U.S. customer is $225, both the level of the dumping and the illegal subsidy are addressed. The U.S. customer is responsible for deposit of the $50 CVD and the $25 AD imposed and, by virtue of these deposits, the softwood lumber from the subsidized mill should be sold into the United States at a "fair price" of $300.

But what happens when the Subsidized Foreign Producer takes responsibility for paying the CVD and AD deposits imposed, i.e., when the terms of sale are duty included?[2] In these circumstances, what is a fair price in the United States? What price accurately reflects the costs the mill has incurred in producing and bringing softwood lumber into the United States? In particular, what happens if a foreign producer chooses to ignore costs so as to buy market share?

The Department has three options: it can measure the "fair price" of the goods by ignoring the amount of AD and CVD imposed; it can measure "fair price" by considering both the ADs and CVDs imposed; or it can measure "fair price" by taking into account the CVDs imposed. See Attachment A.

While adjusting U.S. price for both ADs and CVDs may require a foreign producer to set the price at above what we would otherwise see as a "fair" level to avoid antidumping duties, failing to account for CVDs sets that "fair price" at far too low a level. The "fair price" is $300, the price that a U.S. mill operating on fair terms must charge and the price that an unsubsidized Canadian mill, or equally competitive third country mill, would have to charge to avoid a finding of dumping.[3] In order to get the "fair" price from the sales of the subsidized mill, the Depart-

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2 A more complete discussion of the impact of the terms of sale on this issue is included in Section IV.B below.

3 The softwood lumber producers in the Maritime Provinces (the "Maritimes"), nevertheless, express their opposition to any change in practice. The Maritimes producers object that, so long as they are subject to an "all others rate," or J.D. Irving (by far the largest Maritimes producer) is not investigated separately, they would be disadvantaged by any action that recognized the real cost of their competitors in the other Canadian provinces. See Public Comments from the Maritime Provinces (Howrey & Simon) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties at 3 (Oct. 9, 2003). Of course, this is neither the time nor the place for a discussion of the advantages and disadvantages of the "all others rate," nor whether J.D. Irving should have been chosen as a named opposing party (action which the Coalition did not oppose). The point remains, however, that this is clearly a cost of selling into

(footnote continued)

ment must account for the $100 in stumpage costs, the $150 in processing costs, plus the $50 in CVD deposits made.[4] If a foreign producer charges $300, no antidumping duties will be assessed.[5]

Of course, Canada always has the option of ending the subsidies. There, too, the result would be the same: The fair price needed to avoid a finding of dumping is $300.

The Department's position is, therefore, perverse in that it encourages dumping where the benefits of an illegal subsidy are received. On the other hand, Section 772(c)(2)(A), if properly administered, insures that the Department appropriately identifies the true "fair price" of subject merchandise -- in this example, unquestionably $300.

II. THE STATUTE REQUIRES THE DEPARTMENT TO REDUCE U.S. PRICE BY ANY CVD IMPOSED TO OFFSET A NON-EXPORT SUBSIDY

Section 772(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 . . . .

(footnote continued)

the U.S. market, and the Department's current practice unfairly disadvantages not only U.S. producers, but third country producers or even unsubsidized producers from the country under investigation that are not subject to an "all others rate."

4 While Section 772(c)(2)(A) treats a duty as a deduction from U.S. price (rather than an addition to the cost of production *per se*), the result is the same – if the foreign producer charges $300 in the U.S. market, there is no dumping.

5 Of course, all of these examples (and the Department's reasoning) assume simplistically that Subsidized Foreign Producer is not covering the cost of its CVD. This is a complete fabrication. Money is fungible. One might as well say that it is not covering its labor cost, processing cost or transportation costs. The fact is that it is not covering its costs.

Paragraph (1)(C), referenced in the above excerpt, requires that the Department increase 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 . . . ." Section 772(c)(1)(C) (emphasis added).[6]

The plain and unambiguous language of the statute dictates that CVDs must be considered costs, charges, expenses, or United States import duties incident to bringing subject merchandise to the place of delivery in the United States. See Coalition's Initial Comments at 8-12. Moreover, Congress' action in amending the language of Section 772 in the Trade Agreements Act of 1979 demonstrates that the legislature understood that U.S. price was to be adjusted by the amount of any CVD imposed.

As the Coalition has also previously noted, in 1979 Congress expressly amended the statute to exclude CVDs imposed to offset export subsidies from the adjustments made under the provision. See id. at 12. Had Congress meant for CVDs not to be included among the downward adjustments within the phrase "any additional costs, charges, or expenses, and United States import duties . . ." of Section 772(c)(2)(A), there would have been no reason to exclude one type of CVD (those imposed to offset export subsidies, as opposed to those imposed to offset non-export subsidies) from the reach of the provision. The exclusion of CVDs imposed to offset export subsidies from the downward adjustment would be superfluous unless CVDs generally

6 The legislative history to the Trade Agreements Act of 1979 explains the purpose underlying the addition of Section 772(c)(1)(C) to the statute. See S. Rep. No. 96-249 (July 1979) at 94 (Trade Agreements Act of 1979). Specifically, the Senate Finance Committee noted that an upward adjustment to U.S. price is required where a foreign producer has benefited from an export subsidy because of the differential effect of such a subsidy on U.S. and home market prices, respectively. The Committee further explained that an upward adjustment is not required where the foreign producer has benefited from a domestic subsidy, because the subsidy would have the same impact on both U.S. and home market prices. Id.

were intended to be deducted and to be included within the provision. The Department has improperly adopted "an interpretation of a congressional enactment which renders superfluous another portion of that same law." See, e.g., Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 837 (1988); Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 698 (1995). "{E}ffect must be given, if possible, to every word, clause, and sentence of a statute." See 2A Sutherland Statutory Interpretation § 46:06 (N. Singer, 6th ed. 2000).

Similarly, application of the "familiar canon" of *expressio unius est exclusio alterius* demonstrates that Congress intended for the Department to account for CVDs imposed to offset non-export subsidies. Congress expressly excluded CVDs imposed to offset export subsidies from the reach of Section 772(c)(2)(A), but did not provide that CVDs imposed to offset non-export subsidies be excluded from the provision. "Where {Congress} did not so provide, it is reasonable to conclude that {it} did not so intend." BMW Mfg. Corp. v. United States, 241 F.3d 1357, 1361 (Fed. Cir. 2001). See also Cook v. Principi, 318 F.3d 1334, 1339 (Fed. Cir. 2002).[7]

A. Opposing Parties' Legal Arguments to the Contrary Are Inapposite

Opposing parties have proffered an array of legal arguments seeking to justify the Department's current practice, none of which do so.

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7 While the Supreme Court has noted that *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping, the Court explained that the canon "properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference." Barnhart v. Peabody Coal Co., 537 U.S. 149, ___, Slip. Op. at 18 (Jan. 15, 2003) (quoting E. Crawford, Construction of Statutes 337 (1940)). Here, where Congress has explicitly exempted from the downward adjustment CVDs imposed to offset export subsidies, it can only reasonably be concluded that CVDs imposed to offset non-export subsidies "were excluded {from the exemption} by deliberate choice, not inadvertence." Id. (citing United States v. Vonn, 535 U.S. 55, 65 (2002)).

1. The Statute Does Not Limit "United States Import Duties" To "Ordinary" or "Normal" Customs Duties

Many of the opposing parties rely upon the legal analysis of the legislative history of the Antidumping Act of 1921 (the "1921 Act") previously put forward by the Department in an effort to assert that the statute precludes the deduction of CVDs imposed to offset domestic subsidies from U.S. price. See, e.g., Public Comments from West Fraser Mills Ltd. (Gibson, Dunn & Crutcher LLP) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 2-3 (Oct. 9, 2003) ("West Fraser Initial Comments"); Public Comments from Corus Group plc (Steptoe & Johnson LLP) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 3 (Oct. 9, 2003) ("Corus Group Initial Comments"); Public Comments from British Columbia Lumber Trade Council (Baker & Hostetler) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 6 (Oct. 9, 2003) ("British Columbia Lumber Trade Council Initial Comments"); and Public Comments from EUROFER (IAS) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 4 n.9 (Oct. 9, 2003) ("EUROFER Initial Comments"). These opposing parties observe that the Department has asserted that Congress used the term "United States import duties" in the statute to uniformly refer to "ordinary" customs duties. See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 62 Fed. Reg. 18,404, 18,421 (Apr. 15, 1997). This conclusion is based on the contrast of the use of the phrase "United States import duties" with the phrase used to designate antidumping duties: "special dumping dut{ies}." Id.

This worn legal analysis is flatly incorrect. First, the 1921 Act distinguished at least three phrases (not two) to describe various types of duties -- "special dumping dut{ies}," "regular customs duties," and "United States import duties." Section 211 of the 1921 Act states that for the purpose of duty drawback, "special dumping dut{ies} . . . shall be treated in all respects as regular customs duties." In Section 211, Congress specifically referred to "ordinary" or "normal" customs duties, by the use of the phrase "regular customs duties." The phrase "regular customs duties," however, does not appear in Sections 203 and 204 of the 1921 Act which define "purchase price" and "exporter's sales price," respectively. Instead, Sections 203 and 204 use a third phrase, "United States import duties." Thus, Congress used three distinct phrases in the 1921 Act -- "special dumping dut{ies}," "regular customs duties," and "United States import duties" -- not two as previously argued. If Congress meant "regular customs duties" in Sections 203 and 204, it could have and would have used the same phrase used in Section 211. Thus, "United States import duties" must be understood to mean something other than "special" duties or "regular" duties; the only interpretation consistent with sound logic and the text is that it includes both.

Second, Congress also used the phrase "United States import duties" in Section 302 of the 1921 Act in describing certain deductions to be made to "export value" for Customs' valuation purposes. Employing the Department's understanding of this phrase, under Section 302 of the 1921 Act, a Customs official would only deduct the amount of "normal" or "ordinary" customs duties, and not CVDs, from the export value for valuation purposes. As previously noted, this would have meant that Customs would have imposed duties upon duties, a state of affairs that the statute clearly attempted to avoid. See Coalition's Initial Comments at 12, 33. The legal analysis proffered by opposing parties does not address Section 302 of the 1921 Act.

Third, the legal analysis proffered is focused solely on antidumping duties and completely ignores CVDs, though CVDs were imposed by law as of the enactment of the 1921 Act. See United States v. European Trading Co., 27 C.C.P.A. 289, 297 (Cust. & Pat. App. 1940). Even if opposing parties were otherwise correct, the phrase "special dumping dut{ies}" was used to define antidumping duties, but no similar identifying phrase was used to distinguish CVDs in the 1921 Act. As CVDs were "duties" that were imposed under existing law at the time of the 1921 Act,[8] "special dumping dut{ies}" could be imposed "in addition to" any CVD imposed.[9] Thus, the Department's juxtaposition of the use of the terms "special dumping dut{ies}" and "United States import duties" is irrelevant with respect to CVDs.

2. Congress Did Not Address Whether A Deduction Is to Be Made to U.S. Price For the Amount of Any CVD Imposed to Offset Domestic Subsidies in the Uruguay Round Agreements Act

Certain opposing parties rely on the misguided prior assertion that Congress addressed the issue of whether to deduct the amount of any CVD imposed from U.S. price in the Uruguay Round Agreements Act ("URAA"). See, e.g., Public Comments from O'Melveny & Myers LLP to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Du-

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8 While not specifically mentioned, the 1921 Act clearly contemplated CVDs, referring to them by use of the term "duties" in Section 202(a). The legislative history further explained that "special dumping dut{ies}" were to be imposed "in addition to the duties imposed by existing law . . . ." See S. Rep. No. 67-16, at 10 (1921).

9 The Department's legal analysis also relies upon Section 202(a) of the 1921 Act in order to assert that the term "duties" was meant to refer only to "ordinary" or "normal" customs duties. Specifically, the Department argued that the use of the phrase "duty-free" at the beginning of the provision meant to refer only to merchandise which was free from ordinary customs duties. See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 62 Fed. Reg. at 18,421. The Department's analysis, however, completely ignores the use of the word "duty" at the end of the provision, which, because it permitted the imposition of "special dumping" duties in addition to any CVD imposed, clearly was meant to encompass more than just ordinary customs duties.

ties and Countervailing Duties, at 7 (Oct. 9, 2003) ("O'Melveny & Myers Initial Comments"); Certain Cut-to-Length Carbon Steel Plate from Germany, 62 Fed. Reg. 18,390, 18,394-395 (Apr. 15, 1997) (Final Results of Antidumping Administrative Review). There is, however, no basis for this assertion. See Coalition's Initial Comments at 20-21. The cited provision of the Statement of Administrative Action accompanying the URAA (the "SAA") in fact discusses only whether antidumping duties were to be treated as costs under the statute. See URAA SAA, H.R. Doc. No. 103-316, at 885. The SAA does not address whether CVDs are to be treated as costs.

