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November 7, 2003

Honorable James S. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street, N.W.
Washington, D.C. 20230

Re: *Comments of Korea International Trade Association*
On the Appropriateness of Deducting CVD and Section 201 Duties
in Antidumping Margin Calculations

Dear Mr. Jochum:

On behalf of the Korea International Trade Associations enclosed please find rebuttal comments on the appropriateness of deducting countervailing (CVD) and Section 201 duties from the export price in antidumping margin calculations.

The enclosed comments are submitted pursuant to the Department's Request for Public Comments that was published in the *Federal Register* on September 9, 2003, as amended on October 21, 2003.

In accordance with the Department's request, we also enclose a 3.5" diskette containing KITA's comments.

Please do not hesitate to contact the undersigned should you have any questions concerning the enclosed comments.

Respectfully submitted,

James P. Durling
Daniel L. Porter

Counsel to KITA

Before the United States Commerce Department
International Trade Administration

Rebuttal Comments of Korea International Trade Association On the Propriety of Deducting Countervailing and Section 201 Duties in Antidumping Margin Calculations

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TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY 1

I. THE DOMESTIC INDUSTRY'S ARGUMENTS IN FAVOR OF DEDUCTING CVD DUTIES IN ANTIDUMPING MARGIN CALCULATIONS ARE NOT SUFFICIENT TO REVERSE LONG-STANDING COMMERCE DEPARTMENT POLICY. 6

A. The Commerce Department Has A Long-Standing (and Court Approved) Practice of Not Deducting CVD Duties That Cannot Be Changed Absent Compelling Reasons 6

1. Both the Commerce Department's and the CIT's rejection of the domestic industry's arguments have been consistent and clear.. 6

2. Congress did not change the Commerce Department's statutory interpretation when it had an opportunity to do so, thereby demonstrating the correctness of the Department's interpretation. 8

3. Given this history, the Commerce Department may not change its practice, absent strong compelling reasons to do so.. 15

B. The Domestic Industry's Arguments That The Statute *Requires* The Deduction of CVD Duties In Antidumping Margin Calculations Are Wrong 18

1. The canon of statutory interpretation expresio unius est exclusio alterius does not apply. 18

2. CVD duties are not normal customs duties. 21

3. Any inconsistency with Customs' treatment of CVD duties for valuation is irrelevant....................................... 25

4. CVD duties do not fall within the statutory definition of "other costs incident to bringing merchandise to the United States".. 27

TABLE OF CONTENTS
(continued)

Page

C. That Other Countries' Laws May Allow for Deduction of CVD Duties in Antidumping Margin Calculations Is Not Sufficient Reason to Change Long-Standing U.S. Policy.............................. 28

D. Contrary to the Domestic Industry's Arguments, Deduction of CVD Duties in Antidumping Margin Calculations Does Result in a Double Remedy for The Domestic Industry................ 29

1. The Domestic Industry's arguments are based on the mistaken assertion that CVD remedial measures are typical expenses... 29

2. Proper consideration of AD margin calculations demonstrates double-counting... 31

3. Proponents of deduction ignore the purpose of CVD remedies and the statutory mechanisms that seek to avoid double charges of those remedies............................ 34

II. THE ARGUMENTS IN FAVOR OF DEDUCTING SECTION 201 DUTIES IN ANTIDUMPING MARGIN CALCULATIONS ARE PREMISED UPON AN INCORRECT UNDERSTANDING OF U.S. LAW AND POLICY... 35

A. Antidumping Statute Does Not Require the Deduction of Section 201 Duties... 35

1. The arguments that section 201 duties are "U.S. import duties" as defined by the antidumping statute are either wrong, misplaced, or without consequence........ 36

2. The Commerce Department cases cited as prior precedent supporting the deduction of Section 201 duties are inapposite... 41

B. Parties in Favor of Deducting Section 201 Duties in Antidumping Duty Calculations Admit Such Deductions Would Result in Double-Counting. 44

C. Arguments that the Failure to Deduct Section 201 Duties Would Permit "Absorption" or Treat Some Importers Unfairly Fundamentally Distort the Goals and Purposes of Section 201. 46

TABLE OF CONTENTS
(continued)

Page

1. Nothing in section 201 requires that these duties be fully passed through in the price of the imported product. 46

2. Section 201 duties are not "absorbed" when they are paid by the exporter. 48

3. Refusal to deduct section 201 duties does not provide "inequitable treatment" to importers. 50

INTRODUCTION AND SUMMARY

This submission provides rebuttal comments of the Korea International Trade Association ("KITA") on the appropriateness of deducting countervailing and Section 201 duties in antidumping duty calculations.

The Korea International Trade Association("KITA") is Korea's largest business organization, and the only economic organization in Korea focused exclusively on the field of the international trade. KITA was founded in 1946 with a view to assisting Korean companies develop foreign markets, and it has expanded over the years to represent more than 80,000 Korean companies engaged in various aspects of international trade. Currently almost all Korean companies that export to or import from foreign countries are active members of KITA. As such, KITA members are frequently involved in U.S. antidumping investigations.

As the primary organization representing Korean export companies, KITA also actively provides its comments and opinions in the legislative process or administrative action process taking place in foreign countries. KITA makes every effort to ensure that the interests and perspectives of Korean companies are taken into account when important policies and practices are being considered.

These rebuttal comments respond to the initial comments that were submitted pursuant to the Request for Public Comments issued by the Department of Commerce on September 3, 2003[1] and amended on October 21,

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[1] *See* Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, 68 Fed. Reg. 53104 (September 9, 2003) (hereinafter "Request for Comments").

2003.[2] KITA appreciates the opportunity to provide the Department with its views on these issues.

KITA fundamentally disagrees with the arguments advanced by U.S. domestic interests in support of deducting CVD and Section 201 duties in antidumping margin calculations. In the sections below, KITA explains in detail why the arguments submitted by these parties are either wrong as a matter of law, or reflect a gross disregard for the important policy rationales underlying the past decisions of the Commerce Department not to deduct CVD and Section 201 duties in antidumping margin calculations. A concise summary of KITA's comments is set forth below:

Comments re: CVD Duties

1. *Deduction of CVD Duties is Prohibited Given Departmental, Congressional, and Judicial Precedent, as Well as Rules of Statutory Interpretation*

- Department Rejection of Deduction. The Department has consistently held that CVD duties are unique, flatly rejecting arguments that such duties are costs for purposes of adjustments to U.S. price in AD margin calculations.
- Congressional Intent. Congress demonstrated its clear intent that AD and CVD duties not be treated as a cost by discarding such a proposal during consideration of the Uruguay Round Agreements Act of 1994.
- Rules of Statutory Interpretation. Relevant rules of statutory interpretation further support maintaining the Department's existing position on deduction. Under the *acquiescence rule*, Congress has demonstrated its support for the position by failing to amend Section 772(c) of the Trade Act concerning adjustments in EP / CEP with full knowledge of the Department's interpretation of the provision. Under the *reenactment rule,* Congress has demonstrated its support for the position by reenacting the Trade Act without material change to the provision concerning the deduction of duties. Under the *rejection rule*, the courts will not interpret

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[2] Antidumping Proceedings--Treatment of Section 201 Duties and Countervailing Duties: Extension of Time Limits for Rebuttal Comments, 68 Fed. Reg. 60079 (October 21, 2003).

the trade laws as allowing for deduction of CVD duties because this is language that has been proposed but ultimately rejected by the U.S. Congress.

- Court Rejection of Deduction. Indeed, the courts have also upheld the Department's position and rejected arguments that CVD duties be deducted in dumping calculations, finding that such a deduction would result in a higher AD margin and a consequential second remedy for the U.S. domestic industry.
- No Compelling Reason For Change. The U.S. Supreme Court has held that an administrative agency's change in its statutory construction of a statute that is wholly inapposite to its previous interpretation must have some compelling justification. Because no compelling reason necessitates a departure from the Department's precedent of not deducting CVD duties, the Department should maintain its current treatment of CVD duties for purposes of AD margin calculations.

2. *Assertions that the Statute Requires the Deduction of Non-Export CVD Duties are Simply Wrong*

- No Statutory Mandate. Nothing in the AD statute *requires* the deduction of CVD duties in antidumping margin calculations. Statutory language expressly excluding export subsidy CVD duties does not invoke the canon of statutory interpretation *expresio unious est exclusion alterius* or otherwise establish that non-export subsidy CVD duties should be deducted from EP/CEP. If anything, the canon of *expresio unious* supports a conclusion that CVD duties should not be deducted from dumping calculations.
- CVD Duties Are Unique. CVD duties are remedial in nature, which distinguishes them from normal import duties or other costs within the meaning of the AD statute. Moreover, the fact that CVD duties are deducted in determining dutiable value for customs purposes has no bearing on the question of whether they should be deducted in dumping calculations, given the wholly unrelated purposes and statutes governing customs valuation and AD/CVD actions.

3. *The United States Should Not Amend Its Trade Laws Simply to Mirror Other Countries' Trade Regulations*

- "They Do It, So We Should Do It" Logic Is Not Compelling. The fact that other U.S. trading partners may account for CVD duties in their dumping calculations is not persuasive that such treatment of the duties is an appropriate policy to be incorporated into U.S. law. The most significant flaw in this argument is the failure to consider the differences between the antidumping regimes of these other trading partners and the United States that further affects their practice.

4. *The Deduction of CVD Duties Results in a Double Remedy for the Domestic Industry*

- Duties Twice Paid. The U.S. domestic industry incorrectly argues that CVD duties are like other expenses incurred to bring subject merchandise into the United States and should be treated accordingly in dumping calculations. CVD duties are trade remedial measures, and deducting such duties in a dumping calculation would result in higher AD margins which, in conjunction with imposed CVD duties, would provide a double CVD remedy for the U.S. domestic industry.

