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The Honorable James J. Jochum
Assistant Secretary for Import Administration
Attn: Import Administration
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U.S. Department of Commerce
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

Attn: Becky Erkul, Office of Policy
Import Administration

Re: Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties: Initial Comments in Response to Request for Public Comments

Dear Assistant Secretary Jochum:

United States Steel Corporation ("U.S. Steel") submits the following comments to the U.S. Department of Commerce (the "Department") in response to the Department's request for comments regarding the treatment of Section 201 duties and countervailing duties in antidumping proceedings pursuant to Section 772(c)(2)(A) of the Tariff Act of 1930, as amended (19 U.S.C. § 1677a(c)(2)(A) (2000)).[1] This brief specifically addresses the question of the treatment of countervailing duties under Section 772(c)(2)(A). U.S. Steel is also submitting additional comments addressing the treatment of Section 201 duties under Section 772(c)(2)(A) in a separate letter brief. Some of the arguments presented with respect to countervailing duties

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[1] Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, 68 Fed. Reg. 53,104 (Sept. 9, 2003).

presented in this brief apply equally to Section 201 duties, and these arguments are accordingly identified below.

U.S. Steel respectfully requests that in its calculation of dumping margins for U.S. sales in investigations and administrative reviews, the Department adjust U.S. price by deducting the amount of any Section 201 duties and any countervailing duty deposits imposed to offset non-export subsidies in accordance with 19 U.S.C. § 1677a(c)(2)(A).[2]

Executive Summary

Dumping is the sale of a product in the U.S. market at an unfairly low price. Antidumping duties are calculated by ascertaining the amount by which the U.S. price for the foreign merchandise is below the normal value of the merchandise. See 19 U.S.C. § 1673 (2000). To make this comparison, the price for the good in the foreign originating market and the price in the U.S. market must be placed on a similar footing and at the same level of trade. For example, the cost of transporting a product to the U.S. market and the insurance on such a sale is subtracted from the gross U.S. price so as to permit a fair comparison with the foreign domestic "normal value."[3]

In making its comparison of the U.S. price to the normal value, the Department should adjust the U.S. price to reflect any countervailing duties or duty deposits imposed during either

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2 U.S. Steel observes that, in addition to the Department's Federal Register request for comments on this issue, the question of the appropriate treatment of countervailing duties imposed to offset non-export subsidies under 19 U.S.C. § 1677a(c)(2)(A) is an important issue currently confronted by the Department in, among other cases, Case No. A-533-820 (Certain Hot-Rolled Carbon Steel From India: First Administrative Review Period (2001-2002)).

3 See 19 U.S.C. § 1677a(c)(2)(A); Structural Steel Beams from the Republic of Korea, 68 Fed. Reg. 53,129, 53,132 (Sept. 9, 2003) (Preliminary Results of Antidumping Duty Administrative Review).

the period of investigation ("POI") or the period of review ("POR"). Such an adjustment should be made because: 1) it is required by law; 2) it reflects the real cost of selling into the U.S. market; 3) it is consistent with Customs' treatment of duties; 4) it is consistent with the statutory treatment of duties by our major trading partners; 5) the Department's reasoning for not treating antidumping duties "as a cost" simply does not apply to countervailing duties; and 6) it is the only approach consistent with Congress' admonition that unfair trade be offset to the maximum extent permitted by law.

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

1) Deduction Required By Law:

In an investigation or an administrative review, the Department determines the U.S. price to be used in its fair value comparison pursuant to 19 U.S.C. § 1677a and 19 C.F.R. §§ 351.401-402 (2003). 19 U.S.C. § 1677a(c)(2)(A) (Section 772(c)(2)(A) of the Act) (hereinafter "subsection (c)(2)(A)") requires the Department to reduce the U.S. price by, "except as provided in paragraph (1)(C), the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States . . ." (emphasis added). Paragraph (1)(C) of the provision, referenced by 19 U.S.C. § 1677a(c)(2)(A), requires that the Department increase U.S. price by

"the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy . . . ."[4]

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

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

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[4] See 19 U.S.C. § 1677a(c)(1)(C) (emphasis added).

(c)(2)(A) would be superfluous unless countervailing duties generally were intended to be deducted.

Accordingly, the Department has improperly adopted an interpretation of the statute which renders superfluous another portion of the same provision. Further, the "familiar canon" of *expressio unius est exclusio alterius* demonstrates that because only countervailing duties imposed to offset export subsidies were specifically excluded from the expenses to be deducted pursuant to subsection (c)(2)(A), it is reasonable to conclude that Congress did not intend to prohibit deduction of countervailing duties imposed to offset non-export subsidies.

In contrast, the Department's conclusion that subsection (c)(2)(A) is, in spite of its express terms, limited to "regular" or "normal" customs duties is unsupported by the statute. Nothing in the current or prior statutes indicates that Congress intended for the term "United States import duties" to be so narrowly construed. Indeed, the Department has previously interpreted subsection (c)(2)(A) to encompass all import duties, not just "regular" or "normal" customs duties, as such duties are a cost incurred by foreign producers incident to bringing subject merchandise to the United States.