3. The Statute's Structure Demonstrates That a Reduction of U.S. Price in the Amount of Any CVD Imposed to Offset a Non-Export Subsidy Is Required Regardless of the Treatment of Export Taxes

Opposing parties have additionally asserted that Sections 772(c)(1)(C) and (c)(2)(B) of the Act preclude the Department from correcting its current practice. Contrary to these claims, the interplay of these two provisions in fact further demonstrates that the Department has failed to meet its statutory obligations by refusing to adjust U.S. price by the amount of any CVD imposed to offset a non-export subsidy.

One opposing party asserts that all CVDs (regardless of whether they are imposed to offset export or non-export subsidies) "are specifically excluded from those import duties that may be deducted" under Section 772(c)(2)(A), because the provision excludes CVDs described in Section 772(c)(1)(C). See Public Comments from Miller & Chevalier to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 3 (Oct. 9, 2003) ("Miller & Chevalier Initial Comments"). The opposing party further asserts that Section 772(c)(1)(C) requires that U.S. price be increased "by the amount of any countervailing duty imposed." Id. at 4 (emphasis added). Opposing party, however, is only half-right, which makes the point wholly wrong. While Section 772(c)(2)(A) clearly precludes a re-

duction in U.S. price in the amount of any CVD imposed to offset an export subsidy, no such exclusion is granted for CVDs imposed to offset a non-export subsidy: the request for change at issue.

As other opposing parties have conceded, the statute clearly differentiates between CVDs imposed to offset export subsidies and CVDs imposed to offset non-export subsidies. See, e.g., Public Comments from Embassy of India to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 2-4 (unnumbered) (Oct. 9, 2003) ("Embassy of India Initial Comments") (noting that the Department did not distinguish between domestic and export subsidies in its request for comments, but that the statute clearly does). These opposing parties are completely correct. The clear implication is (and application of the doctrine *expressio unius* requires) that CVDs imposed to offset domestic subsidies must be used to reduce U.S. price. See Section II, supra; Coalition's Initial Comments at 12-14.

Several opposing parties have asserted that because the statute specifically instructs that export taxes, duties and other charges imposed by the exporting country to offset a countervailable subsidy are not to be deducted from U.S. price under 19 U.S.C. § 1677a(c)(2)(B), the statute does not permit the Department to reduce U.S. price by any CVD imposed to offset a domestic subsidy. See West Fraser Initial Comments at 3; British Columbia Lumber Trade Council Initial Comments at 5. This argument, however, proves too much. First, while observing that the statute specifically exempts export taxes imposed to offset a subsidy from deductions made to U.S. price, opposing parties are incapable of pointing to similar language with respect to CVDs imposed to offset domestic subsidies. Again, an application of the "familiar canon" of *expressio unius est exclusio alterius* holds that where Congress has provided an exemption for export taxes

imposed to offset a subsidy, but not CVDs imposed to offset a domestic subsidy, it is reasonable to conclude that Congress did not intend to provide such an exclusion. See BMW Mfg. Corp., 241 F.3d at 1361.

Thus, while Section 772(c)(2)(A) specifically excludes only CVDs imposed to offset export subsidies from the reach of the provision, Section 772(c)(2)(B) excludes all export taxes, duties, or other charges specifically imposed by the export country to offset any subsidy. This dichotomy in treatment makes sense. Section 772(c)(2)(B) provides one more incentive for foreign countries to work with the United States to address subsidization without requiring the imposition of CVDs by the importing country. After all, there are likely to be few circumstances in which a country provides a subsidy and then imposes an export tax to offset it other than as part of a settlement of a case (or to prevent a case from being filed). It is entirely reasonable to encourage settlement, but the doctrine of *expressio unius* still applies.

In sum, the appropriate treatment, for the purposes of dumping calculations, of various forms of measures imposed to offset countervailable subsidies was made clear by the statute after the enactment of the Trade Agreements Act. First, under Section 772(c)(1)(C), the amount of any CVD imposed to offset an export subsidy was to be added to U.S. price and, pursuant to Section 772(c)(2)(A), the amount of any such CVD was not to be deducted from U.S. price where that amount was "included" in the price. Second, under Section 772(c)(2)(B), export taxes, duties and other charges imposed by the export country to specifically offset a countervailable subsidy are not to be deducted from U.S. price. Third, export taxes or duties imposed by the exporting country for reasons other than to specifically offset a subsidy (such as to discourage export of a valuable commodity in order to encourage further processing in the country of origin) are to be deducted because such taxes or duties are expenses incident to selling in the United States. Thus,

only CVDs imposed to offset non-export subsidies remain. Such CVDs are dealt with only in Section 772(c)(2)(A). Pursuant to this provision, and in accordance with the statutory canon of *expressio unius est exclusio alterius*, the statute requires that the amount of such CVDs be deducted from U.S. price.

4. The Department Is Not Legally Prohibited From Correcting its Current Practice

Notwithstanding that the language and structure of the statute require the deduction of CVDs imposed to offset non-export subsidies, certain opposing parties have argued that the Department may not change its current, incorrect practice with respect to the treatment of CVDs absent a change in law or factual circumstances. See Public Comments from Instituto Brasiliero de Siderugica (Willkie Farr) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 3-4 (Oct. 9, 2003) ("Instituto Brasiliero de Siderugica Initial Comments"); Public Comments from Korea Iron & Steel Association ("KOSA") (Kaye Scholer LLP) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 5 (Oct. 9, 2003) ("KOSA Initial Comments"); West Fraser Initial Comments at 4. This is an incorrect statement of law.

Well-established principles of administrative law provide that an administrative agency has the authority to change or revoke its policies and practices if a reasonable explanation is provided for such a change. See Rust v. Sullivan, 500 U.S. 173, 186-87 (1991); NTN Bearing Corp. v. United States, 903 F. Supp. 62, 67 (Ct. Int'l Trade 1995). A court's review of an agency's change of position or practice will center on whether the action was arbitrary and capricious. Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42-43 (1983). A change is arbitrary only if "the factual findings underlying the reason for change are not sup-

ported by substantial evidence," or the reasoning is "inconsistent with the statutory mandate, or, to a lesser extent, if the reasoning (or lack thereof) violates general principles of administrative law . . . or offends standards of procedural fairness implied in the statute." Associacion Colombiana de Exportadores de Flores v. United States, 6 F. Supp.2d 865, 880 n.20 (Ct. Int'l Trade 1998) (citations omitted). Thus, the courts will uphold a change in the Department's practice unless that change is "shown to be unreasonable."

One opposing party relied on precedent, United States v. Cleveland Indians, 532 U.S. 200, 220 (2001), that is wholly inapposite. See KOSA Initial Comments at 5. In Cleveland Indians the Court was not confronted with a change in an agency's practice. Instead, the Court upheld a challenge to an agency's decision declining to change its longstanding practice. In upholding the agency's decision not to change its practice, the Court noted that it would not disturb the agency's discretion where such discretion was utilized in a "reasonable manner." See Cleveland Indians, 532 U.S. 218-219. Similarly, United States v. Hermanos, 209 U.S. 337, 339 (1908) and Saxbe v. Buxtos, 419 U.S. 65, 74 (1974), relied upon by another opposing party, see West Fraser Initial Comments at 4, are inapposite. As with Cleveland Indians, in each of these two cases the Court upheld the relevant agency's practice as a proper interpretation of the prevailing statute. No facet of these decisions -- neither dicta nor holding -- even remotely approaches the asserted legal principle that an agency may not change its practice absent a change in law. Certainly, these cases did not, *sub silentio*, change a long line of Supreme Court decisions about an agency's right to change its practice based upon a reasonable explanation.

In addition, one opposing party has asserted that United States v. Leslie Salt, 350 U.S. 383 (1956), precludes the Department from correcting its practice absent a change in law. See West Fraser Initial Comments at 4. This precedent, however, is also inapposite. In Leslie Salt,

the Court faulted the Treasury Department for making an *ad hoc* change in its administrative interpretation that ran counter to previous Supreme Court precedent. See Leslie Salt, 350 U.S. at 396 (citing United States v. Isham, 17 Wall. 496, 504 (1873)). Thus, Leslie Salt does nothing to abrogate an agency's discretion to correct its administrative practice where a reasonable explanation is provided for such a change.

Indeed, the Department has previously recognized that even where its practice has been affirmed by the courts, it is not precluded from following a new, reasonable policy. See 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, 63 Fed. Reg. 2,558, 2,571 (Jan. 15, 1998) (Final Results of Administrative Reviews). In fact, the Department could have corrected its practice in the course of any investigation or review where this issue was implicated, but has instead chosen to open the issue to comment from all parties. The Department has, therefore, taken extraordinary steps to ensure that, should it choose to correct its practice, a change in the agency's practice would not be *ad hoc*.

Similarly, contrary to the assertion of some opposing parties, the fact that Congress is considering certain bills that would amend the statute, has no bearing on whether the Department may correct its practice on its own. Opposing parties assert that Congress' consideration of the issue means that a change in practice is precluded, absent a legislative mandate directing such a change. See West Fraser Initial Comments at 3-4; Public Comments from Changwon & Dongbang (Akin Gump) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 2 n.2 (Oct. 9, 2003) ("Changwon & Dongbang Initial Comments"); Public Comments from Hysco (Akin Gump) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing

Duties, at 2 n.2 (Oct. 9, 2003) ("Hysco Initial Comments"). But this conclusion does not follow. Congress' consideration of the issue means nothing more than that certain legislators are sufficiently concerned that the agency has not administered the statute in conformity with Congressional intent. This does not, in any way, mean that the Department's discretion to correct its practice has been abrogated. Nor do the proposed bills relieve the Department of its responsibility to review its procedures to insure that the administration of the statute is in conformity with Congress' intent.[10]

B. The Department May Reduce U.S. Price By the Amount of Any CVD Duty Deposit Imposed Pursuant to Section 772(c)(2)(A)

Opposing parties have noticeably not attempted to argue that a CVD imposed to offset a domestic subsidy does not operate as an actual cost to the foreign producer incurred incident to bringing the subject merchandise from the original place of shipment in the exporting country to the United States, if that foreign producer is responsible for the payment of the CVD. See Coalition's Initial Comments at 21-22. The silence on this issue is unsurprising given that such duties are clearly a cost attendant to the exporter's sales in the United States when the terms of sale are "duty-paid." In this manner, a CVD imposed is indistinguishable from any other cost incident to bringing merchandise into the United States -- money that is paid from the foreign producer to the U.S. treasury for a CVD impacts that producer in the same way as money paid to the U.S.

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10 One opposing party asserts that the proposed bills further demonstrate that the phrase "United States import duties" was never meant by Congress to encompass CVDs. See West Fraser Initial Comments at 3-4. As demonstrated above in Section II, however, this is an absurd argument. In 1979, Congress specifically amended the provision to prevent deduction of CVDs imposed to offset export subsidies, evincing a clear understanding that the phrase "United States import duties" encompassed CVDs. The Department's failure to abide by Congressional intent cannot be understood as having effectively changed the statute.

treasury for an "ordinary" customs duty and both impact the producer in the same way as money paid from that producer to third-parties for shipping, handling, or insurance.

As there is no dispute regarding the question of whether a CVD operates as a "cost" to the foreign producer where the producer is also the importer of record, the only issue for the Department's consideration is whether a CVD deposit is, like an assessed CVD, a "cost" to the foreign producer. In its initial submission to the Department, the Coalition demonstrated that CVD deposits were, in fact, a cost to foreign producers. See Coalition's Initial Comments at 25-30. Indeed, in their initial submissions, opposing parties have attested to the fact that such deposits are clearly "actual" costs incurred by exporters.

Moreover, the Coalition has previously demonstrated that an adjustment to U.S. price for any CVD deposit amount included in the U.S. price is legal, fair, and economically sound. See Coalition's Initial Comments at 25-30. Certain opposing parties, however, claim that the Department is prohibited from adjusting for deposit amounts and may only make adjustments for final (i.e., assessed) CVD amounts. See West Fraser Initial Comments at 5; British Columbia Lumber Trade Council Initial Comments at 19. These opposing parties assert that the Department is limited to using assessed CVD amounts because of (1) the Department's "well-established" rules, and (2) the Department's practice of adjusting U.S. price upward pursuant to Section 772(c)(1)(C). See West Fraser Initial Comments at 5.

As demonstrated below, neither argument justifies limiting the Department to the use of only assessed CVD amounts in adjusting U.S. price. In fact, if anything, the second argument proffered by opposing parties establishes that the Department may use CVD deposit amounts to adjust U.S. price; indeed, failure to do so would demonstrate an unjustified bias against petitioning industries -- using deposits on export subsidy CVDs (against the interests of U.S. industry),

but refusing to use deposits on CVDs to offset domestic subsidies (again, against the interest of U.S. industry).

1. CVD Deposits Represent a Cost

Certain opposing parties assert that "it is well-established that the Department can only adjust for final (i.e., assessed) countervailing duty amounts in its antidumping calculation." See West Fraser Initial Comments at 5; see also British Columbia Lumber Trade Council Initial Comments at 19. These arguments ignore the fact that the amount of any "normal" duties may not be "known" when an antidumping rate is established and that the Department's "well-established" practice which makes certain adjustments (such as those for warranty expenses) based on amounts that are not specifically "known" at the time the adjustment is made. See Coalition's Initial Comments at 28-30.