- The Statute Evidences an Intent to Avoid Double Counting. The CVD and AD statutes recognize, in the case of export taxes designed to offset countervailable subsidies, either the CVD margin should be reduced by the amount of such taxes or the taxes should not be deducted as part of a dumping calculation. In light of these statutory provisions, it makes no sense to distinguish between export taxes that are essentially CVD duties paid to a foreign government, and CVD duties paid to U.S. Customs. Implicit in the provisions is the fundamental principle that a CVD remedy should not be charged twice, and that it would be charged twice if deducted.

Comments re: 201 Duties

1. *The U.S. AD Statute Does Not Require the Deduction of 201 Duties*

- Section 201 Duties Are Unique**.** Nothing in the AD statute requires deduction of 201 duties. Moreover, the Department has long interpreted "United States import duties" as referring to normal duties, and that special Section 201 duties do not satisfy this definition. Arguments that Section 201 duties' classification in the HTSUS Schedule demonstrate their normal status are misplaced in that these duties' Schedule categorization in fact supports a conclusion that they are not normal duties that should be deducted in U.S. AD margin calculations.
- Deduction of Other Special Duties Not Dispositive. Cases involving other special duties do not justify the conclusion that Section 201 duties should be deducted. Cases cited in defense of the proposition, where other duties have been deducted by the Department, do not specifically address Section 201 measures and are readily distinguishable from the application of these measures.

2. ***The U.S. Domestic Industry Has Acknowledged that Deductions of 201 Duties Would Result in Double-Counting***

- Proponent Admission**.** The fact that certain proponents of deduction have stated that such a practice results in double-counting of Section 201 duties demonstrates the incontrovertible nature of this position.
- Inconsistent With Statutory Restrictions**.** Deduction of the Section 201 duties in AD margins would necessarily contravene specific restrictions placed on the magnitude and duration of Section 201 remedies.

3. ***Arguments to the Extent that Failure to Deduct Section 201 Duties Would Permit "Absorption" of 201 Duties Distort the Goals of the Section 201 Measure***

- The Objective of the Section 201 Measure is Payment of the Duty. Arguments concerning absorption of the Section 201 duties also fail to account for the principal concern of the Section 201 measure -- the payment of the duty -- which necessarily results in the achieved objective of the Section 201 measure.

- It Does Not Matter Who Pays The 201 Duty. Arguments that the Section 201 duties will lead to "inequitable treatment" of importers, based on the manner in which the importer purchases the subject merchandise, are misplaced in that the duty will necessarily be borne by either the exporters or the importers, and any distinction between the actual parties who pay the duties is irrelevant.

I. THE DOMESTIC INDUSTRY'S ARGUMENTS IN FAVOR OF DEDUCTING CVD DUTIES IN ANTIDUMPING MARGIN CALCULATIONS ARE NOT SUFFICIENT TO REVERSE LONG-STANDING COMMERCE DEPARTMENT POLICY.

A. The Commerce Department Has A Long-Standing (and Court Approved) Practice of Not Deducting CVD Duties That Cannot Be Changed Absent Compelling Reasons

1. *Both the Commerce Department's and the CIT's rejection of the domestic industry's arguments have been consistent and clear.*

The arguments in support of deducting CVD duties in antidumping margin calculations conveniently ignore one very important fact: over the years, the Commerce Department has consistently rejected these very same arguments.

Indeed, several years ago, in a 1997 case, *Certain Cut-to-Length Carbon Steel Plate Germany*,[3] the Department all but chastised the petitioners for wasting the Department's time by submitting arguments on this issue -- an issue that the Department considered had long been resolved. In that case, the Department unequivocally stated the following:

> It is the Department's ***longstanding position*** that AD **and *CVD duties are not a cost*** within the meaning of section 772(d). AD and CVD duties are unique. Unlike normal duties, which are an assessment against value, AD and CVD duties derive from the margin of dumping or the rate of subsidization found. Logically, AD and CVD duties cannot be part of the very calculation from which they are derived. This logical rationale for the Department's interpretation of the statute is consistent with prior decisions of the CIT. See Federal-Mogul, supra, 813 F. Supp. at 872 (deposits of antidumping duties should not be deducted from USP because such deposits are not analogous to deposits of "normal import duties").
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> . . .

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[3] 62 Fed. Reg. 18,390 (April 15, 1997) (final results of antidumping duty administrative review) [hereinafter *Plate from Germany*].

> Moreover, the treatment of AD and CVD duties (already paid or to be assessed) as a cost to be deducted from the export price is an issue that was arduously debated during passage of the URAA and ultimately rejected by Congress. See H.R. 2528, 103rd Cong., 1st Sess. (1993). Alternatively, Congress directed the Department to investigate, in certain circumstances, whether AD duties were being absorbed by affiliated U.S. importers. 19 U.S.C. 1675(a)(4). ***Thus, Congress put to rest the issue of AD and CVD duties as a cost.*** SAA at 885 ("The duty absorption inquiry would not affect the calculation of margins in administrative reviews.") *See also* H. Rep. No. 103-826(I), 103rd Cong., 2nd Sess. 60 (1994).[4]

This Department position has been expressly affirmed by the courts, with respect to both AD duties *and* CVD duties. Indeed, in the appeal of the very determination noted above, the domestic industry argued at great length that CVD duties imposed to offset *domestic* subsidies were different from AD duties, and therefore the DOC rationale for not deducting them in the AD margin calculation did not apply. The court specifically and unequivocally rejected this argument:

> Domestic Producers respond expressly for the first time in their reply brief that Commerce's rationale does not apply to the treatment of countervailing duties imposed to offset non-export subsidies. The Domestic Producers assert that domestic subsidies are not presumed to have any particular price effect, and are not presumed to have equal price effects in the home and U.S. markets. Accordingly, Domestic Producers argue that Commerce has failed to demonstrate that the deduction of non-export CVD duties from U.S. price would result in a double remedy or an impermissible double-counting.
>
> The court has upheld Commerce's interpretation that countervailing duties should not be deducted from U.S. price, based on Commerce's position against double-counting. See *AK Steel*, 988 F. Supp. at 607-08. Domestic Producers ask the court to make a narrow exception to this general rule and find that Commerce's interpretation and rationale are unreasonable as applied to the deduction of countervailing duties designed to offset non-export subsidies.
>
> Based on the information presented, ***the distinction that Domestic Producers attempt to make between the export and non-export***

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[4] *Id.* at 18,395 (emphasis added).

> ***countervailing duties is not a viable one.*** The double counting concern is still relevant if Commerce decides to deduct non-export countervailing duties. Logically, the deduction of a countervailing duty, whether export or non-export, from the U.S. price used to calculate the antidumping margin would result in a double remedy for the domestic industry. ***Commerce has already corrected for the subsidies on the subject merchandise*** *in the countervailing duty order, thereby granting the domestic industry a remedy. To deduct such countervailing duties from U.S. price would create a greater dumping margin, in effect a second remedy for the domestic industry.* Therefore, Commerce's rationale for not deducting countervailing duties is reasonable as applied to both export and non-export countervailing duties.[5]

As discussed below, as a matter of law, the consistent and long-standing rejection of the domestic industry's arguments by both the Commerce Department and the courts is the most important consideration in analyzing whether to adopt a different practice.

2. ***Congress did not change the Commerce Department's statutory interpretation when it had an opportunity to do so, thereby demonstrating the correctness of the Department's interpretation.***

Despite numerous opportunities for Congress to alter the Department's interpretation of the statute, it has simply refused to do so. As a matter of law, this fact is significant.

The courts have long advised that "[i]n determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning - or ambiguity - of certain words or phrases may only become evident when placed in

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5 *U.S. Steel Group. v. United States*, 15 F. Supp. 2d 892, 900 (Ct Int'l Trade 1998) (emphasis added).

context."[6] It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[7] In particular, "the meaning of one statute may be affected by other Acts, *particularly where Congress has spoken subsequently and more specifically to the topic at hand.*"[8] In effect, Congressional *inaction* is equally pertinent as Congressional *action*.[9] Thus, the long history of Congressional refusal to modify § 772(c)(2) clearly demonstrates the correctness of the Department's long-standing policy of not deducting CVD duties from the antidumping margin calculation in accordance with the statute's plain language and Congressional intent.

Three related rules of statutory interpretation are applicable in this instance. First, courts presume that a judicial or administrative interpretation is accurate if Congress is aware of the interpretation but fails to amend the statute.[10] This rule, otherwise known as the "acquiescence rule," is particularly relevant where the judicial or administrative interpretation is well-established and Congress paid special attention to the issue.[11] As stated by the Department itself,

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[6] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

[7] *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

[8] *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (citing *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998); *United States v. Fausto*, 484 U.S. 439, 453 (1988)) (emphasis added).

[9] *See, e.g.*, *Green v. Bock Laundry*, 490 U.S. 504, 523-34 (1989) (stating that refusal of the conferees to apply Federal Rule of Evidence 609 to individuals other than the criminal defendant despite adequate opportunity and awareness was dispositive on the court's holding to that effect).

[10] *Brown & Williamson Tobacco*, 529 U.S. at 156.

[11] *See id.*; *Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983).

it is a "*long-standing position* that AD and CVD duties are not a cost within the meaning of section 772(d)."[12] And as acknowledged by the Coalition for Fair Lumber (the "Coalition") the phrase "additional costs, charges, and expenses, and United State import duties," as it is currently interpreted, has existed since 1921 but never amended.[13] Since that time, Congress has been well-aware that the phrase does not encompass special duties such as AD and CVD duties.[14] And despite Congress's knowledge, it has made no effort to amend it. When the relevant provision came into existence in 1930, the original language was retained.[15]

Since that time, the provision has been amended three times but in ways that have no bearing on the phrase at issue.[16] Furthermore, Congress has declined any change to § 772(c)(2)(C) despite the CIT's repeated approval of the Department's interpretation of that provision.[17] This legislative history clearly serves as "overwhelming evidence of acquiescence" that reflects Congressional

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[12] *Plate from Germany* 62 Fed. Reg. at 18,395 (emphasis added).

[13] Comments filed by Dewey Ballantine on behalf of the Coalition for Fair Lumber Imports at 10 [hereinafter CFLI Comments].

[14] *See* H.R. Rep. No. 103-826, pt. 1, at 60-61 (1994); H.R. Rep. No. 96-249, at 94-95 (1979). *See also* Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 62 Fed. Reg. 18,404, 18,421-22 (April 15, 1997) (final results of antidumping duty administrative reviews) [hereinafter *Carbon Steel Products from Korea*].

[15] *See* Tariff Act of 1930, Title VII, § 772.

[16] *See* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101; Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 614; Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, § 223.

[17] *See Hoogovens Staal BV v. United States*, 4 F. Supp. 2d 1213, 1223 (Ct. Int'l Trade 1998); *U.S. Steel Group*, 15 F. Supp. 2d at 899; *AK Steel Corp. v. United States*, 988 F. Supp. 594, 607 (Ct. Int'l Trade 1997).

approval of the Department's interpretation that the agency cannot choose to ignore.[18]

Second, courts apply the "reenactment rule," which allows a court or administrative agency to incorporate a previous interpretation of a statute if it was reenacted without material change to the interpreted provision.[19] Under this principle, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."[20] The legal force of this doctrine is strengthened where the interpretation is authoritative, *i.e.*, issued by the agency charged with administering the statute and affirmed by a reviewing court.[21] Application of the reenactment rule is appropriate in such a situation because it understandably yields public and private reliance on unscathed administrative interpretations.[22] Conversely, application of this doctrine is further warranted by the protracted existence of the statutory interpretation at issue.[23]

As stated above, the interpretation at issue has existed since the 1921 Act. In 1930, the relevant provision was enacted without any change to the language

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18 *Solid Waste Agency v. Army Corps of Engineers*, 531 U.S. 159, 170 n.5 (2001).

19 *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974).

20 *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

21 *See Fogerty v. Fantasy,* 510 U.S. 517, 527-33 (1994); *Farragher v. City of Boca Raton,* 524 U.S. 775 (1998).

22 *Id.*

23 *See United States v. Hermanos*, 209 U.S. 337, 339 (1908).

used in the 1921 Act.[24] Since its enactment, the provision was amended three times without any change to the relevant language, and nothing in the legislative history of these amendments suggests that Congress intended any change to the status quo.[25] As declared by the Department itself, "[i]n the hundreds of antidumping duty administrative reviews that Commerce has conducted since 1980, the Department has never deducted AD duties or CVDs from the starting price in the United States.... Congress has been well aware of this situation, and, despite numerous revision of the antidumping law since 1921, has never amended the law to change this result."[26]

In addition, Congress explicitly stated that "Section 772 of the Tariff Act of 1930, as added by the [1979 Trade Agreement Acts] bill, would generally continue existing law with respect to the meaning of purchase price and exporter's sales price."[27] Similarly, in enacting the Uruguay Round Agreements Act (the "URAA"), Congress clarified that the duty absorption inquiry for purposes of administrative reviews "would not affect the calculation of margins.... This new provision of law is not intended to provide for the treatment of antidumping duties as a cost."[28] The changes to § 772 that were encompassed by the URAA were largely composed of

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24 *See* Tariff Act of 1930, Title VII, § 772.

25 *See* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101; Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 614; Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, § 223.

26 *Carbon Steel Products from Korea*, 62 Fed. Reg. at 18,421-22.

27 H.R. Rep. No. 96-249, at 94-95 (1979).

28 H.R. Rep. No. 103-826, pt. 1, at 60-61 (1994).

changes to the calculation of constructed export price.[29] Thus, in every single instance where § 772 was amended, Congress intended to continue the Department's practice of not deducting CVD duties.

Also of significant note is Congress's failure to make any changes in the URAA despite the existence of the CIT's decision in *Federal Mogul Corp. v. The Torrington Co.*,[30] holding that antidumping duties should not be deducted from export price because such deposits are not analogous to deposits of "normal import duties."[31] Congressional failure to amend § 772 in a manner that would alter the Department's interpretation of that statute unquestionably serves as a resounding approval of the Department's statutory interpretation and resulting policy of not deducting CVD duties from AD margin calculations.

Third, courts also apply the "rejection rule", and give effect to Congress's explicit rejection of specific language that would have altered the agency's well-established practice.[32] Under that principle of statutory interpretation, a court will not interpret a statute consistent with language that has been proposed but rejected by Congress.[33] As the Department once noted:

> *[T]he treatment of AD and CVD duties (already paid or to be assessed) as a cost to be deducted from the export price is an issue that was arduously debated during passage of the URAA and ultimately rejected by Congress. See* H.R. 2528, 103rd

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29 *See id.* at 79-82.

30 813 F. Supp. 856 (1993)

31 *Id.* at 872.

32 *See Runyon v. McCrary*, 427 U.S. 160, 180 (1976); *FDA v. Brown & Williamson Tobacco,* 529 U.S. 120, 147-48 (2000).

33 *See id.*

> Cong., 1st Sess. (1993). Alternatively, Congress directed the Department to investigate, in certain circumstances, whether AD duties were being absorbed by affiliated U.S. importers. 19 U.S.C. 1675(a)(4). *Thus, Congress put to rest the issue of AD and CVD duties as a cost.* SAA at 885 ("The duty absorption inquiry would not affect the calculation of margins in administrative reviews.") *See also* H. Rep. No. 103-826(I), 103rd Cong., 2nd Sess. 60 (1994).[34]

Indeed, as stated above, Congress explicitly rejected the view that trade remedy duties should be treated as costs that are deducted from export price or constructed export price.[35] These repeated rejections abundantly illustrate the Congressional desire to retain the Department's well-established interpretation to retain CVD duties in the AD margin calculation.

The applicability of these statutory principles is bolstered by current developments in Congress. For instance, a proposal is before both the House and Senate that would amend Section 772(c)(2)(A) of the Act by inserting in parentheses "including countervailing duties imposed under this Act" after the phrase "United States import duties", reflecting the contemporary understanding of the long-held interpretation that CVD duties cannot be deducted from EP or CEP, absent a change to the underlying statute.[36]

In short, although "non-action by Congress is not often a useful guide,…the non-action here is significant."[37] Congressional failure to reverse the Department's interpretation effectively constitutes confirmation of the agency's well-established

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[34] *Plate from Germany*, 62 Fed. Reg. at 18,395 (emphasis added).

[35] H.R. Rep. No. 103-826, pt. 1, at 60-61 (1994).

[36] *See* S. 136 105th Cong. § 3 (2003); S. 219 § 1 105th Cong. (2003); H.R. 491 105th Cong. § 2 (2003); H.R. 2092 105th Cong. § 3 (2003); H.R. 2365 § 109 105th Cong. (2003).

[37] *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983).

policy, and has generated a level of reliance that implicates issues of fairness and due process that the agency cannot and should not ignore. The long history of legislative acquiescence, reenactment and rejection demonstrates the correctness of the Department's interpretation and provides a sound basis for the continued non-deduction of CVD duties from the antidumping margin calculation.

3. *Given this history, the Commerce Department may not change its practice, absent strong compelling reasons to do so.*

Despite the broad discretion generally afforded to the Department in interpreting the antidumping law, legally, the Department may not depart from its long-standing, well-established policy of not deducting CVD duties from the antidumping calculation, absent very compelling reasons to do so.

As the Department knows well, under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,*[38] an administrative agency is afforded broad deference in the interpretation of a statute that it is charged with administering.[39] "[I]f the statute

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[38] 467 U.S. 837 (1984).

[39] *See id.* at 842-43. In that case, the Supreme Court articulated a two-prong test as follows:

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

Id.

is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[40]

However, the Supreme Court has also made clear that there are limits to the deference owed under *Chevron* when the agency adopts a complete reversal of its previous statutory interpretation. For example, in *INS v. Cardoza-Fonseca*,[41] the Supreme Court cited the inconsistency of the agency's interpretation of the provision at issue "as an additional reason for rejecting [its] request for heightened deference in its interpretation of a statute."[42] According to the Court in that case, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." [43]

Moreover, in *Good Samaritan Hospital v. Shalala*,[44] the Court, in upholding an agency's shift in its long-standing interpretation of a statute, emphasized the following:

> '[A]n administrative agency is not disqualified from changing its mind; and when it does, *the courts still sit in review of the administrative decision and should not approach the statutory*

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[40] *Id.* at 843.

[41] 480 U.S. 421 (1987)

[42] *Id.* at 448 n.30.

[43] *Id.* (citing *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *General Electric Co v. Gilbert*, 429 U.S. 125, 143 (1976)).

Consistent with this approach, a longstanding interpretation is accorded extra deference under the *Chevron* inquiry. *Barnhart v. Walton*, 535 U.S. 212, 219 (2002).

[44] 508 U.S. 402 (1993).

> *construction issue* de novo *and without regard to the administrative understanding of the statutes.'* … *[T]he consistency of an agency's position is a factor in assessing the weight that position is due.* As we have stated: "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.'[45]

Against this background, an interpretation of § 772(c)(2)(A) that squarely conflicts with the Department's original and long-standing interpretation of not deducting CVD duties militates against its reasonableness under *Chevron*. Although there exists more than one reasonable construction of an ambiguous statute and an administrative agency is authorized to change its construction, an interpretation that is wholly inapposite to a previous, well-established interpretation is practically indefensible.[46] Thus, it is clear that Commerce may not deduct CVD duties from AD margin calculations absent compelling reasons to do so.

In light of the drastic nature of reversing the Department's long-standing policy, the question becomes whether any change has surfaced in the underlying law or factual circumstances that would be compelling enough for the Department to reconsider its long-established, court approved position, rendering it reasonable under *Chevron.* The answer is an unqualified "no." There is simply no legitimate

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45 *Id.* at 417 (citations omitted) (emphasis added).