This argument also ignores that both affected exporters and importers, and other federal agencies, treat CVD deposits as a cost incident to bringing subject merchandise into the United States.

In its initial submission to the Department, Energizer Battery explained the impact of CVD deposit amounts on importers through its discussion of the potential impact of AD deposit amounts on the opposing party. Energizer noted:

> Within the context of the U.S. anti-dumping duty deposit system, remains the constant fact that businesses have strong profit incentives to know the whole cost of imported goods, including all taxes, fees, and duties at the time of entry.

Public Comments from Energizer Battery Manufacturing, Inc. (Sonnenberg & Anderson) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and

Countervailing Duties, at 4-6 (Oct. 8, 2003) (emphasis added).[11] Accordingly, as a commercial matter, importers have strong incentives to treat CVD deposits made at the time of entry as costs incurred incident to selling subject merchandise into the United States. As the Coalition reported in its initial submission, a review of the public financial reports of foreign producers affected by CVD deposits demonstrates that such deposits are commercially considered costs incident to bringing subject merchandise into the United States. See Coalition's Initial Comments at 22-23. More recent financial reports further demonstrate this principle. For instance, in Slocan Forest Products Limited's recently announced third-quarter 2003 results, the company reported that it "expensed" the amount of CVD deposits made in that quarter. See Slocan Forest Product Ltd., Third Quarter Report 2003 at 9 (unnumbered). See also Widman's Market Barometer at 4 (Oct. 29, 2003) (analyzing the net mill returns to Canadian softwood lumber producers on U.S. sales by reducing the U.S. sales price by the amount of the CVD and AD duty deposits imposed), attached at Attachment B.

Further, treating CVD deposits as costs is consistent with Customs' practice regarding such deposits. As detailed at Section III, infra, Customs deducts the amount of any CVD paid from the dutiable value of subject merchandise. In a publication addressing the softwood lumber imports, Customs addressed how it administers this deduction. See Questions and Answers: Canadian Softwood Lumber, U.S. Customs Service (Jan. 24, 2002), available at <www.cbp.gov/ImageCache/cgov/content/import/add_5fcdv/lumber_2epdf/v1/lumber.pdf>. In

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11 As explained in detail below, no adjustment for a CVD deposit imposed to offset a domestic subsidy would be made in situations where an unaffiliated importer purchases subject merchandise on a terms of sale basis other than "duty-paid." See Section IV.B, infra. In these circumstances, the amount of the CVD would not be "included" in the U.S. price and Section 772(c)(2)(A) would not be implicated.

response to the question: "Are AD and CVD duties deductible from the price actually paid or payable?," Customs answered:

> A. Customs has ruled that AD/CVD duties are Customs duties. (See HQ 543963 dated 9/11/87 as modified by HQ 544722 dated 6-4-91, and HQ 546111 dated 3/1/96.) Thus, they can be deducted from the price paid or payable. However, there are two operative terms that have to be satisfied. The AD/CVD duties have to be **CURRENTLY PAYABLE**, i.e., they must be actually paid and included in the price paid or payable, and they must be **IDENTIFIED SEPARATELY** on the invoice.
>
> Based on the preliminary determination, an importer may elect to bond for the AD/CVD. When an importer elects to bond, the duties are not currently payable and cannot be deducted from the price.
>
> Nevertheless, if the AD/CVD duties are clearly identified separately on the invoice, are included in the price, and in fact paid, Customs can adjust at liquidation for duties included in the price versus final AD/CVD rates.
>
> **Note:** The importer must provide sufficient and credible evidence that the AD/CVD duties were included in the price and actually paid.

Id. at 4 (emphasis in original). Unlike a bond, CVD deposit amounts are transfers out of an importer's bank account actually paid to Customs and thus do not appropriately constitute part of the dutiable value of merchandise. Thus, Customs, like foreign producers and importers, also recognizes that CVD deposits are costs incident to bringing merchandise into the United States.

2. The Department's Practice of Adjusting U.S. Price Under Section 772(c)(1)(C) Establishes That CVD Deposits May Be Used to Adjust U.S. Price Under Section 772(c)(2)(A)

Certain opposing parties assert that the Department's administration of the adjustment to U.S. price mandated by Section 772(c)(1)(C) where a CVD has been imposed to offset an export subsidy demonstrates that the Department does not have the discretion to use deposit amounts to adjust U.S. price under Section 772(c)(2)(A). See West Fraser Initial Comments at 5; British Columbia Lumber Trade Council Initial Comments at 19-20. One opposing party declares:

"{t}he Department could not reasonably adopt a different practice with respect to countervailing duties that are deducted, rather than added, to U.S. prices." See West Fraser Initial Comments at 5.

Their premise is simply false.

The Department has recently asserted before the Court of International Trade that it has the discretion to adjust U.S. price pursuant to 19 U.S.C. § 1677a(c)(1)(C) where the countervailing duty imposed was "not yet finally assessed." See DuPont Teijin Films USA, LP v. United States, Slip. Op. 03-79 at 10 n.11 (July 9, 2003) (Ct. Int'l Tr.).[12] Accordingly, the Department currently does make an adjustment to U.S. price for CVD deposits (as opposed to final assessed CVDs) and has defended its ability to do so.

As West Fraser has correctly pointed out, if the Department has the discretion to adjust U.S. price upwards for a CVD deposit imposed to offset an export subsidy under Section 772(c)(1)(C), then the Department also has the discretion to adjust U.S. price downwards for a CVD deposit imposed to offset a domestic subsidy under Section 772(c)(2)(A). As West Fraser recognizes, there is simply no logical, statutory, or policy basis to read Section 772(c)(1)(C) as pertaining to deposits, and read Section 772(c)(2)(A) as pertaining to assessed duties only. See West Fraser Initial Comments at 5. In fact, any such statutory interpretation would be blatantly unreasonable by using a deposit rate when to do so works against petitioners, but refusing to do so in a parallel context when it supports more effective antidumping remedies.

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12 The Court did not pass on this claim, holding that the issue was not ripe for review, and instead remanded the Department's determination for reconsideration.

III. THE INCONSISTENCY OF THE DEPARTMENT'S PRACTICE WITH CUSTOMS' DUTY CALCULATION METHODOLOGY REQUIRES THAT THE DEPARTMENT'S PRACTICE BE CHANGED

Another issue not expressly addressed by opposing parties is the inconsistency of the Department's practice with Customs' practice regarding the valuation of merchandise. As the Coalition has previously explained, 19 U.S.C. § 1401a (2000) establishes a hierarchy of valuation methods used by Customs to determine the dutiable value of a good. Of these methods, the "transaction value," as defined under 19 U.S.C. § 1401a(b), is the preferred method. Pursuant to 19 U.S.C. § 1401a(b)(3)(B), the transaction value of imported merchandise does not include the "customs duties and other Federal taxes currently payable on the imported merchandise by reason of its importation . . . ." As with the terms contained in Section 772(c)(2)(A), the use of the term "customs duties" in 19 U.S.C. § 1401a(b)(3)(B) is not defined.

Nevertheless, Customs has understood and employed the phrase "customs duties and other Federal taxes currently payable on the imported merchandise by reason of its importation . . ." to include a CVD, provided that the duty amount is reported separately from the price actually paid or payable for the merchandise. See Headquarters Ruling Letter 545304 (citing Headquarters Ruling Letter 543963 (Sept. 11, 1987); Headquarters Ruling Letter 544552 (Sept. 20, 1990); Headquarters Ruling Letter 544596 (Nov. 23, 1990); and Headquarters Ruling Letter 544722 (June 4, 1991)). See also "Questions & Answers Regarding Canadian Softwood Lumber," U.S. Customs Service (Jan. 24, 2002) at 4, Question #8. Thus, the amount of any CVD deposit is deducted from the amount used to determine the dutiable value of a good.

Customs' interpretation of the statute plainly is correct. By deducting the amount of any CVD deposit included in the gross U.S. price when determining the net dutiable value, Customs insures that it is not imposing a duty upon a duty. That would be precisely the type of double-

counting, as discussed further infra, with which opposing parties purport to be concerned. Indeed, the principle that the dutiable value of merchandise should not include CVD amounts is an internationally agreed upon principle of valuation methodologies. The Customs Valuation Encyclopedia, published by the U.S. Customs Service, notes that the deduction of CVDs is required by the GATT Valuation Agreement. See Customs Valuation Encyclopedia, U.S. Customs Service at 127-128 (Jan. 2001). As noted in the Encyclopedia, the Customs Cooperation Council ("CCC")[13] Technical Committee Advisory Opinion 3.1 states that:

> Since the duties and taxes of the country of importation are by their nature distinguishable from the price actually paid or payable, they do not form part of the Customs value.

Id. at 128. CCC Technical Committee Advisory Opinion 9.1 further notes that "countervailing duties should be deducted under Article 5.1(a)(iv) as Customs duties and other national taxes." Thus, Customs' practice faithfully reflects an international consensus that when the amount of a CVD is included in the export price, the CVD is not a part of the Customs value and is a cost incurred incident to bringing subject merchandise into the country of importation.

At the same time, neither the statute nor Congressional intent can be considered to support the inconsistent administration by Customs and the Department of similar statutory provisions. The legislative history of the Trade Agreements Act of 1979 defines United States price for dumping analysis as "the price at which merchandise is purchased, or agreed to be purchased prior to the date of importation." See S. Rep. No. 96-249 at 93 (1979). The legislative history

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13 The CCC was the predecessor to the World Customs Organization ("WCO"). The WTO's Valuation Agreement mandates the WCO to administer the Agreement through its Technical Committee on Customs Valuation. The responsibility of the Technical Committee, which meets twice a year, is to ensure uniformity in the interpretation and application of the Agreement at the technical level.

similarly defines transaction value for valuation purposes as "the price actually paid or payable for the merchandise when sold for export to the United States." See id. at 114. Given that these two definitions are equivalent, any assertion that Congress intended for Customs and the Department to administer the provisions in a contradictory manner is indefensible.

The conflict in agency practice means that antidumping duties imposed or collected by Customs will never sufficiently address the level of price discrimination found by the Department to be occurring in the market. For example, suppose that a foreign producer's total duty-paid sales price in the United States for subject merchandise is $290. Assume that subject merchandise is subject to a zero rate for "normal" duties, but is subject to a CVD deposit of $40 along with a freight expense of $45, and a brokerage/handling fee of $5. Presented with this factual scenario, Customs would assess duties on the value of subject merchandise derived by subtracting the (a) invoiced amount for duty deposit, (b) freight, and (c) brokerage/handling fees from the delivered price of $290 ($290 - $40 - $45 - $5). The dutiable value, then, would be $200. The Department, on the other hand, derives U.S. price by subtracting only two of the three invoiced costs, charges, or expenses considered by Customs. Under the Department's incorrect interpretation of the statute, the delivered price of $290 is reduced by the amount of the freight expenses ($45) and the amount of the brokerage/handling fee ($5) ($290 - $45 -$5). The net U.S. price (or "ex-factory" price), then, is considered to be $240.

In these circumstances, if the normal value of subject merchandise is found to be $300, the Department would find an dumping margin of 25 percent (300-240/240 = 0.25). This margin would represent a $60 difference between the U.S. price ($240) and the normal value ($300) of subject merchandise. Customs, however, would apply the 25 percent antidumping duty rate to the lower dutiable value of $200, thereby collecting only $50. In sum, there would be a substan-

tial difference between the level of dumping that the Department intended to be offset ($60) and what Customs actually would collect ($50). The Department's failure to correctly apply the law means that the ADs imposed will not sufficiently address the level of price discrimination occurring in the market. See also Coalition's Initial Comments at 33 (demonstrating the consequences of the conflicting practices of the two agencies).

IV. PROPERLY ACCOUNTING FOR COUNTERVAILING DUTIES IN U.S. PRICE WOULD NOT RESULT IN A DOUBLE REMEDY OR DOUBLE COUNTING

Opposing parties supplement their flawed legal analyses in opposition to a correction of the Department's current practice with arguments premised upon fundamental misunderstandings of how the United States' antidumping laws operate. Specifically, opposing parties claim that should the Department reduce U.S. price for the amount of any CVD imposed to offset a non-export subsidy where the amount of that CVD is included in such price it would constitute "double-counting." This argument is semantics and without substance.

First, CVDs and AD duties address distinct unfair trade practices -- the first addresses artificial cost advantages provided by a government and the latter addresses unfair pricing. Plainly CVDs and ADs may be imposed simultaneously on the same merchandise to offset distinct unfair trade practices. Ensuring that particular imports do not enjoy a subsidy is not inconsistent with ensuring that those same imports are sold at a fair price (including all costs -- whether timber prices set in a market or CVDs imposed in lieu of fair market timber prices).