46 *See also United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956) ("Against the Treasury's long-standing and consistent administrative interpretation[,] its more recent *ad hoc* contention as to how the statute should be construed cannot stand."); INS v. Yang, 519 U.S. 26, 33 (1996) ("Though the agency's discretion is unfettered at the outset, if it announces and follows – by rule or settled course of adjudication – a general policy by which its exercise of discretion will be governed, an irrational departure from that policy…could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion'….).

reason for the Department to abandon its long-standing policy of not deducting CVD duties from AD margin calculations. The element of fairness demands consistent and evenly-applied action by the Department. Improperly implemented change on behalf of the Department will not only raise issues of inequity such as retrospectivity, but it will undermine both the domestic and international industry's confidence in the agency's implementation of the very statute it is charged with interpreting. Therefore, the Department should adhere to the law and decline any change to its current treatment of CVD duties in the antidumping margin calculation.

B. The Domestic Industry's Arguments That The Statute *Requires* The Deduction of CVD Duties In Antidumping Margin Calculations Are Wrong

1. *The canon of statutory interpretation expresio unius est exclusio alterius does not apply.*

In the absence of clear and specific Congressional directives, the Department possesses broad discretion in interpreting the domestic trade laws.[47] In determining whether the statute lacks clear and specific Congressional directives, the appropriate question to ask is whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter…."[48]

As expressly noted by the Department and the CIT on numerous occasions, Congress has not spoken on the issue of whether the antidumping statute requires

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[47] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996).

[48] *Chevron U.S.A. Inc.*, 467 U.S. at 842.

the deduction of CVD duties that offset non-export subsidies from the antidumping margin calculation, and the terms of that provision remain ambiguous.[49] Simply put, nothing in Section 772 or elsewhere in the domestic trade statutes *requires* the Department to deduct CVD duties.

Implicitly recognizing that its claim of a statutory mandate is weak, the Coalition goes to great lengths to support its position by espousing the statutory maxim of *expressio unius est exclusio alterius*, which means that reference to a certain item indicates the exclusion of another.[50] The domestic industry asserts that it is reasonable to assume that Congress intended for non-export subsidy CVD duties to be deducted from export or constructed export price "because Congress expressly excluded countervailing duties imposed to offset export subsidies from 'the costs, charges, or expenses and United State imports'.... [under § 772(c)(1)(C) and] did not provide that countervailing duties imposed to offset non-export subsidies be excluded from [this] provision."[51]

Several considerations render the Coalition's proposition untenable. First, use of this very same canon to support the argument of deducting CVD duties from antidumping calculations was specifically and summarily rejected by the CIT in *U.S. Steel Group v. United States*:

> Domestic Producers ask the court to make a narrow exception to the general rule and find that Commerce's interpretation and rationale are unreasonable as applied to the deduction of countervailing duties designed to

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49 *See, e.g., U.S. Steel Group*, 15 F. Supp. 2d at 900.

50 Black's Law Dictionary 403 (6th ed. 1991).

51 CFLI Comments at 13.

> offset non-export subsidies. Based on the information presented, *the distinction that Domestic Producers attempt to make between the export and non-export countervailing duties is not a viable one.*[52]

In addition, contrary to the domestic industry's assertions, the statutory maxim of *unius est exclusio alterius* actually supports a conclusion that CVD duties should not be deducted from AD margin calculations. Under the statutory maxim, reference of one item indicates the exclusion of another. Applied to the drafting and amending of Section 772(c) of the Act, the maxim supports a conclusion that Congress' specifically addressing export-subsidy CVD duties indicates that Congress did not intend for Section 772(c) to address non-export subsidy CVD duties. Because Section 772(c) exclusively provides for either increases or reductions to export or constructed export price, Congressional intent that non-export subsidy CVD duties be neither added nor deducted would have required either a separate statutory provision to this effect or, more simply, silence as to these CVD duties in Section 772(c). Congress appears to have accepted the simple alternative and omitted reference to non-export subsidy CVD duties as it did not intend for these duties to be either added or deducted from the export or constructed export price. If Congress had intended that non-export subsidy CVD duties be deducted from export or constructed export price, it could have specifically referenced these duties within the language of Section 772(c) in the same manner in which it addressed export subsidy CVD duties.

The *expressio unius* canon is subordinate to the primary rule that the legislative intent governs the interpretation of the statute and, thus, it can be

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[52] *U.S. Steel Group*, 15 F. Supp. 2d at 900.

overcome by a strong indication of contrary legislative intent or policy.[53] In this case, as demonstrated above, the canon and legislative intent support a conclusion that Congress drafted Section 772(c) in a manner so that export subsidy CVD duties were included within the provision's scope but that non-export subsidy CVD duties would not be included within the scope of the provision.

2. *CVD duties are not normal customs duties.*

The statute does not define the term "United States import duties." Consequently, the Department has the discretion to define these terms so long as the definition is based on a permissible construction of the statute.[54] In fact, the Department has long interpreted "United States import duties" to mean "normal import duties" or "normal customs duties" which do not include special duties that are applied to offset either antidumping duties or countervailing duties, and the courts have upheld this interpretation.[55] Thus, the domestic industry argument -- that the Department's restriction of the meaning of the term "U.S. import duties" to normal import duties is unsupported by the statute -- is itself unsupported by prior precedent.

Moreover, both the Department and the courts have repeatedly held that CVD duties cannot be considered normal import duties. Countervailing duties are special, remedial duties to correct for subsidization that has been deemed unfair

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[53] *Christensen v. Harris Country*, 529 U.S. 576, 582-83 (2000).

[54] *See Hoogovens Staal BV v. United States*, 4. F. Supp. 2d 1213, 1220. *See also AK Steel Corp. v. United States*, 1279, 988 F. Supp. 594, 607 (Ct. Int'l Trade 1997).

[55] *See, e.g., U.S. Steel Group*, 15 F. Supp. 2d at 901*; Federal Mogul Corporation v. United States*, 813 F. Supp. 856, 872 (Ct. Int'l Trade 1993).

and thus countervailable.[56] Both the process by which CVD duties are calculated and how they are assessed distinguishes them from normal customs duties.

Normal import duties are *ad valorem* rates of general application, which are published in Chapters 1-97 of the Harmonized Tariff Schedules of the United States.[57] In contrast, CVD duties are based on specific findings made by 1) the Department concerning whether countervailable subsidies have been provided and the level of subsidization for the relevant period and 2) the U.S. International Trade Commission ("ITC") that an industry in the United States is materially injured (or threatened with material injury) by reason of the unfairly traded merchandise.

In addition, CVD duties are normally determined long after importation based on an administrative review conducted by the Department. The duties themselves are only assessed at the close of the administrative review based on instructions issued by the Department. Thus, unlike normal customs duties which are assessed against the dutiable value of the merchandise at the time of entry, Customs cannot assess these duties without specific guidance from the Department.[58]

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[56] *See U.S. Steel Group,* 15 F. Supp. 2d at 900.

[57] *See* 19 U.S.C. §§ 1202, 3004 (2003).

[58] The Coalition argues that the assessment of normal customs duties is not finally determined upon entry but can be subject to change until liquidation or even after liquidation if a protest is filed. *See* CFLI Comments at 28. However, the fact that there are procedures for the post-entry adjustment of customs duties does not alter the fact that these duties are "normally" assessed at a given rate, which is determined at entry based on the tariff classification and value declared to Customs.

The remedial nature of CVD duties is also apparent from the fact that they may be applied to duty-free merchandise.[59] The Department has found that because antidumping duties can be applied to "duty-free" merchandise, they are out of the realm of "normal customs duties.[60]" The same logic can be applied to CVD duties. That is, the fact that CVD duties can be applied to "duty-free merchandise" also evidences their special, remedial purpose, which distinguishes them from normal import duties.

The submission by the Coalition for Fair Lumber Imports cites *C.J. Tower & Sons v. United States*,[61] a decision issued by the Court of Customs and Patent Appeals ("CCPA") in 1934, as support for its argument against the Department's limitation of the term "U.S. import duties" to normal customs duties.[62] However, the Coalition's reliance on *C.J. Tower* is misplaced. The issue addressed by the Court in *C.J. Tower* was whether the Antidumping Act of 1921 was unconstitutional because it authorized an agency to impose a penalty on the importer. The court held that antidumping duties are not penalties and therefore the statute was not unconstitutional. In fact, the court in *C.J. Tower* does not specifically deal with the term "U.S. import duty." This case only deals with

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59 In distinguishing special antidumping duties from normal customs duties, the Department referred to section 202(a) of the Tariff Act of 1921, which "provided that 'special dumping duties' may be applied to 'duty-free merchandise.'" *See Carbon Steel Products From Korea* at 18420-21.

60 *Id.*

61 71 F.2d 438 (1934).

62 *See* CFLI Comments at 17-18.

antidumping duties and is thus not relevant to a consideration of the deductibility of CVD duties in antidumping duty calculations.

The Coalition also argues that *Fuel Ethanol from Brazil*[63] provides support for the proposition that the Department should not limit the term U.S. import duty" to a normal customs duties.[64] Congress imposed a special duty in addition to the existing *ad valorem* duties on fuel ethanol (ethyl alcohol imported for fuel use) by legislation.[65] This special duty was imposed in order to offset a tax incentive provided to producers of gasoline-ethanol fuel blends.[66] In the 1986 antidumping investigation into *Fuel Ethanol from Brazil*, the Department deducted this additional duty in the margin calculation. [67]

However, CVD duties are readily distinguished from the additional duties imposed on ethanol. The fuel ethanol tariffs are *ad valorem* duties assessed upon import by the Customs Service regardless of the country of origin or producer. In this regard, they are analogous to normal customs duties. The duties are not specifically calculated by a separate agency, nor are they intended to offset an unfair trade practice or protect a domestic industry from material injury. Thus, they are readily distinguished from CVD duties. As a result, the *Fuel Ethanol* case does not support the deduction of CVD duties and antidumping duty calculations.

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[63] Antidumping; Fuel Ethanol from Brazil, 51 Fed. Reg. 5,572 (February 14, 1986) (final determination of sales at less than fair value).

[64] *See, e.g.*, CFLI Comments at 19.

[65] *See* Omnibus Reconciliation Act, Pub. L. No. 96-499, § 1161 (1980).

[66] *Import Duty On Ethanol*, N.Y. TIMES, Aug. 3, 1985, at A41.

[67] *See* Antidumping; Fuel Ethanol From Brazil, 51 Fed. Reg. at 5,572.

Based on the foregoing, it is clear that CVD duties are not normal import duties. As a result, based on the Department's longstanding construction of the statute, they are not "United States import duties" within the meaning of the statute. Therefore, the statute does not require that CVD duties be deducted in calculating U.S. price (EP or CEP) in antidumping duty calculations.

3. ***Any inconsistency with Customs' treatment of CVD duties for valuation is irrelevant.***

The Coalition dedicates a whole section of its comments to an argument that the Department's longstanding practice of not deducting CVD duties in antidumping duty calculations is inconsistent with Customs determination of dutiable value.[68] More specifically, the Coalition argues that because duties and fees (including CVD duties) are to be deducted in determining the dutiable value of imported merchandise, the Department should deduct CVD duties in AD margin calculations. However, the truth of the former (CVD duties are deducted in determining dutiable value) simply does not bear any demonstrable relationship to the latter (CVD duties should be deducted in AD calculations). As a result, the argument is of little consequence.

The valuation of imported merchandise for purposes of U.S. import entry is performed in accordance with the GATT Customs Valuation Agreement, which was implemented into U.S. law through the Trade Agreements Act of 1979.[69] The specific valuation provisions are set forth at 19 U.S.C. § 1401a.

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[68] *See* CFLI Comments at 30-34.

[69] Pub. L. No. 96-39, § 201(a) (1979).

In contrast, the statute creating U.S. antidumping duties, including the disputed statutory language specifying the costs and expenses to be deducted in calculating such duties, was enacted in 1921. The specific provision in question is set forth at 19 U.S.C. § 1677a(c)(2). Thus, the two provisions are wholly unrelated in terms of their history. They are also contained in completely different and unrelated subtitles of the statute.

In addition, the two provisions are wholly unrelated in their purpose and intent. The valuation provisions are designed to establish or construct an objectively valid value for imported merchandise to enable an appropriate assessment of ad valorem duties and for statistical reporting purposes.[70] In contrast, CVD duties are additional duties used to offset the effects of an unfair trade practice.[71]

Although the customs valuation provisions of U.S. law are generally designed, at least in concept, to achieve an export price or value that is comparable to some degree with the ex-factory price in an antidumping duty calculation, that is the extent of the similarities. The statutory scheme for both customs valuation and antidumping are highly complex and do not permit close analogies. In particular, the statutory language mandating the deduction of certain duties and costs in AD margin calculations is wholly separate from and has no relationship to the customs valuation provisions. Therefore, the Coalition's argument is of little consequence.

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70 *See Salant Corp. v. United States*, 86 F. Supp. 2d 1301, 1306 (2000)

71 *See* U.S. Customs Service, *Importing Into the United States: A Guide for Commercial Importers*, at 43 (November 1998).

4. *CVD duties do not fall within the statutory definition of "other costs incident to bringing merchandise to the United States"*

The Coalition also argues that the Department must account for the real costs of selling into the U.S. market in calculating U.S. price.[72] In particular, the Coalition argues that CVD duty deposits are "real expenses" incurred in selling in the United States, that foreign producers treat CVD duty deposits as a cost incident to their international sale in their accounting systems, the deduction of CVD duty deposits would not lead to double counting, and such an adjustment would be legal, fair, and economically sound.[73]

The statute directs the Department to deduct certain costs and expenses in antidumping calculations. Specifically, in determining EP or CEP, the Department is to deduct the amount "attributable to any additional costs, charges, or expenses . . . 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."[74] "

The intent of the language of "costs...incident to importing" is to cover charges necessary to transport the merchandise, such as port charges, ocean freight and insurance, and handling costs. It is not intended to cover charges or expenses, such as CVD duties imposed by the U.S. government as a remedial trade measure.

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72 CFLI Comments at 21.

73 *Id.* at 21-30.

74 19 U.S.C. § 1677a(c)(2).

C. That Other Countries' Laws May Allow for Deduction of CVD Duties in Antidumping Margin Calculations Is Not Sufficient Reason to Change Long-Standing U.S. Policy.

Some comments claim that U.S. practice should reflect the practices of certain trading partners, such as the EC, that also deduct CVD duties in their dumping calculations.[75] They support this argument with the proposition that the WTO Antidumping Agreement permits the practice.[76] Simply because some U.S. trading partners account for AD and CVD duties in their dumping calculations, or the WTO Antidumping Agreement supposedly permits such a practice,[77] does not mean that deducting CVD duties from a dumping calculation is appropriate either under U.S. law or as a matter of policy. Indeed, U.S. trading partners engaged in the practice are flirting with the same double counting problem the Department and the courts have already recognized as an illogical and unwarranted outcome.

The greatest flaw in the "they do it, so we should do it" logic advanced by these comments is that they do not consider *other differences* in the antidumping regimes of our trading partners. They offer the trunk of an elephant in an attempt to describe the elephant, citing narrow provisions concerning the deduction of duties without context, and especially the limits U.S. trading partners have in place that can restrict the magnitude of antidumping duties. For example, these comments fail to mention that the EC antidumping regime (and others) includes a "lesser duty rule" that serves to cap antidumping liability commensurate with the

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75 *See* Comments filed by U.S. Steel at 39-42.

76 *Id.*

77 The WTO does not permit such a practice. We refer to the Comments submitted on behalf of the Government of Korea on this issue.

amount of injury experienced by the domestic industry.[78] The rule can have a mitigating effect on the EC's deduction of CVD duties. Moreover, the lesser duty rule is consistent with, and even promoted by, Article 9.1 of the WTO Antidumping Agreement. Following the "they do it, so we should do it" logic, one would expect that since the EC and other countries apply the lesser duty rule, and if the WTO Antidumping Agreement promotes the rule, then the United States should also adopt the rule. Of course, the United States has not adopted such a rule, nor is it required to, nor is it likely that parties in favor of deducting CVD duties believe the rule to be sound policy. In short, the "they do it, so we should do it" argument is simply not a compelling rationale for deducting CVD duties from EP/CEP.

D. Contrary to the Domestic Industry's Arguments, Deduction of CVD Duties in Antidumping Margin Calculations Does Result in a Double Remedy for The Domestic Industry

1. *The Domestic Industry's arguments are based on the mistaken assertion that CVD remedial measures are typical expenses*

The domestic industry attempts to argue that that the deduction of CVD duties from AD margin calculations would not represent a "double counting" of these duties. The domestic industry's arguments to this effect are based on the inaccurate characterization of CVD remedial measures as normal expenses incurred in bringing the subject merchandise to the United States. According to

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[78] E.C. Council Regulation No. 384/96, Art. 14(2). *See* Audio tapes in cassettes (Japan, Korea, Hong Kong), OJ 1991 L119/35:

> There is . . . an additional responsibility on the institutions to avoid measures which can have excessive consequences. Indeed, Article 13.3 [of the 1988 Regulation] . . . states that the measures "should be less" than the dumping margin "if such lesser duties would be adequate to remove the injury."

the domestic industry's arguments, no double-counted benefit derives from deduction of the CVD duties in AD margin calculations as these duties rationally serve the dual purpose of addressing foreign subsidization and of representing typical expenses that should be considered for purposes of the AD statutes.

At its core, the domestic industry's argument is illogical. If CVD duties in themselves are remedies to address subsidies and are also to be considered factors in a remedy under the AD statutes, this would imply that they represent "double benefits" or would be "double counted." The domestic industry at times seems unsure as to whether the duties would properly be considered as dual instruments. At page 23 of its submission, the Coalition for Fair Lumber Imports asserts that "simply, antidumping and countervailing duties are different remedies for different wrongs." Even though its argument that CVD duties are not double counted rests on its characterization of these duties expenses, the domestic industry never reconciles how these duties can be both remedies <u>and</u> expenses for purposes of the U.S. trade laws.

Simply put, the U.S. AD and CVD statutes were drafted to provide relief to U.S. producers suffering from different types of trade distortions and were not drafted so as to allow dual definitions of AD or CVD duties as both remedies and normal expenses. Rather, the U.S. Congress recognized the distinct yet equally important nature of the CVD and AD remedial trade measures and enacted Title VII of the Tariff Act of 1930 - Countervailing Duty and Antidumping Duties - to provide for CVD and AD duties. The domestic industry's assertion that CVD duties are normal expenses for purposes of the AD statutes represents a flawed

understanding of the logic behind the manner in which the U.S. Congress wrote and implemented the trade remedial CVD and AD regulations.

2. *Proper consideration of AD margin calculations demonstrates double-counting*

The Coalition for Fair Lumber Imports provided an example at pages 42-43 of its October 9 submission to support its conclusion that the deduction of CVD duties from AD margin calculations would not result in a double-counting of the CVD duties. However, a closer inspection of the Coalition's illustration reveals that the Coalition did not specifically address issues concerning the actual effects of such a deduction on the AD margin calculation but instead provided a generalized perspective on how the deduction of CVD duties could be viewed.

The Coalition's hypothetical provides the following scenarios:

<u>Scenario One</u>
Normal Value - $10
Entered (Export) Value - $10
No Dumping
No Subsidization

<u>Scenario Two - Subsidization</u>
Normal Value - $12 (increased by CVD rate of 20% or $2)
Entered (Export) Value - $10
Dumping - $2

<u>Scenario Three - U.S. Incidental Expenses</u>
Normal Value - $12 (increased by transportation surcharge of $2)
Entered (Export) Value - $10
Dumping - $2

In its explanation of the three scenarios above, the Coalition asserts that an increase by $2 to the normal value in Scenario Two to account for a 20 percent CVD rate would be equivalent to an increase by $2 to the normal value in Scenario Three due to a transportation surcharge. According to the Coalition, the AD margin calculations for Scenario Two and Three should be considered in the same

manner as both the CVD duties and transportation expenses are incurred directly by the exporter as selling expenses to the U.S. market. The Coalition asserts that Scenarios Two and Three demonstrate that the argument of double-counting is semantic and that including CVD duties in the AD margin calculations results in double counting no more than including other costs associated with selling in the U.S. market.