Second, the numeric examples which have been offered purporting to show that an adjustment for the amount of a CVD imposed to offset a domestic subsidy would constitute "double-counting" are premised upon an assumption that such a deduction would automatically be made wherever a CVD has been imposed. In fact, under the statute the Department would only

make such an adjustment where the amount of the CVD is included in the U.S. price, i.e. where the terms of sale are duty-paid, or where the export price must be constructed. Even in those instances, no duties would be imposed if price properly reflects costs.

Third, should the Department correct its practice and adjust U.S. price for the amount of any CVD imposed to offset a non-export subsidy where the CVD is included in such price, no "double-counting" would occur. Instead, the Department would appropriately be taking into account an additional cost to the exporter in bringing subject merchandise to the United States, as it is required to do under Section 772(c)(2)(A).

A. The Imposition of a CVD Does Not Address All Unfair Trade Practices

One major misconception underlying claims that an adjustment for the amount of a CVD imposed would constitute "double-counting" is that the CVD addresses all unfair trade. For example, one opposing party actually states that "{o}nce the countervailing duty is imposed, the imports are, by definition, fairly traded." See Miller & Chevalier Initial Comments at 5. This argument is telling: This is in fact a restatement of the alleged "double-counting" argument that lies at the base of opposing parties' objections and the Department's practice. Yet, the claim is simply false, and it is premised upon a confused understanding of U.S. trade remedy laws.

As the EU notes, "{e}ach WTO trade defence instrument (anti-dumping, anti-subsidy and safeguard) was designed to address a particular phenomenon and provides the appropriate tools to counteract the injurious effects thereof." See Public Comments from the European Union ("EU") to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 3 (Oct. 8, 2003) ("EU Initial Comments"). A CVD is imposed to offset the amount of any subsidy received (and unfair cost advantage) and therefore addresses only that unfair trade related to the receipt of the subsidy. See Coalition's Initial

Comments at 39-40. A CVD does not address any dumping (unfair prices) that may or may not be occurring in the U.S. market. To assert that a product which is not subsidized or on which the subsidy has been offset is "by definition, fairly traded" is simply false.

An individual company may be unfairly trading in the United States because it is dumping, even though it is not subsidized. Another company may be unfairly trading in the United States because it is subsidized, although not dumping. And yet another company may be unfairly trading because it is both dumping and subsidized. The fact that a company's subsidization may be fully offset by a CVD does not necessarily mean that the company should be assumed to be fairly trading with respect to dumping. Obviously if a foreign producer benefiting from a domestic subsidy sells at a U.S. price of $225 when the merchandise's normal value is $250, the foreign producer is dumping as well as enjoying the benefit of a subsidy, and the domestic industry may seek trade remedy relief under both the antidumping and CVD laws to address these unfair trade practices.

In fact, one opposing party also appears to understand this distinction (but miscomprehends its significance). In its submission, the Corus Group asserts:

> The antidumping law addresses an internationally recognized discriminatory practice – namely, exporting at a price that is either below the home market price of comparable transactions or, in effect, below fully allocated cost plus a normal profit. Accordingly, the calculation of the amount of the antidumping duty must reflect accurately the amount of price discrimination (or below-cost pricing, as the case may be). Understanding this point is critical to analysis of the present issue on policy grounds. The antidumping law focuses on an exporter's pricing decisions. The statutory analysis of that exporter pricing decision is completely performed by the calculations that result. . . .

See Corus Group Initial Comments at 7.[14] Thus, where merchandise is sold on a "duty-paid" basis the exporter's pricing decision must take into account the additional cost of the imposition of a CVD for which the exporter is responsible. Specifically, the exporter must adjust its U.S. price upwards to reflect the additional cost incurred by assuming the CVD obligation. This additional cost is attendant only to the exporter's U.S. sales, and the exporter's prices in its home market are unaffected. Therefore, the amount of the costs incident to bringing subject merchandise to the U.S. market necessarily includes any CVD imposed to offset a domestic subsidy. If the exporter's pricing decisions in this market do not account for the cost incurred through the imposition of that CVD it is dumping.

B. A Deduction for the Amount of Any CVD Imposed to Offset a Non-Export Subsidy Should Only Be Made Where the Amount of Any Such Duty Is "Included" in the U.S. Price

As demonstrated in Section II, supra., Section 772(c)(2)(A) requires the Department to deduct from U.S. price "any additional costs, charges, or expenses, and United States import duties," which are "incident" to bringing subject merchandise to the place of delivery in the United States, where such additional costs are "included" in U.S. price. Thus, this provision is not implicated when the terms of sale of subject merchandise are such that an unrelated importer or purchaser is responsible for customs clearance and any attendant formalities, customs duties,

14 While the Corus Group recognizes that a dumping analysis is distinct from any other trade remedy analysis, the opposing party nevertheless draws an unwarranted conclusion from its understanding. Namely, it asserts that a change in the Department's practice would represent "double-counting" and comparing "apples-to-oranges." See Corus Group Initial Comments at 8. But as demonstrated previously, see Coalition's Initial Comments at 40-43, and as explained below, an adjustment to U.S. price for the amount of any CVD imposed does not constitute "double-counting" and, in fact, facilitates an "apples-to-apples" comparison.

taxes, or other charges. In such cases, a CVD duty would not be "included" in the U.S. price as the unrelated importer or purchaser would pay any CVD duties assessed.

On the other hand, where the terms of sale are delivered duty paid ("DDP")[15] or where the terms of sale otherwise obligate the seller (or related importer) to pay for any CVD imposed to offset a non-export subsidy, the Department is required to adjust for such a CVD by deducting the CVD's amount from U.S. price. Indeed, the concept of DDP is that the seller (or related importer) takes responsibility for the cost of any CVD imposed. As such, this additional cost incident to bringing merchandise to the United States becomes part of the U.S. price of that merchandise, but is not part of the normal value to which U.S. price will be compared.

Many opposing parties appear not to understand that the Department is obligated to reduce U.S. price by the amount of any CVD imposed only where (1) the CVD is imposed to offset a non-export subsidy, and (2) the terms of sale of the subject merchandise obligate the seller (or a related importer) to pay the costs of the CVD (or CVD deposit) imposed. Accordingly, opposing parties overstate claims that a correction of the Department's current practice would automatically increase dumping margins. If the Department corrects its practice, a dumping margin

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15 The International Chamber of Commerce defines DDP in International Commercial Terms ("INCO Terms") as:

> {T}he seller delivers the goods to the buyer, cleared for import, and not unloaded from any arriving means of transport at the named place of destination. The seller has to bear all the costs and risks involved in bringing the goods thereto including, where applicable, any "duty" (which term includes the responsibility for and the risks of carrying out of customs formalities and the payment of formalities, customs duties, taxes and other charges) for import in the country of destination.

Incoterms 2000: ICC Official Rules for the Interpretation of Trade Terms, International Chamber of Commerce, the world business organization (Sept. 1999) at 121 (footnote omitted).

would not be impacted if a CVD was imposed to offset an export subsidy. Nor would a dumping margin be impacted if the terms of sale of merchandise subject to a CVD imposed to offset a non-export subsidy did not obligate the seller to pay the costs of the CVD. In neither case would a downward adjustment to U.S. price be made and, accordingly there could be no upward effect on the dumping margin calculated.

More importantly, opposing parties' argument is sophistry: if the dumping margin increases, it must be wrong or double counting. This is to assume a result (and assume a wrong result). Even in a case involving CVDs to offset domestic subsidies in which the importer is not an unrelated party, the dumping margin would be affected only if the exporter's price in the United States fails to cover its costs (including its CVD costs) -- i.e., if it is dumping.

This is the essential inquiry which opposing parties would have the Department ignore. If the product is dumped, it is appropriate -- indeed required -- that antidumping duties be imposed to offset fully the amount of dumping. If the product is dumped, offsetting that dumping cannot be said to be double counting.

Opposing parties' confusion regarding the application of such an adjustment is made clear by reviewing a specific example of how the terms of sale of subject merchandise is determinative in an antidumping investigation or review where a CVD has been imposed to offset a domestic subsidy. Consider two hypothetical sales of merchandise made by the same foreign producer to the same unaffiliated customer in the United States, where each sale is made on a different basis. The first sale made is "free on board" ("FOB")[16] to its customer in the United

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16 The International Chamber of Commerce defines FOB in International Commercial Terms ("INCO Terms") as:

(footnote continued)

States, which acts as the importer of the merchandise. For the purposes of this example, assume that the transaction price for the sale of merchandise is $200 and that importation of the merchandise is contingent on the deposit of a "regular" customs duty of three percent and a CVD of ten percent. The actual purchase price for the unaffiliated U.S. customer would be $200 paid to the foreign producer plus the three percent tariff ($6) and the ten percent CVD ($20) paid to the U.S. Treasury, or $226. But that figure is irrelevant, however, for dumping purposes, as the transaction price ($200) from the seller to the unaffiliated customer would be used as the export price or U.S. price. If during the course of an antidumping investigation, the Department determines that the normal value of the merchandise is $220 and that no adjustments are to be made to the export price, the dumping calculation would compare the normal value ($220) to the U.S. price ($200) to arrive at a dumping margin of ten percent ((220-200)/200 = 0.1).

The second sale from the seller to the unaffiliated customer is made on a DDP basis. Here, the total price payable to the foreign producer by the unaffiliated customer is the sum of the transaction price of the FOB sale ($200) plus the deposit for the "regular" customs duty (3 percent or $6) and the deposit for the CVD (10 percent or $20). This transaction price would also constitute the U.S. price for dumping purposes ($226 total). Again, the normal value determined by the Department is $220. Here, however, under current Department practice, the Department would adjust the U.S. price to deduct the "regular" customs duty deposited, but would not deduct the amount of the CVD deposited. The adjusted U.S. price would therefore be $220

(footnote continued)

> {T}he seller delivers when the goods pass the ship's rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of damage to the goods from that point.

Incoterms 2000: ICC Official Rules for the Interpretation of Trade Terms at 49.

($226 - $6 = $220) and a comparison with normal value would result in a finding of no dumping margin ((220-220)/220 = 0).

There is only one difference between the first and second sale: whether the seller or unaffiliated purchaser is responsible for payment of duties. There is no rational justification for this disparity in treatment based on the terms of a sale. Where U.S. price is adjusted downward to reflect the amount of any CVD imposed, the result is merely to set both a FOB and DDP sale on the same basis. This cannot be interpreted as "double-counting."

One opposing party asserts that an adjustment for CVD or 201 duties is inappropriate because such an adjustment 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." See British Columbia Lumber Trade Council Initial Comments at 11-12. As explained here, opposing party misunderstands the operation of this adjustment. A deduction for the amount of any CVD imposed to offset a domestic subsidy would be made only where the terms of sale were "duty-paid" and included the amount of the CVD imposed. Further, even under its current practice of administering Section 772(c)(2)(A), the Department deducts freight, selling expenses, and any "regular" customs duties paid from U.S. price for "duty-paid" sales. This does not "make it appear" that the price is lower than it really is; it reflects the actual price and real costs.

C. Treating Countervailing Duties Imposed to Offset Domestic Subsidies as a Cost Would Not Constitute Double-Counting

As the Coalition demonstrated, an adjustment to U.S. price for the amount of any CVD imposed to offset a domestic subsidy does not constitute a "double remedy" for domestic industries. See Coalition's Initial Comments at 40-43. The "double-counting" concern, repeated by

opposing parties, is misleading, vaguely-defined, and, as demonstrated above, premised upon misconceptions of how the adjustment would operate.

As a general matter, opposing parties have not addressed the nuances of the Department's "double-counting" position. Instead, opposing parties simply assert that, because a correction of the Department's practice would lead to higher dumping margins, such an adjustment would constitute "double-counting." See O'Melveny & Myers Initial Comments at 1. As demonstrated above, a "higher" dumping margin would only result if an exporter's pricing decisions for the U.S. market failed to reflect the cost of the CVD where the amount of the CVD was included in the exporter's U.S. price, just as would occur with any other cost increase.

Opposing parties' arguments again attempt to obfuscate the fundamental issue: whether the imports are dumped. If so, imposing an antidumping duty to offset that dumping is not double-counting; it is an independent remedy for an independent wrong.

At the same time, other opposing parties have asserted that "logically" the deduction of any CVD, whether imposed to offset an export or domestic subsidy, would result "in a double remedy for the domestic industry." See Instituto Brasiliero de Siderugica Initial Comments at 3. But the impact of a CVD imposed to offset an export subsidy is distinct from the impact of a CVD imposed to offset a non-export subsidy. In the case of the former, an export subsidy theoretically impacts a foreign producer's export price only and does not impact the producer's home market sales price. Accordingly, a CVD imposed to offset the export subsidy is intended to raise the U.S. price to a level equivalent to that of the producer's home market sales. Under these circumstances, a reduction in U.S. price of the amount of the CVD imposed would mean that the U.S. price would artificially be lowered below the home market sales price (because the export subsidy had no impact on the home market sales price). Antidumping duties would be imposed

to address the same behavior that led to the imposition of a CVD in the first place. Congress' desire to avoid such "double-counting" explains why it specifically excluded CVDs imposed to offset export subsidies from the scope of adjustments under Section 772(c)(2)(A).

In the case of a CVD imposed to offset a domestic, non-export subsidy, however, the situation is quite different. Home market and U.S. prices are equally affected by a domestic, non-export subsidy, so no dumping is created by virtue of the subsidy alone (unlike the case with an export subsidy). The imposition of a CVD to offset the domestic subsidy, however, differentially affects the export price -- in a way that must be taken into account when measuring the amount of price differentiation between the markets. Far from being "double-counting," the treatment of a CVD imposed to offset a domestic, non-export subsidy as a cost differentially borne when exporting the subject merchandise is eminently reasonable and, indeed, mandated by the statute. As a result, Congress clearly distinguished the two circumstances in the statute. <u>See</u> Section II.A.3, <u>supra</u>; Coalition's Initial Comments at 24.

Moreover, opposing parties fail to explain why an adjustment for CVDs would constitute "double-counting" any more than other adjustments appropriately made to U.S. price. For instance, consider, if instead of a CVD, a $2 transportation surcharge for rail transportation in the United States is added (to cover additional security measures). Obviously, this $2 increase is an additional cost of selling into the United States which is incurred by the foreign producer. Under the Department's current practice and the clear provision of Section 772(c)(2)(A), the Department would review the foreign producer's U.S. sales prices to ascertain whether the $10 price was increased to $12 subsequent to the imposition of the additional surcharge. If the price remained at $10, the Department would find $2 of dumping, and if the price rose to $11, the Department would find $1 dumping. Such a result cannot be construed as "double-counting." This

scenario is, for all intents and purposes, indistinguishable from an adjustment to account for a CVD imposed to offset a non-export subsidy. Recognizing and accounting for CVDs in an anti-dumping calculation is no more double-counting than is recognizing and accounting for ocean freight or marine insurance, for example.

Finally, some opposing parties have accused petitioners of "manipulating" certain calculations in rebutting the "double-counting" arguments. See Changwon & Dongbang Initial Comments at 11; Hysco Initial Comments at 11. These opposing parties correctly observe that an "exporter's price to its customers generally reflects all costs and expenses, plus a mark-up for profit, the starting point for an antidumping analysis is the gross unit price to an unaffiliated customer." Id. at 11-12. These opposing parties, however, conclude from this that the domestic industry's analysis is "inherently flawed," because petitioners have used "gross unit price plus the cost of" any additional duties imposed. Id. Again, however, a deduction to U.S. price would only be made where a CVD imposed to offset a non-export subsidy was included in such price, i.e., where the terms of sale are "duty-paid." In these circumstances, the gross unit price would include the amount of the CVD imposed -- no addition of the CVD is necessary to arrive at the appropriate "starting" price for the Department's dumping analysis. Indeed, it is precisely this point that demonstrates that such an adjustment would not constitute "double-counting."

Here, the statute clearly requires an adjustment for the amount of any CVD imposed. Such an adjustment makes eminent sense. The day prior to the imposition of a CVD, the exporter's "duty-paid" price is the transaction price of the merchandise plus the deposit amount of any "regular" customs duty in place. On the day of the imposition of a CVD, the exporter's "duty-paid" price is the transaction price of the merchandise plus the deposit amount of any "regular" customs duty in place and the deposit amount of the CVD imposed. Thus, the gross

unit price is the "duty-paid" price, and it is this price which the Department must adjust by deducting the amount of both "regular" customs duties and CVDs imposed to offset non-export subsidies in accordance with Section 772(c)(2)(A).

Opposing parties nevertheless state that the domestic industry's analysis "assume{s}" that exporters can pass along the costs of the additional duties imposed, "when, in fact, the market usually determines U.S. prices." Id. at n.17. Whether the exporter can pass along this particular cost (or any other cost) or not is irrelevant to the Department's dumping analysis. If, for example, during an administrative review period an exporter's freight costs increased, that additional cost must be reflected in the exporter's U.S. sales price. It is no excuse to say that market conditions required the exporter to absorb the cost increase (i.e., dump) in order to maintain market share.[17] Similarly, "market conditions" cannot excuse an exporter from not reflecting the full costs of its U.S. sales in its "duty-paid" price where a CVD has been imposed to offset a non-export subsidy.

In sum, charges that a change in the Department's practice would constitute "double-counting" are unfounded. Such claims are premised upon misconceptions and distortions of how any such adjustment would actually operate in the Department's dumping analysis.

V. A CHANGE IN THE DEPARTMENT'S PRACTICE IS FULLY CONSISTENT WITH THE UNITED STATES' INTERNATIONAL OBLIGATIONS

Certain opposing parties claim that a correction of the Department's current practice would violate this country's international obligations which would ultimately harm the United States by setting off a "domino effect" amongst our trading partners. As an initial matter, where,

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17 Opposing parties' comments also ignore the fungibility of money. In reality, there is no way to tell which costs -- whether freight or labor or CVDs -- are not reflected in price, and the AD law does not attempt to distinguish the result.

as here, the U.S. statute clearly requires the Department to take certain action, the domestic statute must be adhered to. But even assuming that the United States' international obligations were relevant to the question of whether the Department should correct its practice to conform to the statute, these claims are belied by the laws of our major trading partners. Moreover, in asserting that a change in practice would run afoul of the relevant international agreements in place regarding international trade, opposing parties mischaracterize those various agreements.

A. U.S. Law Requires the Department to Correct its Current Practice

As noted below, some parties erroneously claim that applying an interpretation of the regulation which would count antidumping duties as a cost would violate U.S. international obligations under the WTO. These parties ignore Congress' plain statement that any U.S. statutes have precedence over WTO/GATT trade obligations when it adopted the Uruguay Round Agreement Act. See 19 U.S.C. § 3512(a)(1), (2) (2000); accord Suramerica v. United States, 966 F.2d 660, 668 (Fed. Cir. 1992) (giving priority to U.S. law over GATT/WTO obligations when the two cannot be fairly reconciled). See also URAA SAA at 659. The URAA SAA also states that "{t}he WTO will have no power to change U.S. law." URAA SAA at 659.

Even under an application of the Charming Betsy doctrine, the Department's interpretation of the statute would take precedence, as the Supreme Court limited the imposition of international obligations to "the law of nations as understood in this country." Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (emphasis added). As a matter of U.S. law, the political -- the legislative and the executive branches -- determine what that understanding is. See also Fundicao Tupy S.A. v. United States, 652 F. Supp 1538, 1543 (Ct. Int'l Trade 1987) (recognizing that the intent of Congress is the basis for construing U.S. law in conjunction with GATT).

B. A Change in the Department's Practice Is Fully Consistent With the Relevant International Agreements

Moreover, the opposing parties' arguments that a change in the Department's practice would violate the United States' international obligations are incorrect. Many of these claims are based on a confused understanding of the operation of the dumping laws. For example, while the European Union ("EU") is correct in observing that antidumping and CVD laws were designed to address distinct phenomena, the EU is simply wrong when it asserts that a change in the Department's practice regarding CVDs imposed to offset domestic subsidies would mean that the imposition of one remedy would automatically lead to the imposition of another. See EU Initial Comments at 3. Quite to the contrary, an adjustment to U.S. price for the amount of any CVD imposed to offset a domestic subsidy where such CVD is included in the price ensures that the CVD laws do not improperly undercut the AD laws and that each is permitted to fully address the unfair trade that each was designed to counteract. See Coalition's Initial Comments at 39-40.

Similarly, other opposing parties assert that a change in the Department's practice would violate Article VI(5) of the GATT. See Miller & Chevalier Initial Comments at 7. Yet, as the Embassy of India concedes in its opposition, Article VI(5) expressly applies only to CVDs imposed to offset export subsidies. See Embassy of India Initial Comments at 3.

Opposing parties have further alleged that a change in the Department's practice would violate the provisions of the GATT, the Antidumping Agreement, and the SCM which limit the amount of antidumping duties to a level that does not exceed the margin of dumping and limit the amount of a CVD to not exceed the amount of a subsidy found to exist. See, e.g., Corus Group Initial Comments at 5; O'Melveny & Myers Initial Comments at 10; Miller & Chevalier Initial Comments at 7. As an initial matter, a change in the Department's antidumping practices

would have no bearing on the amount of the CVD duty imposed and, as such, opposing parties arguments regarding Article VI.3 of the GATT and the SCM are irrelevant.

More importantly, each of these arguments is spurious as to dumping margins as well. A correction of the Department's current practice only impacts the dumping margin insofar as it will now take into account, and make an appropriate adjustment for, a cost that is included in a company's U.S. sales of subject merchandise, but is not included in its home market sales. Thus, consistent with the practice of our major trading partners, the dumping margin derived would still be equivalent to the antidumping duties imposed. Opposing parties, however, premise their arguments on the WTO upon the conclusion that it is inappropriate to account for the imposition of CVD duties to offset non-export subsidies in a dumping calculation. This is circular. This conclusion, for all the reasons provided above, is incorrect. As the Coalition has demonstrated, accounting for the cost of CVDs is entirely appropriate and indeed required in order to engage in a true fair comparison of U.S. market and home market sales.

Finally, the EU also asserts Article 9.3.3 of the Antidumping Agreement provides for the deduction of antidumping duties from export price. See EU Initial Comments at 2. The EU further asserts that the remainder of the Antidumping Agreement does not "provide for the deduction of any other remedial duties (CVD/section 201) from the export price" beyond antidumping duties and the EC Basic Anti-Dumping Regulation is in accord. Id. Article 9.3.3 of the Antidumping Agreement holds:

> In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

While the provision affords an instance when antidumping duties should not be deducted, no provision of the Antidumping Agreement expressly provides for the deduction of antidumping duties. Thus, Article 9.3.3 is inapposite to the question of whether an export or constructed export price should be adjusted to reflect the amount of any CVD imposed.

The provision of the Antidumping Agreement relied upon by the EU cannot be construed as prohibiting an adjustment to export and constructed export price for the amount of any CVD imposed to offset a non-export subsidy. Instead, the EU can only rely upon Article 9.3.3 in an effort defend its own practice of deducting antidumping duties from export price pursuant to Article 2.B.9 of the Basic Antidumping Regulation. As the EU reduces the export price by the amount of "any anti-dumping duties" under Article 9.3.3, the EU's practice of adjusting export price is even more aggressive than what is requested of the Department. In other words, the EU's position is that all duties (including antidumping duties) are costs incident to bringing subject merchandise into the country of importation which must be accounted for in a dumping analysis.

This leaves the EU's assertion that it does not adjust export price for the amount of any CVD imposed. Based on a review of antidumping determinations in the EU and consultations with EU trade law practitioners, the Coalition believes that the EU has never in a proceeding formally addressed the question of whether an adjustment should be made to export and constructed export price for the amount of any CVD imposed to offset a non-export subsidy. Article 2.B.9 of the EC Basic Antidumping regulation states that export price is to be reduced by "customs duties, any anti-dumping duties, and other taxes payable in the importing country by reason of the importation or sale of the goods . . ." This latter phrase, "other taxes payable," is suffi-

ciently inclusive so as to encompass CVD duties paid. In any case, it is telling that the EU does make the more aggressive adjustment for AD duties, which is not even suggested here.

C. A Change in the Department's Practice Would Not Result in a Domino Effect that Would Hurt the United States

Opposing parties have asserted that a correction of the Department's current practice would trigger a series of events that would ultimately harm the United States. See Public Comments from Embassy of Brazil to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 1 (Oct. 8, 2003); Public Comments from Japan Automobile Manufacturer's Association, Inc. to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 2 (Oct. 9, 2003). However, the antidumping laws of the European Union, Canada, Mexico, and other major trading partners require the deduction of import and other duties, and taxes. See Council Regulation (E.C.) No. 384/96 of 22 December 1995, Article 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). See also Notifications of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements: Australia; G/ADP/N/1/AUS/2, G/SCM/N/1/AUS/2 at 33 (269TAB.2); Notifications of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements: New Zealand; G/ADP/N/1/NZL/2, G/SCM/N/1/NZL/2 at 5 (4); Decree No. 2121/94, Article 28 (Argentina) (requiring that export price be deducted by "{a}ny import duty payable in the Argentine Republic"); Decree No. 1602 (Aug. 23 1995) (Brazil) (export price is to be "livre de impostos" or "free of taxes"); Notifications of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements: South Africa; G/ADP/N/1/ZAF/1, G/SCM/N/1/ZAF/1 at 3

(defining export price as "net of all taxes"); Notifications of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements: Bulgaria; G/ADP/N/1/BGR/1, G/SCM/N/1/BGR/1 at 5 (Article 4(3)(2)) (Mar. 27, 1997) (setting out law equivalent to EC's); Notifications of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements: Costa Rica; G/ADP/N/1/CRI/1, G/SCM/N/1/CRI/1 at 4 (Art. 7) (Mar. 30, 1995) (export price is to be reduced by "all duties and taxes"). Each of these administering laws seems, on its face, to require adjustments based on the amount of the countervailing duty imposed.