The Coalition provided the above three scenarios in response to a Department of Commerce memorandum regarding the "double counting" of 201 duties when deducted from AD margin calculations – a memorandum that the Coalition asserts "thoroughly confuses the issue."[79] However, the Coalition neither provided a detailed analysis of an AD margin calculation nor clarified the issue concerning the "double counting" of CVD duties in such a calculation. Instead, the Coalition finessed an interpretation of the effects of deducting CVD duties in AD margin calculations by demonstrating the outcome and avoiding the specific details of such calculations.

The above-referenced Department of Commerce memorandum is instructive regarding the issue of deducting CVD duties in that the outcome for deduction of

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[79] As discussed on page 42 of the CFLI's Comments, the referenced memorandum was U.S. Department of Commerce Internal Memorandum from Gary Taverman to Bernard T. Carreau, Case No. A-274-804, at 3 (Aug. 13, 2002) (Recommendation Memorandum - Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: Carbon and Alloy Steel Wire Rod from Trinidad and Tobago accompanying Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, 67 Fed. Reg. 55,788 (Aug. 30, 2002) (notice of final determination of sales at less than fair value)). The Department provided an example whereby entries valued at $10.00 subject to a 20 percent Section 201 duty would be liable for a $2.00 Section 201 remedial duty. If the Department also deducted such a 201 duty from EP or CEP, the resulting antidumping duty would increase by $2.00, and the total impact in this case of the Section 201 remedy would be a $4.00 duty rather than the original duty of $2.00.

CVD duties would mirror the results of a deduction for 201 duties. As provided in the Department's memorandum, the deduction of CVD (201) duties would result in the CVD duty itself and, in addition, would increase the AD duty so that the total impact of the CVD duty would be greatly increased. Contrary to the Coalition's assertions, the Department correctly concluded that a deduction of either 201 or CVD duties would result in a "double counting" of such duties.

The following hypothetical provides a clear, detailed demonstration of the "double-counting" effect that deduction of CVD duties would have in regards to an AD calculation:

Scenario A - No Deduction of CVD Duties
CVD Duty Rate of 20 Percent

HM Invoice Price	70	U.S. Invoice Price	80
HM Freight	10	U.S. Freight	20
HM Direct Expense	10	U.S. Direct Expense	20
Adjusted HM Price	50	Adjusted U.S. Price	40
AD Margin	10		
AD Rate	25%		
CVD Rate	20%		

Scenario B - Deduction of CVD Duties
CVD Duty Rate of 20 Percent

HM Invoice Price	70	U.S. Invoice Price	80
HM Freight	10	U.S. Freight	20
HM Direct Expense	10	U.S. Direct Expense	20
		CVD Duty	14
Adjusted HM Price	50	Adjusted U.S. Price	26
AD Margin	24		
AD Rate	92%		
CVD Rate	20%		

This example represents the chilling effect that the double-counting of CVD duties would have on exporters trading with the United States in that calculated AD margins would exponentially increase due to the double application of CVD duties and would result in an unfair double remedy.

3. *Proponents of deduction ignore the purpose of CVD remedies and the statutory mechanisms that seek to avoid double charges of those remedies*

The goal of CVD duties is to burden the foreign producer by the amount of benefit that producer received in the form of government subsidies. That the burden should not be borne twice by the foreign producer is clear in both the CVD and AD statutory provisions. The objective is to offset the benefit, and no more.

Specifically, Section 771(6)(C) expressly provides that, for purposes of calculating a net countervailable subsidy, the Department may subtract from the gross countervailable subsidy export taxes, duties or other charges levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received. This provision recognizes that the export taxes constitute part of the subsidy remedy offsetting benefit, requiring an adjustment to the CVD duties so as not to capture more than any residual benefit left after the export tax.

Likewise, as pointed out on page 3 of the comments filed by West Fraser Mills, Subparagraph (B) of Section 772(c)(2) states that EP/CEP shall <u>not</u> be reduced by the amount of any export tax or duty described under Section 771(6)(C). Thus, even the AD statute recognizes that dumping and subsidy remedies are distinct, and that the dumping remedy should not be allowed to distort a subsidy remedy by means of deducting the value of the subsidy remedy in the dumping calculation.

In light of these statutory provisions, it makes no sense to distinguish, as comments in favor of deduction effectively do, between export taxes that are essentially CVD duties paid to a foreign government, and CVD duties paid to U.S.

Customs. Implicit in the provisions is the fundamental principle that a CVD remedy should not be charged twice, and that it would be charged twice if deducted from U.S. price.

II. THE ARGUMENTS IN FAVOR OF DEDUCTING SECTION 201 DUTIES IN ANTIDUMPING MARGIN CALCULATIONS ARE PREMISED UPON AN INCORRECT UNDERSTANDING OF U.S. LAW AND POLICY

A. Antidumping Statute Does Not Require the Deduction of Section 201 Duties

The antidumping statute plainly requires that certain costs and expenses be deducted from the U.S. sales price for imported merchandise in AD margin calculations. However, in this context, the statute only *requires* the deduction of "U.S. import duties" and other costs or expenses incident to international shipment. Domestic interests favoring deduction uniformly contend that Section 201 duties should be considered "U.S. import duties" within the meaning of the statute either based on the plain meaning of the statute, because such duties were not expressly excluded, or simply because of where they are listed or not listed in certain publications, and hence, the statute requires that such duties be deducted. However, the Department has determined that the term "U.S. import duties" should be limited to "normal customs duties," and Section 201 duties are not normal customs duties. As a result, the statute does not *require* that Section 201 duties be deducted.

The domestic interests also contend that there are prior cases in which duties and fees that are analogous to Section 201 duties have been deducted in the Department's AD margin calculations. These commenters contend these prior cases support treating Section 201 duties as "U.S. imports duties" for purposes of

antidumping duty calculations. KITA believes the duties and fees involved in these prior cases are not analogous to Section 201 duties for the same reasons CVD duties are not analogous. Hence, these cases do not compel the Department to deduct Section 201 duties in antidumping duty calculations.

Because there is no statutory or precedential requirement that the Department deduct Section 201 duties, the real issue in this proceeding is whether the policy considerations involved in both U.S. antidumping and Section 201 proceedings support the deduction of Section 201 duties in antidumping proceedings.

1. *The arguments that section 201 duties are "U.S. import duties" as defined by the antidumping statute are either wrong, misplaced, or without consequence.*

The commenters in this proceeding uniformly recognize that Section 772(c) of the Trade Act of 1930 requires the Department to deduct certain costs and expenses when calculating the Export Price ("EP") or Constructed Export Price ("CEP") in a dumping calculation. The statute specifically requires deducting 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."[80]

In arguing that Section 201 duties are "U.S. import duties" within the meaning of the statute, some commenters contend that the plain language of the statute means that the term must include any import duties, including

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[80] 19 U.S.C. § 1677a(c)(2) (emphasis added).

Section 201 duties, incident to the sales transaction.[81] Others contend this phrase cannot be limited to "normal" customs duties, but must include all duties not expressly excluded."[82] Still others assert that Section 201 duties are U.S. import duties simply because they appear in the HTSUS or because they are not listed as "Special Duties" in the Customs regulations.[83]

Despite these arguments, it is universally conceded that the term "U.S. import duties" is not specifically defined either in the statute itself or in the legislative history. Moreover, it is well established that, where the statute does not define a term, the administering agency has discretion interpret the term so long as the agency's decision is based on a permissible construction of the statute. [84]/[85]

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[81] *See* Comments filed by Collier Shannon Scott on behalf of Carpenter Tech. Corp., Crucible Specialty Metals, Electralloy Corp., Slater Steels Corp., and Fort Wayne Specialty Alloys at 3 [hereinafter CTC Comments]; Comments filed by Schagrin Associates on behalf of Comm. on Pipe and Tube Imports at 3 [hereinafter CPTI Comments].

[82] *See* Comments filed by Stewart and Stewart on behalf of International Steel Group and United Steelworkers of America at 8 [hereinafter ISG Comments].

[83] *See* Comments filed by Wiley Rein & Fielding on behalf of Long Producers Coalition, Nucor Corp., and Rebar Trade Coalition at 4-5; CTC Comments filed at 7.

Some of the commenters also suggest that Section 201 duties are a cost or expense incident to the U.S. sales transaction that should be deducted in antidumping duty calculations. *See, e.g.*, CFLI Comments at 8-12; CPTI Comments at 9; Comments filed by Skadden, Arps, Meagher & Flom, & Dewey Ballantine on behalf of U.S. Steel Group at 7 [hereinafter USSG Comments]. Both the Department and the courts have consistently held that antidumping duties cannot be considered such a cost or expense under the statute, but this conclusion was based on the fact that deducting antidumping duties as a cost would lead to double counting or the creation of margins where none otherwise existed. *See* Hoogovens Staal BV v. United States, 4 F. Supp. 2d 1213, 1220 (Ct. Int'l Trade 1998); PQ Corporation v. United States, 652 F. Supp. 724, 737 (Ct. Int'l Trade 1987). In our view, the double counting question is more appropriately addressed as a policy issue rather than as a matter of statutory interpretation. Consequently, this issue is addressed in the following section of KITA's rebuttal comments.

[84] *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

In fact, the Department has long interpreted "United States import duties" to mean "normal import duties," which do not include special duties applied to offset particular trade situations.[86]

Thus, those domestic interests that argue Section 201 duties are U.S. import duties within the plain meaning of the statute are simply wrong. The statute's meaning is not plain, and DOC has discretion to interpret this term so as to exclude Section 201 duties.

The Antidumping Act of 1921 first introduced the term "U.S. import duty." As the Department itself has noted, the Senate Report accompanying this legislation uniformly refers to antidumping duties as "special dumping duties," and uniformly refers to ordinary customs duties as "United States import duties."[87] As a result, the Department concluded the term "United States import duties" is to be interpreted as "normal import duties" or "normal customs duties,"[88] and the Courts have repeatedly upheld this interpretation.[89]

Therefore, those domestic interests that argue the Department cannot limit the term U.S. import duties to "normal customs duties" are also wrong. As a

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85 *See Hoogovens Staal BV*, 4 F. Supp. 2d at 1220. *See also AK Steel Corp. v. United States*, 988 F. Supp. 594, 607 (Ct. Int'l Trade 1997).