Some of these laws expressly provide for the deduction of CVD duties. 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) (emphasis added) available at: <www.canlii.org/ca/sta/s-15/sec25.html>. Under New Zealand's antidumping laws, where the importer is the foreign producer or the sale of merchandise was not on an arms-length basis, the export price is reduced by "{t}he amount of any duties imposed under any Act . . ." See Notifications of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements: New Zealand; G/ADP/N/1/NZL/2, G/SCM/N/1/NZL/2 at 5 (4(1)(b)(i)) (emphasis added). In explaining its practice, the Government of India has stated that,

> The Export price of the goods allegedly dumped into India means the price at which it is exported to India. It is generally the CIF value minus the adjustments on account of ocean freight, insurance, commission, etc. so as to arrive at the value at ex-factory level.

See Department of Commerce, Ministry of Commerce & Industry, Government of India, "Anti-dumping and Anti-subsidy Measures: Frequently Asked Questions," at Question #6, available at: <http://commerce.nic.in/faqmain.htm>. As the specific intent of India's adjustments to export price is to arrive at a price at the "ex-factory level," this would also necessarily require an adjustment for CVD duties imposed to offset a non-export subsidy where the CVD was included in the "duty-paid" price. Thus, where the Indian administering authority has been faced with merchandise sold on a "duty-paid" basis, the authority has made adjustments to the export price for movement expenses and duties paid. See Potassium Carbonate from the European Union, China PR, Korea RP, and Taiwan Preliminary Findings, No. 14/42/2002-DGAD (Apr. 30, 2003). Similarly, when constructing an export price, India requires "due allowance for costs including duties and taxes . . ." See Department of Commerce, Ministry of Commerce & Industry, Government of India, Directorate General of Anti-Dumping and Allied Duties Annual Report 2002-2003 at Annexure 2 (includes Annexure I.5 of Indian AD law).

The laws of other WTO Members demonstrate that an adjustment for any countervailing duties imposed to offset domestic subsidies is consistent with the United States' international obligations. See Vienna Convention, Article 31.3.B ("General Rule of Interpretation") (providing that subsequent practice of the parties is instructive as to how an agreement is to be interpreted).

As such, the converse of opposing parties' assertion is true. The domestic industry in the United States is disadvantaged vis-à-vis the domestic industries of our major trading partners, such as Canada, because of the Department's failure conduct its dumping analysis in a manner that fully encompasses the level of dumping occurring in the U.S. market.

VI. A CHANGE IN THE DEPARTMENT'S PRACTICE WOULD FACILITATE A SETTLEMENT IN THE ONGOING SOFTWOOD LUMBER NEGOTIATIONS

Several opposing parties have also alleged that if the Department corrects its current practice, it would adversely impact the ongoing negotiations for a resolution to the unfair trade practices of Canadian softwood lumber producers. See Public Comments from Weyerhaeuser to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 1 (Oct. 7, 2003) ("Weyerhaeuser Initial Comments"); Public Comments from U.S. Value-Added Wood Products to the U.S. Department of Commerce, Anti-dumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 3 (Oct. 4, 2003). These assertions are, at best, unsupported. Indeed, as noted above, Canadian laws specifically permit Canadian administrative authorities to take account of the CVDs imposed when conducting a dumping analysis. See Special Import Measures Act, CH. S-15, Article 25(1)(c)(i) (1997). Canadian producers may hardly be heard to complain about being held to the same standard that American producers may be held to in Canada.

If anything, a correction in the Department's practice should encourage settlement. Under the Department's current practice, certain Canadian producers of softwood lumber began a program of massive dumping designed to maintain, or increase, market share despite the imposition of duties to offset years of unfair trade.[18] These efforts have been undoubtedly helped by the

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18 For example, after imposition of countervailing duties in the lumber case, officials for Canada's largest lumber producer publicly declared an intent to maintain market share regardless of cost:

> US lumber dealers are hearing one message from Canadian producers. That message is "Canadian lumber mills intend to bury the Coalition for Fair Lumber Imports in lumber. If they lose money or shut down . . . so be it."

(footnote continued)

Department's current incorrect practice. By selling on "duty-paid" terms at prices which do not reflect the amount of the CVD imposed, Canadian producers could maintain or increase market share by increasing their level of dumping in the U.S. market to the amount of the CVD without incurring additional antidumping duties. A change in the Department's practice would close this "safe harbor" for dumping and permit a full offset of the level of unfair trade occurring in the U.S. market.[19] If anything, then, a correction of the Department's current practice would help guarantee that any negotiated settlement agreed to by the Canadian government would fully address the level of unfair trade occurring in the U.S. softwood lumber market.

VII. A CHANGE IN THE DEPARTMENT'S PRACTICE WOULD NOT UNFAIRLY HARM DOMESTIC CONSUMERS, IMPORTERS OR FOREIGN PRODUCERS

Certain opposing parties have asserted that should the Department correct its practice, it would unfairly have an adverse impact on domestic consumers, importers, and foreign producers. For example, one opposing party asserts that, with respect to a 30 percent Section 201 duty:

> any exporter of steel would have to sell to the U.S. market at a price more than 30% higher than its domestic price in order to avoid dumping charges. Thus, imposing duties under a safeguards action would transform otherwise perfectly legitimate pricing behavior into an unfair pricing practice, i.e., dumping.

(footnote continued)

Matt Layman, in Layman's Lumber & Panel Guide (Oct. 28, 2002); see also Alberni Valley Times (Sept. 10, 2002) (quoting Susan Yurkovich, the spokesperson for Canfor, as stating "by hook or by crook we're going to be the last guy standing").

19 One opposing party asserts that a change in the law by Congress regarding this issue would trigger certain NAFTA obligations. See British Columbia Lumber Trade Council Initial Comments at 16. This observation is irrelevant to the Department's consideration of whether to correct its practice. A change in the Department's practice to bring that practice into conformity with the statutory mandate does not, obviously, constitute a change in law.

See Public Comments from CITAC (Hogan & Hartson) to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 7 (emphasis in original) (Oct. 9, 2003). But this statement is inaccurate. Where the exporter sold on an FOB basis, there would be no need to adjust the U.S. market price. Where the exporter sells on a "duty-paid" basis, the price should increase, because the cost to the exporter of selling into the United States (by virtue of the imposition of the CVD or Section 201 duty) has increased. A failure to reflect this additional cost in the exporter's sales price in the U.S. market is by no means "legitimate pricing behavior," it is dumping -- just as it would be if the exporter's U.S. market sales price failed to reflect freight or any other cost incurred.

The corollary to this is that an exporter's "duty-paid" price should increase where a CVD has been imposed to offset a non-export subsidy.[20] The impact of appropriately accounting for all costs in the price of a U.S. market sale on foreign producers, importers, and consumers is, therefore, a necessary byproduct of an effective application of our trade remedy laws.[21]

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20 Indeed, the purpose of "remedial duties" is to offer a remedy to domestic producers competing against unfairly traded imports. If the imposition of a purportedly "remedial duty" has no effect whatsoever on the domestic market, then the duty is not remedial -- and has failed its assigned purpose. This logic applies equally to CVDs or 201 duties.

21 Certain opposing parties have specifically claimed that a correction in the Department's practice would have a dire impact on consumers of softwood lumber and products which use softwood lumber. See Public Comments from Consumers for World Trade to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties (Oct. 9, 2003); Weyerhaeuser Initial Comments at 2; Public Comments from WTCA & SCDA to the U.S. Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 3 (Oct. 4, 2003). These predictions are based upon a flawed analysis of the impact on homebuyers of the application of the trade remedy laws to softwood lumber. These inaccurate, irrelevant and misleading claims are addressed in Attachment C to this letter.

This argument, as with many of those submitted by opposing parties, seeks to obfuscate the fundamental question: is the foreign producer dumping? Where the exporter has assumed the costs of any CVD imposed to offset a domestic subsidy and then does not reflect the amount of that cost in its U.S. market sales, there is no question: the exporter is dumping. Where this is true, Congress has appropriately weighed the long-term interest of the United States in fair trading, and the focus of our trade remedy laws is on the impact of unfair trade on the domestic industry. The fact that the unfair trade practice may provide short-term benefits to consumers in the domestic market cannot acquit unfair traders from the application of the trade remedy laws.[22]

VIII. A CORRECTION IN THE DEPARTMENT'S CURRENT PRACTICE SHOULD TAKE EFFECT IMMEDIATELY

In the comments received by the Department, some parties argue that the Department should not immediately apply policy changes resulting from this inquiry to existing matters. See Weyerhaeuser Initial Comments at 2; Instituto Brasiliero de Siderugica Initial Comments at 14; EUROFER Initial Comments at 8. These arguments are unsupported and are contrary to agency practice. In accordance with the Department's past practice, any policy change regarding the calculation of duties as cost should be applied immediately to any existing matters currently before the Department.

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22 While Congress has enacted a "public interest" requirement for the acceptance of any agreement seeking to eliminate the injurious effect of unfair trade, no such requirement attends the portion of the statute establishing when antidumping duties are to be imposed. Compare 19 U.S.C. § 1673c(d)(1) (2000) with 19 U.S.C. § 1673 (2000) (an antidumping duty "shall be imposed" where it is found that subject merchandise is sold, or is likely to be sold, at less than fair value, and either (1) an industry in the United States is materially injured or threatened with material injury, or (2) the establishment of an industry in the United States is materially retarded).

At a conceptual level, respondents argument here evidences the same misdirection as with many of the issues discussed above. They hope to ignore the fundamental question: Are they dumping? If they are, the Department has an obligation to offset fully that dumping in any ongoing proceeding. The fact that the Department has, wrongly, failed to assess fully the level of dumping in the past is hardly a basis to continue protecting dumping in the future. Again, Congress could not be clearer that it expects the full level of dumping to be offset in all cases.

Further, the Department has addressed the issue of so-called "retroactive" application of a methodology change to existing proceedings before the agency, and consistently determined that the practice is fair and supported by the courts. In the Issues and Decision's memorandum accompanying Porcelain-on-Steel Cookware From Mexico: Final Results of Antidumping Duty Administrative Review, 65 Fed. Reg. 30,068 (comment 1a) (May 10, 2000), for example, the Department rejected an opposing party's claim that applying a new methodology for calculating reimbursement of antidumping duties in the 12th administrative review, which differed from the Department's practice in the 9th and 10th administrative reviews, was contrary to the Department's past practice and not legally permitted under the statue. In response, the Department stated that:

> {T}he general principle is that when, as an incident of its adjudicatory function, an agency interprets a statute, it may apply that new interpretation in the proceeding before it. See Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission, 826 F.2d 1074, 1081 (D.C. Cir. 1987), cert. denied, 485 U.S. 913 (1988). The same is true of applying a new interpretation of a regulation. Thus, the Department does not apply its new reading "retroactively" when it applies it in this final determination after adopting the new interpretation in the prior review.

Notably, the complaining party in that case also claimed that "manifest injustice" would result from the practice, as is presently claimed by Weyerhaeuser, Instituto Brasileiro de Siderugica

and EUROFER. The Department was not persuaded, and additionally provided court approval for its interpretation, stating that "the Court of International Trade (CIT) has held that the Department...may depart from a prior position if it 'articulates a reasoned basis' for doing so." Citing Hoogovens Staal BV and Hoogovens Steel USA Inc. v. United States, 4 F. Supp. 2d 1213, 1217.

The Department again affirmed this position in Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Final Results of Antidumping Duty Administrative Review A-583-516, 65 Fed. Reg. 81,827 (Dec. 27, 2000), citing Porcelain-on-Steel Cookware from Mexico: Final Results of Antidumping Duty Administrative Review, 64 Fed. Reg. 26,934, 26,937 (May 18, 1999).

Therefore, the Department should implement any policy changes resulting from the present inquiry to all matters currently before the Department.

IX. CONCLUSION

For each of the foregoing independent reasons, the Department must, consistent with Section 772(c)(2)(A), adjust U.S. price downward to account for the amount of any countervailing duty deposit imposed on the subject merchandise to offset non-export subsidies in its calculation of dumping margins for U.S. sales.

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

Respectfully submitted,

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ATTACHMENT A

ATTACHMENT A

	U.S. Mill	Subsidized Foreign Producer
Stumpage	150	100
Processing	150	150
Costs	300	250
U.S. Price		225
CVD Duty Imposed		50
AD Duty Imposed		25
"Fair Price"	300	

Options for Administrative Review What is a Fair Price? (What U.S. price is not dumped?)		
Current Department Practice	**Adjust for All Duties**	**Adjust For Countervailing Duty Only**
Stumpage: 100	Stumpage: 100	Stumpage: 100
Processing: 150	Processing: 150	Processing: 150
Cost of Production: 250	Cost of Production: 250	Cost of Production: 250
	CVD Duty: 50	CVD Duty: 50
	AD Duty: 25	
"Fair" Price: 250	"Fair" Price: 325	"Fair" Price: 300
U.S. Mill Fair Price: 300	U.S. Mill Fair Price: 300	U.S. Mill Fair Price: 300

ATTACHMENT B

WIDMAN'S Vol. 5, No. 21 • October 29, 2003

Market Barometer

A Weekly Newsletter Forecasting North American Lumber Markets

Market Overview

Depending on the region, the market found bottom this week. Eastern suppliers, along with producers in the Inland Empire, saw greater activity and higher prices, while those in the West continued to deal with a slow, sloppy market. At this time of year, weather begins to be a major factor in market direction. Good weather along the east coast and in the south helped sustain strong building activity. In the west, Californians had to content with devastating fires, while in the Pacific Northwest and B.C. many were still recovering from the floods of the last ten days.

On the housing front, new-home sales continued at a near-record pace in September, with 1.145 million units (SAAR), down just slightly from August's rate of 1.147 million units. At the same time, according to the National Association of Retailers, sales of existing homes rose 3.6% in September to a record rate of 6.69 million units (SAAR). Low mortgage rates continued to spur demand.

For the coming week, we expect prices to remain in the same general area. With strong building activity, there will be continued demand for lumber. Furthermore, many observers believe this level of building may continue right through November. However, the big question mark will still be the weather. Depending on the region, moderate price increases can be expected, while other areas should see a further easing. With this in mind, we are forecasting both an increase and a decline in the range of $5.

Next Barometer: November 12, 2003 Next Market Update: November 5, 2003

Product Update

Western SPF

Sales have been slow in the past few days as mills tried to maintain price levels but did take moderate counters. Many buyers were just looking for fill-ins. The most vulnerable was #2&btr 2x4. At the time of writing, futures were in the low-$270s for November shipment, which reflected trading levels realistically. Look for sideways or slightly downward movement in the coming week, depending on the item or tally.

Eastern SPF

Unlike the West, there was fairly good activity here as mills and wholesalers sensed a bottom was near. Many secondaries had trouble buying at print. Mill inventories are not high, and they have been able to sell at a regular pace. Look for a slight price increase over the coming week as this level of activity continues.

Southern Pine

Producers had an active week as treaters stepped in to buy; #2&btr 2x8 was very active as mills resawed material for the truss market; #1&btr 2x4 was selling at $460; and select structural was at $480. There were some cracks in the panel market, as unsold contract supply appeared at secondaries. With good building weather, look for the market to stay active as prices inch upwards.

Inland Hem-Fir

Activity remained reasonable, with std&btr 2x4 the most active item. Dealers were having difficulty buying fill-in items, as mill and distribution yard inventories remained broken. Look for more of the same, with a moderate price increase, over the next ten days.

Green Douglas Fir

The past week was slow for fir producers as the fires shut down a number of regions in southern California. At the time of writing, it is estimated that over 2,000 homes have been lost. Dealers showed the most attention toward #2&btr 2x6 and 2x12. Look for prices to remain sloppy in the coming week.

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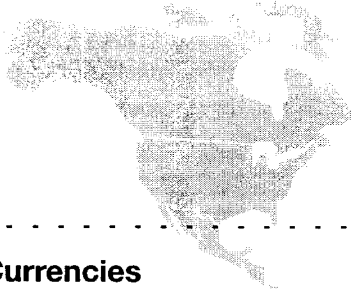
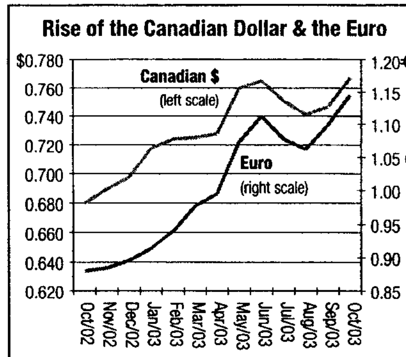
October 29, 2003



Trade Talk

Currencies

Over the past twelve months, both the Canadian dollar and the euro have risen almost 20% against the U.S. dollar. If these present trends continue, there could be significant consequences for supplying nations in the coming months.



Canadian Supply

After a midsummer lull, the Canadian dollar is again on the rise against its U.S. counterpart. Since September/01, this rise has been almost 6% (see chart). The stronger dollar, in combination with the 27% duty to the U.S., is again starting to play havoc with the bottom line of many Canadian forest companies. The concern for Canadian companies is not only the size of the increase of the Canadian dollar, but also the speed of the change. It makes forward planning very difficult.

As seen in Table 1, a cash price of US$214 funds in October, 2002 equated to $260 for 2x4 W-SPF, after tariff and currency adjustments. Using the same formula, today, a US$280 funds cash level is now basically $280 in Canadian funds. The difference is completely related to the rising Canadian dollar.

While high prices in the summer months provided producers with some comfort, the rising dollar, along with a downward market trend, has resulted in considerable erosion of profits during the last few months. With excess capacity in North America and the winter months just ahead, producers could be forced to look at curtailing production sooner rather than later.

European Supply

As the chart also shows, the euro has jumped similarly, moving up more than 8% against the U.S. dollar in the last few months. When put in perspective, the past two years have shown there is a place for European wood in the North America. However, for the most part, it has been only as a spot substitute. With existing lumber prices and the currency differences, only a few customers will pay a significant premium for European wood.

Early in 2002 we saw the best return for European suppliers into the U.S. As shown in Table 2, there was also a brief window of opportunity in August and September of this year. In general, however, other markets, such as Japan, continue to provide a better return for European producers than the U.S.

(concluded on page 2)

Table 1: 2x4 #2&btr W-SPF (C$ net mill)*

Date	Price in US$	After 27% Duty	Exchange Rate	Price C$
Oct/02	$214	$164.78	$0.6338	$260
Jan/03	$210	$161.70	$0.6490	$249
Apr/03	$227	$174.79	$0.6857	$255
Jul/03	$277	$213.29	$0.7240	$295
Aug/03	$312	$240.24	$0.7165	$335
Sep/03	$358	$275.66	$0.7336	$376
Oct/03	$295	$227.15	$0.7549	$301
Today	$280	$215.60	$0.7629	$283

Source: Random Lengths, Pacific Exchange Bureau **includes underweights*

Table 2: Prices to European Suppliers (euros)*

Date	W-SPF 2x4	Euro in US$	Return to Supplier
Oct/02	$214	$0.9810	€218
Jan/03	$210	$1.0630	€198
Apr/03	$227	$1.0860	€209
Jul/03	$277	$1.1680	€237
Aug/03	$312	$1.1147	€280
Sep/03	$358	$1.1270	€318
Oct/03	$295	$1.1720	€252
Today	$280	$1.1690	€240

Source: Random Lengths, Pacific Exchange Bureau **includes underweights*

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ATTACHMENT C

ATTACHMENT C

DUTIES TO OFFSET UNFAIR TRADE IN LUMBER HAVE ONLY A MINOR IMPACT ON HOUSING COSTS

Under U.S. law, Congress has made clear that subsidies to and dumping of products which injure U.S. industries, or threaten U.S. industries, are to be offset fully at the border. Congress has struck a balance of industry and consumer interests and determined that, over the long-term, the United States as a whole, including consumers, will benefit from robust, fair competition. There is considerable logic to this approach, including the extent to which trade remedies discourage market distorting behavior in the first place.

Some, however, continue to insist that duties on unfairly traded lumber should somehow be lessened -- should not fully account for the level of subsidies and level of dumping -- because of the alleged harm to housing consumers. As a preliminary matter, these arguments are legally irrelevant. It is clear as a matter of law that the full magnitude of subsidies and dumping are to be offset at the border.

Equally, however, these arguments grossly overstate the impact of duties on lumber on the U.S. housing market. In this proceeding, the so-called Consumers for World Trade ("CWT") repeats absurd claims made by the National Association of Home Builders ("NAHB") and the so-called American Consumers for Affordable Homes ("ACAH") -- a group funded in part by subsidized Canadian lumber companies -- of which CWT is a member,[1] that the current anti-dumping and countervailing duties on unfairly traded lumber are increasing home building costs by $1000 per new single family unit and may exclude as many as 300,000 U.S. households from mortgage eligibility. See Public Comments from the Consumers for World Trade to the U.S.

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1 "Members," American Consumers for Affordable Homes, available at: <http://www.acah.org/members.htm> (noting that ACAH's members include CWT and the Free Trade Lumber Council).

Department of Commerce, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, at 2 (Oct. 9, 2003) ("Consumers for World Trade Comments"). These claims of significant adverse impacts on new home construction and consumers are intentionally and grossly exaggerated, and based on faulty and misleading analysis.

First, as the International Trade Commission has previously noted, softwood lumber accounts for a "fairly small share of the total cost" of building a house. See Softwood Lumber from Canada, Inv. Nos. 701-TA-414 & 731-TA-928 (Final), USITC Pub. 3509 at 24 (May 2002). Data from the U.S. Census Bureau, Random Lengths, and NAHB indicates that the share of the purchase price of a new single family home accounted for by softwood lumber has steadily decreased since 1999 and now represents only approximately 2.0% of the price. See "Housing Costs Have Increased More Rapidly than Lumber Costs," attached here as Exhibit C-1. Indeed, softwood lumber's share of a new single-family home's purchase price is currently the lowest it has ever been. Id. (Of course, the disastrous and rapid decline in lumber prices has not resulted in any pause in the steady increase in the price charged for new homes.) In fact, while the U.S. lumber industry continues to suffer from unfair trade and close facilities, homebuilders have been reporting year after year of record profits.[2] Moreover, there is every indication that the financial status of the homebuilders will continue to soar. According to one analyst, "{t}here are virtually no clouds on the horizon for . . . most public home builders at this point." See Roger

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2 See, e.g., Jennifer Shubinski, "Builder's Profit Soars," Las Vegas Sun (Oct. 10, 2003) (noting the M.D.C. Holdings Inc., a builder of homes in Colorado, Virginia, Maryland, California, Arizona, Nevada, Utah and Texas, reported a profit of $65.5 million in the third quarter of 2003, up from a profit of $43.6 million in 3Q2002); Roger Vincent, "Standard Pacific's Profit Soars Amid Brisk Home Sales," Los Angeles Times (Oct. 28, 2003) (reporting that Standard Pacific Corp., a homebuilder in California and Florida, experienced a profit of $57.9 million in 3Q2003, up from $22.6 million in 3Q2002); Press Release, D.R. Horton, Inc. "D.R. Horton Inc. Reports a 44% Increase in Net Income for the Second Quarter and an All-Time Record $3.5 Billion Backlog" (Apr. 16, 2003).

Vincent, "Standard Pacific's Profit Soars Amid Brisk Home Sales," Los Angeles Times (Oct. 28, 2003) (quoting Nathan Hudson, an analyst for Banc of America Securities).

Second, independent reports show that the price of a new home has not been affected by the cost of lumber. For example, a November 2002 report prepared by Peter Woodridge & Associates Ltd. entitled "Manufacturing of Value-Added Wood Products in Western North America: How Competitive is BC?" observed that there is a general disconnect in the homebuilding industry between the cost of lumber and the housing starts. See Peter Woodridge & Associates Ltd., "Manufacturing of Value-Added Wood Products in Western North America: How Competitive is BC?," at 75 (Nov. 2002) available at: <http://www.woodinfo.net/sites/ivawa /Competitiveness_Report.pdf> ("Woodbridge Report"). Exhibit 61 of the Report illustrates that lumber and building material prices have declined while housing starts have increased over the last few years. Id. Similarly, the tables attached at Exhibit C-1 demonstrate that the share of new home cost attributable to lumber is at an all-time low and housing costs have increased far more rapidly than lumber costs. See Exhibit C-1. While the cost of lumber substantially decreased from 1999 to 2002 and leveled out in 2003, the price of a new single-family home steadily increased throughout that same time period. Id. If homebuilders did not share these lower costs, there is no reason to assume that a cost change in the other direction -- occasioned by a full offset of the unfair trade -- would simply be passed on to housing consumers.

Third, claims of a $1,000 price increase and the purported devastating impact on the housing market have been recklessly overstated. The statements are apparently based on a presumption that each one dollar increase in the wholesale price of framing lumber increases the cost of a home by $20. See Michael Carliner, National Association of Home Builders ("NAHB"), "Background on Lumber" at 1 (May 8, 2003) ("NAHB Background on Lumber"), available at: <http://www.nahb.org/publication _details.aspx?publicationID=18>. As an initial

matter, it appears that the foundation of this argument is that each dollar deposited for a CVD leads directly to an additional dollar in the cost of a new home. This is remarkable display of acrobatics -- on one hand, the Department should not adjust for the amount of any CVD imposed to offset a domestic subsidy because such amounts are not really a "cost" incident to bringing subject merchandise into the United States, and, on the other hand, the amount of any CVDs deposited is a cost of bringing subject merchandise to the United States such that it directly impacts the price of both Canadian and U.S. softwood lumber in the U.S. market.