86 Although they may argue to the contrary, this point is essentially conceded by many of the commenters. *See, e.g.*, ISG Comments at 4 ("The language of the statute providing for safeguard relief demonstrates that Section 201 duties relate to and are part of normal U.S. import duties). *See also* CTC Comments at 8 ("In other words, section 201 duties, like other normal Customs duties are an assessment against the ad valorem value . . . .").

87 *See Carbon Steel Products from Korea*, 62 Fed. Reg. at 18,420.

88 *Id.*

89 *See, e.g.*, *Federal Mogul Corporation v. United States*, 813 F. Supp. 856, 872 (Ct. Int'l Trade 1993).

matter of law, in prior precedent, the Department has in fact limited "U.S. import duties" to "normal customs duties," and this interpretation has been upheld.

In fact, many of the commenters representing domestic interests and arguing in favor of deduction ignore the established court precedent interpreting the statutory term "U.S. import duty" with respect to antidumping duties. This precedent wholly supports the Department's limitation of that term to "normal" import duty. Instead, of acknowledging this prior precedent, several of commenters argue that *C.J. Tower & Sons v. United States*,[90] a decision issued by the Court of Customs and Patent Appeals ("CCPA") in 1934, indicates that the term "U.S. import duties" should include all import duties imposed by the United States for any and all purposes.[91]

However, the commenter's reliance on *C.J. Tower* in the 201 context is misplaced. The case simply does not support this proposition. The issue addressed by the Court in *C.J. Tower* was whether the Antidumping Act of 1921 was unconstitutional because it authorized an agency to impose a penalty on the importer. The court held that antidumping duties are not penalties and therefore the statute was not unconstitutional. The statement cited in support of the proposition that the term "U.S. import duties" should include all import duties for any and all purposes is as follows:

> We conclude, rather, that this language [the dumping duty should be considered as 'regular customs duties,' in drawback cases] indicates

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[90] 71 F.2d 438 (1934).

[91] *See* ISG Comments at 10-11; CFLI Comments at 10-12; USSC at 21. These comments both argue that this case, simply by virtue of its proximity in time to the passage of the Antidumping Act of 1912, is supposed to be of greater weight than later court decisions.

> that the Congress desired and intended that the additional duties provided for in this act [(*i.e.*, dumping duties)] should be considered as duties for all purposes.[92]

In fact, the Court in *C.J. Tower* does not specifically deal with the term "U.S. import duty." This case only deals with antidumping duties and is thus not relevant to a consideration of the deductibility of Section 201 duties.

The arguments that Section 201 duties should be considered "U.S. import duties" simply because they are set forth in the HTSUS are misplaced. Section 201 duties are in fact identified as additional duties to be assessed against the importation of specific types of merchandise in Chapter 99 of the HTSUS. In our view, this fact is not sufficient in and of itself to compel the conclusion that Section 201 duties are U.S. import duties for purposes of antidumping duty calculations. Quite the contrary, in our view, the fact that these duties are set forth in HTSUS Chapter 99 (rather than in the body of the tariff schedules dealing with regular import duties) indicates that they are NOT normal import duties and, as a result, they do NOT fall within the statute's mandatory deductions from U.S. price in the antidumping context.[93]

Finally, the fact that Section 201 duties are not mentioned in the section of the Customs regulations dealing with "Special Duties" is of no consequence. This part of the Customs regulations deals with the liquidation of duties, which is the

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[92] *C.J. Tower*, 71 F.2d at 438.

[93] We also note that the Harmonized Commodity Description and Coding System, which constitutes a multilateral agreement regarding tariff classification and defines the basic provisions of the HTSUS, is comprised of only 97 chapters. Chapters 98 and 99 are reserved for "special" uses by the Contracting Parties (see Explanatory Notes, Third edition, Volume 1, at VII (2002)). Thus, it seems clear that the normal customs duties for individual commodities are set forth in Chapters 1-97, while duties imposed for various special purposes are set forth in Chapters 98 and 99.

final computation of the amounts owed. For each of the types of duties listed in Subpart D, Customs cannot determine the importer's final duty liability based on the entry documents alone. Additional information is required, either from another agency or from other Customs offices. Although both antidumping and countervailing duties are listed in this subpart of the Customs regulations, this subpart was not created with the intent of defining the universe of duties that should not be considered "U.S. import duties" under antidumping statute, nor does it in fact define this universe. Thus, the argument that Section 201 duties do not appear in this part is of no consequence in considering whether such duties should be deducted in antidumping duty calculations.

2. ***The Commerce Department cases cited as prior precedent supporting the deduction of Section 201 duties are inapposite.***

Several parties supporting the deduction of Section 201 duties claimed that there were prior cases in which the Department deducted duties that were similar in nature and effect to Section 201 duties in calculating antidumping duty margins. Specifically, several commenters claimed that *Softwood Lumber From Canada*[94] and *Fuel Ethanol from Brazil*, constitute supportive precedent for the deduction of Section 201 duties.[95] However, neither of these cases actually

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[94] *See Certain Softwood Lumber Products From Canada*, 66 Fed. Reg. 56,062, 56,067 (Nov. 6, 2001) (notice of preliminary determination of sales at less than fair value and postponement of final determination); Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada, from Bernard Carreau, Deputy Assistant Secretary, Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration (March 21, 2002) accompanying *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15539 (April 2, 2002) (notice of final determination of sales at less than fair value).

[95] *See, e.g.*, CTC Comments at 4.

involves Section 201 duties, and these duties and fees are readily distinguishable from Section 201 duties.

Under Article II, paragraph 2 of the Canada-United States Agreement on Softwood Lumber ("Softwood Lumber Agreement or SLA"), Canada was required to collect a fee on issuance of a permit for export to the United States for softwood lumber first manufactured in the province of Ontario, Quebec, British Columbia or Alberta for quantities above the established base in a given year.[96] In *Softwood Lumber,* the Department allocated the SLA fees of each respondent across all transactions in its U.S. sales file and treated them as an export tax in making adjustments to U.S. prices as part of the antidumping duty calculations.[97] These export fees were negotiated as part of a voluntary agreement with Canada. They are not import duties, and they were not imposed based on a Presidential determination that such duties were necessary and appropriate to protect the domestic industry from serious injury. Thus, they are quite different than Section 201 duties. As a result, the Department's deduction of these export fees in calculating antidumping duties in the *Softwood Lumber from Canada* does not indicate that the Department should deduct Section 201 duties.

With respect to *Fuel Ethanol*, Congress passed legislation in 1980 imposing a special duty in addition to the existing *ad valorem* duties for ethyl alcohol

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[96] Notice to Exporters: Export and Import Permits Act Issued by the Department of Foreign Affairs and International Trade of Revenue Canada, Serial No. 124 (March 31, 2000).

[97] See *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. at 56,067.

imported for fuel use.[98] This special duty was imposed in order to offset a tax incentive provided to producers of gasoline-ethanol fuel blends.[99] Congress did not want the benefits of this tax incentive to flow to foreign ethanol producers, so they imposed the additional duty. In the 1986 antidumping investigation into *Fuel Ethanol from Brazil*, the Department deducted this additional duty in the margin calculation.[100]

Clearly, the additional duties imposed on ethanol are not Section 201 duties. Moreover, in our view, they do not resemble a Safeguard Measure. First, Congress, not the President, imposed the additional duties. Second, these duties were not specifically intended or gauged to prevent ongoing injury to a U.S. industry. Instead, it was intended to limit the benefits provided by U.S. tax incentives to domestic ethanol producers. Because the additional duties imposed on fuel ethanol are not similar to Section 201 duties, the *Fuel Ethanol* case does not compel the Department to deduct Section 201 duties in antidumping calculations.

To conclude, Section 201 duties are not "U.S. import duties" within the meaning of the statute. And, neither the statue nor Department precedent require that Section 201 duties be deducted in calculating AD margins. Moreover, there are strong policy arguments against deducting Section 201 duties in an AD margin calculation.

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98 *See* Omnibus Reconciliation Act, Pub. L. No. 96-499, § 1161 (1980).

99 "Import Duty On Ethanol," The New York Times Saturday, Late City Final Edition, SECTION: Section 1; Page 41, Column 1; Financial Desk (August 3, 1985)

100 *Import Duty On Ethanol*, N.Y. TIMES, Aug. 3, 1985, at A41.

B. Parties in Favor of Deducting Section 201 Duties in Antidumping Duty Calculations Admit Such Deductions Would Result in Double-Counting.

In original comments filed in this proceeding, some respondent interests argued that deducting Section 201 duties in antidumping duty calculations results in double-counting. At least one group of domestic producers agrees. The Comments filed by Schagrin Associates include the following statements:

> Treating the section 201 duty as a deduction from the gross price when the first unaffiliated U.S. purchaser is the U.S. importer, *does, as the Department indicates, double the impact of the section 201.* First, the importer must pay the section 201 duty itself to the U.S. government. Second, the importer must pay additional antidumping duties which would not have been imposed if section 201 duties did not apply to the subject merchandise. *Domestic producers recognize that the deduction of the section 201 duty from the EP/CEP is not appropriate, and is not required by statute, when the first unaffiliated U.S. purchaser is the U.S. importer.* because the section 201 duty is not included in the price to the unaffiliated U.S. purchaser.[101]

The fact that at least one group of domestic producers concedes that Section 201 results in double counting of duties demonstrates the incontrovertibility of our position. Where the deduction of Section 201 duties would result in the double-counting of duties, it clearly should not be permitted.

Other comments by domestic interests in favor of deducting Section 201 duties are not so forthcoming. Some of these commenters seek to change the focus of the discussion by arguing that, unless Section 201 duties are deducted in antidumping duty calculations, the dumping will be "masked" because the

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[101] CPTI Comments at 5-6 (emphasis added).

Section 201 duties can be simply "absorbed" by the exporter. As we will discuss in the following section, this argument is fundamentally flawed.

Before we move on to the substance of this issue, however, it must be stated that those raising the duty absorption argument fail to answer the critical problem posed by the double-counting of Section 201 and antidumping duties. Such double-counting upsets the careful calculus performed by the President in imposing a Section 201 remedy. Both the authorizing statute and the various bilateral and multilateral agreements that recognize the legitimacy of Safeguard Measures contemplate trade remedies that are narrowly tailored. Double-counting Section 201 duties would automatically and incontrovertibly exceed those narrowly tailored restrictions.

For example, Section 201 duties are limited in size (they can be no higher than 50 percent *ad valorem*).[102] If there is double counting of the Section 201 duty in an antidumping duty calculation, any Section 201 duty that is above 25 percent would necessarily result in an overall duty impact under Section 201 that exceeds 50 percent *ad valorem*. Moreover, the statute requires that the Section 201 remedy be imposed for a specified duration and progressively decrease over its duration.[103] Given the retrospective nature of U.S. antidumping laws, deducting Section 201 duties would perpetuate the effect of the remedy well beyond the limits specified by statute. In addition, the double counting of Section 201 duties would defeat the progressive elimination of the remedy codified in the statute.

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[102] See 19 U.S.C. § 2253(e)(3).

[103] *See* 19 U.S.C. § 2253(e)(1) and § 2253(e)(5).

C. Arguments that the Failure to Deduct Section 201 Duties Would Permit "Absorption" or Treat Some Importers Unfairly Fundamentally Distort the Goals and Purposes of Section 201.

Unable to deny the double-counting that occurs when Section 201 duties are both paid upon import *and* deducted from U.S. price in antidumping calculations, commenters in favor of deducting such duties argue that, unless such duties are deducted, Section 201 duties could be "absorbed" by the exporter,[104] thereby treating some importers "more favorably" than other importers who purchases on an f.o.b. basis.[105] However, these arguments are based on a fundamentally flawed view of Section 201 relief, which is that the additional Section 201 duties are intended to be immediately and fully reflected in the price of the subject merchandise at the time of its importation. Not surprisingly, the commenters cannot cite any evidence in support of this view. In fact, it is wrong.

1. *Nothing in section 201 requires that these duties be fully passed through in the price of the imported product.*

There is nothing in Section 201 that requires these remedial duties be fully reflected in an increase in the price of the subject merchandise at the time of importation. Rather, the goal of Section 201 is to provide protection to the domestic industry from "increased imports." Thus, remedies can be imposed in the form of quantitative restraints, which may have no direct price impact at all. When restraints are imposed in the form of duties, Section 201 imposes no requirements as to who pays the duties. Thus, where a product is not subject to

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[104] CTC Comments at 10.

[105] ISG Comments at 14, 16-19.

an antidumping duty order, the exporter can fully reimburse the importer for Section 201 duties or sell the merchandise duty paid, without raising U.S. prices one cent. Section 201 itself is indifferent as to who pays the duties.

Why then, do commenters in favor of deducting Section 201 duties from U.S. price in antidumping calculations argue that Section 201 duties must be paid by the importer when the product is subject to an antidumping duty order? The only support that they can muster for this claim is the opinion of the U.S. International Trade Commission ("ITC") in the Section 201 decision on *Certain Steel Products*.[106] The ITC statements cited by these commenters,[107] however, do not stand for the proposition that Section 201 duties must be reflected in the price of imports. Instead, the ITC stated:

> the tariff-based remedies we are recommending are intended to *increase domestic prices* . . .[108]
>
> we found that a tariff will not unduly restrict imports but will allow *domestic prices to rise* . . .[109]

The language used refers to *domestic* prices, not import prices. The assumption of the ITC's statements is that the restrictions on imports will eventually result in an increase in domestic prices ("will allow domestic prices to rise"). But, this goal can be achieved without increasing the U.S. price of imports. Indeed, the statements cited by the commenters pointedly do not require that there be any impact at all on import prices.

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[106] *Certain Steel Products*, USITC Publication 3479 (Dec. 2001).

[107] *See* U.S. Steel Comments at n.21

[108] *Certain Steel Products* at 354 (emphasis added).

[109] *Certain Steel Products* at 363 (emphasis added).

There is, then, simply nothing in Section 201 itself that dictates these remedial duties must be fully reflected in the price paid by the importer for the product. As a result, there is no basis to object if these duties are absorbed rather than passed on to the importer.

2. ***Section 201 duties are not "absorbed" when they are paid by the exporter.***

Thus, domestic interests favoring deduction have failed in their attempt to prove their claim that the "goal" or purpose of Section 201 is to force an immediate reflection of those duties in the price of the imported product. However, regardless of the success or failure of this argument, it simply does not follow that the failure to deduct Section 201 duties results in the "absorption" of those duties by the exporter. This is merely another flawed claim. In fact, one commenter even goes so far as to claim that exporters that do not raise their U.S. prices to account for the full Section 201 duties "effectively lower their prices to the first unaffiliated customer. In that instance, the section 201 duties *would not be counted at all* if they were not deducted from EP/CEP."[110]

These claims ignore one obvious fact: an exporter that sells on a duty-paid basis, by definition, *pays the Section 201 duties.* The duties do not disappear. They are not magically "absorbed." They are *paid*. The merchandise simply cannot enter the United States unless someone, either the importer or exporter, pays the Section 201 duties. To argue that these duties somehow magically disappear when paid by the exporter is to disregard reality.

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[110] CTC Comments at 10 (emphasis added).

Some commenters also argue that, when the exporter pays Section 201 duties it "masks" dumping. This argument, however, is a tautology. Dumping involves a comparison of a net home market price (after certain deductions) against a U.S. price (after certain deductions). Commenters who support deducting Section 201 duties in making this comparison essentially argue that, if an exporter that sells on a duty-paid basis does not raise its U.S. price to account for the full amount of Section 201 duties, it is dumping because its U.S. price must be reduced by the amount of the Section 201 duties. In other words, Section 201 duties must be deducted because they must be deducted.[111]

Other commentators argue that, when Section 201 duties are not deducted from U.S. price in dumping calculations, there is "no beneficial effect to the domestic industry *as intended by the section 201 relief*."[112] This statement is equally, demonstrably wrong. It ignores the fact, again, that when an exporter sells duty-paid, *it pays the duties*, thereby receiving less return on its exports. Over the long run, an exporter that receives less return on its exports to the United States will reduce its exports. This is precisely the same effect that occurs when an exporter who is not subject to a dumping order pays the Section 201 duties. The economic effect is the same whether the importer pays more for its goods or the exporter receives less in return. In either case, imports to the U.S.

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[111] To be sure, not deducting Section 201 duties from the sales price results in a different treatment for Section 201 duties as opposed to normal "import duties." The fact that Section 201 duties are treated differently from import duties is nothing more than a reflection of the fact that they are a different type of duty, as set forth in detail in Section I of these comments. Section 201 duties ***are not normal import duties and thus they are not supposed to be treated the same as normal import duties in the calculation of dumping margins.***

[112] CTC Comments at 11 (emphasis added).

are reduced, and the domestic industry is protected. This is the only protection intended or afforded by the statute. The goal of section 201 is equally accomplished regardless of who pays the duty.

3. ***Refusal to deduct section 201 duties does not provide "inequitable treatment" to importers.***

One commenter argues that, if Section 201 duties are not deducted in antidumping duty calculations, importers that purchase on a duty-paid basis are treated "more favorably" than importers who purchase on an f.o.b. basis.[113] At one level, this is little more than a tautology: an importer that does not pay duties by definition pays less than an importer that does pay duties (unless the duty costs are fully passed through). Obviously. The question, however, is whether this results in "inequitable treatment" under either the dumping law or Section 201.

The only time an importer purchasing on a duty-paid basis may ultimately be treated "more favorably" than an importer who purchases on an f.o.b. basis is when the exporter does not raise its duty-paid price to fully reflect the Section 201 duties. That is, if an importer would pay $100 on an f.o.b. basis, and Section 201 duties are 20%, then the importer would pay $120 for the merchandise.[114] If the exporter charged $120 for the product on a duty-paid basis, then the importer would be no better off (and no worse off) than it would have been buying on an f.o.b. basis. However, if the exporter kept its duty-paid price to the importer at $100, then the importer would pay less than it would have paid had it paid the

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[113] ISG Comments at 15.

[114] For purposes of simplicity, we are assuming all transportation and other costs are zero.

duties itself. Again, however, this is because *the exporter pays the duties.* The importer may be better off, but the exporter is worse off by the amount of the duty.

The fact that the exporter can choose to pay the Section 201 duties and not increase its price to the U.S. importer does not mean that it is dumping by the amount of the Section 201 duties. As previously discussed, dumping is defined as U.S. price less certain specified deductions. If the dumping statute does not require the deduction of Section 201 duties, then the exporter cannot be dumping by virtue of the payment of the duties.

Commenters who argue that, unless Section 201 duties are deducted, dumping will be "masked" are engaged in a circular argument: Section 201 duties should be deducted because they should be deducted. It remains, however, thet Section 201 duties are not "U.S. import duties" that are required to be deducted in an antidumping duty proceeding. Hence, failure to deduct them in calculating antidumping duties does not "mask" dumping.

As for the goal or intention of the Section 201 duties, as stated above, there is nothing in Section 201 that requires the U.S. price of imported merchandise to be raised to take into account the full amount of the duties. Section 201 is entirely indifferent as to whether the exporter or importer pays the duties. Section 201 assumes that, if the exporter pays the duties and receives less return on the export, the domestic industry will be every bit as protected as if the Section 201 duties were paid by the importer.

In sum, the importer may pay less when purchasing f.o.b. than when purchasing duty paid if the exporter does not pass the full amount of the Section 201 duties through to the importer. Nonetheless, there is no reason to

conclude that this treatment is "discriminatory" or that it provides "more favorable" treatment than is intended by either the dumping law or Section 201.