In fact, these fantastical calculations assume that a $1 duty actually increases housing costs by considerably more than $1. The calculated price increase asserted by these groups includes several costs that are wholly unrelated to softwood lumber supply. For example, in explaining its calculation, NAHB has noted that a typical new wood-framed home requires approximately 15,000 board feet of lumber, but asserts that "each increase of $1 per 1,000 board feet (MBF) in wholesale lumber prices increases the costs of a new home by $20" per MBF. How $15/MBF in added lumber costs could increase the cost of a new home by $20/MBF is not immediately apparent. The extra five dollars is apparently made up in part of "costs that rise in proportion to lumber costs, such as sales taxes, financing, real estate commissions, and permit fees . . .". See NAHB Background on Lumber. These costs are not appropriately attributed to price movements in the lumber market. It is unreasonable to blame U.S. lumber mills or the trade laws when, for example, lumber dealers, which have also had year-after-year of record profits and which roundly criticize imposition of duties to offset unfair trade, increase their mark-up. Indeed, the absurdity of NAHB's analysis is made clear by the fact that these alleged extra costs constitute 1/4 of the total supposed price impact of the softwood lumber duties on the price of a new home.

Fourth, in addition to including dubious estimates of price impacts, the CWT submission gratuitously includes a breathless and highly inaccurate estimation regarding the number of potential housing consumers that would be impacted by the duties. See Consumers for World Trade Comments at 2. Specifically, CWT asserts that as many as 300,000 U.S. households would be excluded from mortgage eligibility. Id. This grossly distorted estimate is based upon at least three fundamental flaws:

1) As discussed, the estimate depends upon a greatly overstated price effect which is, in turn, premised upon an extremely flawed methodology.

2) The number of affected consumers is based upon the false assumption that all Americans are in the housing market at any given time.[3] Indeed, the NAHB has previously criticized as spurious exactly the analysis which it now relies on, noting that, at any given time, only about 5 percent (or 15,000) of the total number claimed to be affected will actually be in the market to buy a house. "NAHB Timber Harvest Limits on Public Lands Affecting Lumber, New Home Prices" (Aug. 30, 1996).

3) CWT ignores the real cost of homeownership -- a monthly mortgage payment -- and, thus, provides the $1,000 - 300,000 household estimate without context. The amount of the as-

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3 No context is given for the figures cited by the homebuilders. For instance, there are roughly one million new single-family homes sold annually in the United States. See "Housing Sales Historic Press Releases," U.S. Census Bureau, http://www.census.gov/const/ www/newressaleshist.html. For the most recent information available, in September of 2003 sales of new single-family houses were at a seasonally adjusted annual rate of 1,145,000. See http://www.census.gov/const/newressales.pdf If the 300,000 families figure is meant to imply that approximately 1/3 of this market would be impacted by a $1,000 increase in cost, the claim must be dismissed as absurd on its face. Instead, the relevant statistic is that there are over 70 million families in the U.S. housing market. See http://www.census.gov/hhes/www/ housing/hsgaffrd/afford95/afford95.html. Even with the exaggerated price impact alleged by home builders, 300,000 families represents less than one-half of one percent of this total. Moreover, the analysis also ignores that by far the greatest share of home purchases are made by families that are also selling homes which, if NAHB is to be believed, have increased significantly in value as a result of the imposition of duties on lumber.

serted increase in price is dwarfed by other, far more relevant costs which directly impact those seeking to purchase homes, and the calculation is based on dated (and inaccurate) estimates of mortgage costs. For example, as the International Trade Commission has reported, a one percentage point change in home mortgage interest rates would increase or decrease the cost of an average home by approximately $37,000 dollars over the course of a 30 year mortgage. See Conditions of Competition in U.S. Forest Products Trade, Inv. No. 332-400, USITC Pub. 3246 (October 1999) at 3-11. Even at the inflated price effect alleged by the homebuilders, the impact of the softwood lumber duties is much less, for example, than a 1/8 percent change in interest rates (comparable to the cost of a dishwasher upgrade).[4] Indeed, a comparison of the impact of an increase in lumber prices versus an increase in interest rates on monthly mortgage payments illustrates how minor the impact of the duty may be anticipated to be on the market for new homes. Even accepting CWT's exaggerated estimate of the cost impact on homebuyers, the impact of a $1,000 increase in the price of a new home works out to an increase of only $5.40 per month in mortgage payments. See Exhibit C-2. On the other hand, a shift upward in interest rates of even 1/8 percent increases monthly mortgage payments by $16.32, more than three times the impact of even the highest estimates of the price increase to homebuyers based on lumber costs. Id. Accordingly, homebuilders have acknowledged that increased lumber prices can be easily offset by lower mortgage rates (or that any movement in lumber prices would be dwarfed by a movement in interest rates). See Marty Hope, "Rising Lumber Costs Hit Home For Build-

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4 See Exhibit C-2. The model assumes the average price of a new home, a 30 year fixed-mortgage at the current interest rate of 6 percent, with a 10 percent down payment. Indeed, in the lumber investigation the Commission noted that residential construction was "affected by the level of long-term and home mortgage interest rates" and that an "important component in considering the cost of housing is the mortgage interest rate because interest costs during the typical full 30-year payment period can equal or exceed the initial purchase price." See Softwood Lumber from Canada, Inv. Nos. 701-TA-414 & 731-TA-928 (Final), USITC Pub. 3509 at at 23, n.139 (May 2002).

ers: House Prices on Rise By One or Two Percent," Calgary Herald (June 2, 2001) (quoting Jim Moir, president of Excel Homes).

This analysis is in accord with previous governmental studies evaluating the true effect on households of the inflated price increase which homebuilders claim. For example, the Congressional Research Service's ("CRS") 2001 Report to Congress regarding the softwood lumber dispute criticized the price impact claim repeated in this proceeding by CWT on this very point. In the report, the CRS assessed the significance of a claimed $1,300 increase in the price of a new home as a result of increased lumber costs. The $1,300 increase:

> which some argue is grossly inflated, seems likely to have a negligible impact on housing when compared to the impact of changes in mortgage interest rates. For example, a rise in mortgage rates from 8% to 8 1/8% would increase monthly payments on a $128,000 mortgage (assuming a 20% down payment on the 1999 median price of a new home) by more than would a $1,300 increase in lumber prices.

See Ross W. Gorte, "Softwood Lumber Imports from Canada: History and Analysis of the Dispute," CRS Report for Congress (Feb. 2, 2001) at CRS-24 ("CRS Report").

* * * * *

Claims that the duties imposed on softwood lumber to offset unfair trade practices in the market have had a significant adverse impact on homebuilders have been recklessly overstated. Through the use of a distorted methodology and shrill repetition of a false claim, CWT (and its Canadian-funded colleagues at ACAH) seeks to obscure the reality of the housing market in the United States: homebuilders and lumber dealers have reported record profits in a time period where the price of softwood lumber has been decreasing, the share of the total cost of a new home attributed to softwood lumber has been decreasing, and the cost of a new home has been increasing. Most fundamentally, the cost of lumber to a sawmill makes up a tiny share of the cost of a new home and does not significantly affect housing affordability. For all of the forego-ing reasons, the Department must reject cynical arguments allegedly based on housing costs that

it should not correct its current practice regarding adjustments to U.S. price for the amount of any CVDs imposed to offset non-export subsidies.

EXHIBIT C-1

Housing Costs Have Increased As Lumber Costs Have Remained Static

	AVERAGE PRICE OF NEW SINGLE-FAMILY HOME ($) /1	FRAMING LUMBER COMPOSITE PRICE ($/MBF) /2	SOFTWOOD LUMBER USAGE FACTOR (MBF/house) /3	LUMBER COSTS ($)	LUMBER SHARE OF NEW HOUSE COST	NON-LUMBER COSTS OF NEW HOME ($)
1979	$71,800	$254	16.000	$4,064	5.66%	$67,736
1980	$76,400	$203	16.000	$3,248	4.25%	$73,152
1981	$83,000	$195	16.000	$3,120	3.76%	$79,880
1982	$83,900	$169	16.000	$2,704	3.22%	$81,196
1983	$89,800	$221	16.000	$3,536	3.94%	$86,264
1984	$97,600	$207	16.000	$3,312	3.39%	$94,288
1985	$100,800	$203	16.000	$3,248	3.22%	$97,552
1986	$111,900	$218	16.000	$3,488	3.12%	$108,412
1987	$127,200	$244	16.000	$3,904	3.07%	$123,296
1988	$138,300	$236	16.000	$3,776	2.73%	$134,524
1989	$148,800	$241	16.000	$3,856	2.59%	$144,944
1990	$149,800	$230	16.000	$3,680	2.46%	$146,120
1991	$147,200	$236	16.000	$3,776	2.57%	$143,424
1992	$144,100	$287	16.000	$4,592	3.19%	$139,508
1993	$147,700	$394	16.000	$6,304	4.27%	$141,396
1994	$154,500	$410	16.000	$6,560	4.25%	$147,940
1995	$158,700	$337	16.000	$5,392	3.40%	$153,308
1996	$166,400	$401	16.000	$6,416	3.86%	$159,984
1997	$176,200	$416	16.000	$6,656	3.78%	$169,544
1998	$181,900	$349	16.000	$5,577	3.07%	$176,323
1999	$195,600	$402	16.000	$6,433	3.29%	$189,167
2000	$207,000	$323	16.000	$5,168	2.50%	$201,832
2001	$212,300	$312	16.000	$4,992	2.35%	$207,308
2002	$225,908	$299	16.000	$4,777	2.11%	$221,131
2003	$239,944	$300	16.000	$4,793	2.00%	$235,152

Sources: U.S. Census Bureau; NAHB; *Random Lengths*

Notes:

1/ Current Construction Reports, Series C25, New One-Family Houses Sold, US Census Dept.

2/ Weekly Lumber Price Database, Random Lengths

3/ Softwood lumber usage factors is taken from NAHB web site. <*http://www.nahb.org/facts/forecast/lumcost.html*>
Usage factor represents (according to NAHB in July 2000) the total volume of lumber required to build a 2000-foot home.

4/ 2003 reflects Jan. - Sep. data.

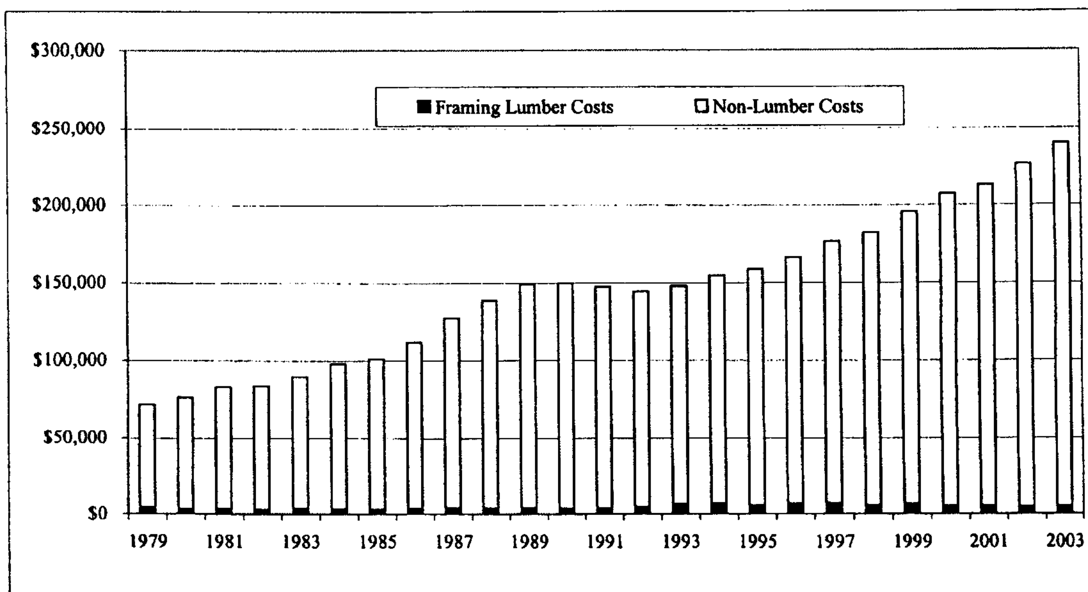

EXHIBIT C-2

Baseline Assumptions

Price of Single-Family Home	=	225,000
Downpayment	=	22,500
Mortgage	=	202,500
Payment Term	=	360 months
Interest Rate	=	6.000%
Monthly Mortgage Payment	=	($1,214.09)

Scenario 1: Increase in Home Price of $1000

Price of Single-Family Home	=	226,000
Downpayment	=	22,600
Mortgage	=	203,400
Payment Term	=	360 months
Interest Rate	=	6.000%
Monthly Mortgage Payment	=	($1,219.49)
Difference from Baseline	=	$5.40

Scenario 2: Interest Rate Increase of 0.125 Percent

Price of Single-Family Home	=	225,000
Downpayment	=	22,500
Mortgage	=	202,500
Payment Term	=	360 months
Interest Rate	=	6.125%
Monthly Mortgage Payment	=	($1,230.41)
Difference from Baseline	=	$16.32