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

More generally, 19 U.S.C. § 1677b(a) requires the Department to make "a fair comparison . . . between the export price or constructed export price and normal value." A "fair comparison" requires that, inter alia, the Department account for all expenses and costs incurred incident to bringing subject merchandise into the United States. Countervailing duty deposits are indistinguishable from other costs or expenses incurred incident to bringing subject merchandise into the United States for which the Department does adjust. Foreign producers selling products affected by countervailing duties on a delivered basis in the United States must pay to the Bureau

of Customs and Border Protection ("Customs") the amount of the countervailing duties as a condition of that merchandise entering the United States. There is an actual transfer of cash from the foreign producer to Customs, and the foreign producer does not have access to or legal control over the funds paid to Customs. As such, these payments are real expenses that are borne by the foreign producer and affect the net return to that producer of that sale. To the extent that the foreign producer increases his price to cover his expenses, including countervailing duties, dumping margins are not created or exacerbated. To the extent, however, that the foreign producer does not increase his price to cover all expenses, including countervailing duties, that difference will become part of the dumping margin calculated. That result is consistent with the overall structure of the antidumping law.

There is no logical basis for accounting for freight or insurance expenses in an antidumping analysis but disregarding countervailing duties. Each is an expense of selling in the United States and each is a reduction of the total amount of cash available to the foreign producer. In fact, foreign producers impacted by such countervailing duty orders generally treat the duty deposits as costs or expenses incurred incident to bringing the subject merchandise into the United States for commercial purposes. Absent a downward adjustment to U.S. price for the amount of any countervailing duty deposit imposed to offset a non-export subsidy, a "fair comparison" of U.S. price and normal value is not possible.

3) The Department's Practice Is Inconsistent With Customs' Treatment of Duties:

The Department's practice is inconsistent with the Bureau of Customs and Border Protection's ("Customs") statutorily mandated method of valuing merchandise pursuant to 19 U.S.C. § 1401a (2000). Pursuant to Section 1401a, Customs determines the dutiable value of merchandise by deducting the amount of any countervailing duty that may be included in the

price. In consequence, Customs assesses duties on the value of the merchandise alone, absent duty. Thus, as demonstrated by the example provided in Section III, infra, the Department's incorrect practice ensures that the amount of antidumping duties collected by Customs will not fully address the amount of dumping found by the Department. This, alone, requires correction.

The Department's practice is inconsistent with Customs' valuation and, as a result, provides importers with an unfair advantage. The conflict in agency practice means that antidumping duties imposed or collected will never sufficiently address the level of price discrimination occurring in the market.

4) The Department's Practice Is Inconsistent With the Laws of Our Major Trading Partners:

Accounting for countervailing duties imposed to offset non-export subsidies in calculating U.S. price is not only fully consistent with the United States' international obligations, but it is also consistent with the laws of our major trading partners. The laws of the European Union, Canada and Mexico each require the deduction of import and other duties, and taxes. For example, Canada's Special Import Measures Act -- authorizing the imposition of anti-dumping and countervailing duties -- specifically requires, in certain enumerated circumstances, that the export price of the goods investigated be adjusted downward for "all costs, including duties imposed by virtue of this Act or the Customs Tariff and taxes." Failing to correct this defect leaves U.S. producers at a disadvantage compared to their foreign competitors, hardly the level playing field that Congress and the President have sought.

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

In the past, the Department has explained its failure to adjust U.S. price for duties imposed to offset non-export subsidies by claiming, in part, that to do so either results in (1) a

"double remedy" for the domestic industry or (2) the introduction of a "recursiveness" problem into the calculation of duties. These arguments have no merit with respect to the treatment of countervailing duty deposits.

Adjusting for the amount of any countervailing duty deposits incurred is no more double-counting than adjusting for any other costs, charges, expenses or United States import duties incurred by a foreign produced incident to selling a product in the United States. The rationale of the statute is that prices should bear and account for all expenses. If a seller sets prices to cover all expenses and otherwise does not sell for export at a lower price than in the home market, no dumping will be found. An accurate analysis of the existence and magnitude of dumping, however, requires that the normal value and the U.S. price be placed on a comparable footing, i.e., at the factory gate. Direct expenses incurred by either sale must be deducted. A delivered normal value must be adjusted for home market freight, for example, and a delivered U.S. price must be adjusted for foreign inland freight and international freight. If the U.S. price also included countervailing duty deposits, however, under the current Department analysis no adjustment would be made despite the fact that the countervailing duty deposits are an expense of selling in the United States and despite the fact that not adjusting for the difference in expenses of selling in the two markets would leave the prices being compared on different bases. Recognizing and accounting for countervailing duty deposits in an antidumping calculation is no more double-counting than is recognizing and accounting for ocean freight or marine insurance, for example.

In addition, "recursiveness" is not a problem with respect to countervailing duty deposits. As a threshold matter, adjusting for the amount of the antidumping duty in an antidumping duty calculation is argued to be "recursive" because deducting the amount of the antidumping duty

affects (and increases) the margin of dumping which in turn affects (and increases) the antidumping duty, and so on. Put another way, if one of the determinants of the antidumping margin is the antidumping margin itself, then the Department will be faced with an unsolvable equation and an impossible task. Whatever the merits of that argument with respect to antidumping duties, where U.S. price is adjusted to account for countervailing duties to offset a non-export subsidy, no issue of "recursiveness" is implicated. The antidumping duty does not impact the countervailing duty rate (i.e., there is no adjustment to the countervailing duty rate based on the antidumping duty). The countervailing duty rate will remain the same as that used to initially adjust U.S. price. The effect of the deduction of a countervailing duty on the antidumping calculation is no different than the effect of the deduction of freight or other recognized expense. Thus, no problem of "recursiveness" is presented.

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

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

The Department's failure to adjust U.S. price for countervailing duties permits subsidized foreign producers to continue selling in the U.S. market at an unfairly low price but avoid antidumping disciplines. This is patently inconsistent with Congress' repeated admonition that unfair trade practices be offset to the fullest extent possible in order to prevent harm to the domestic industry. Moreover, a failure to appropriately account for countervailing duties

imposed to offset non-export subsidies is inconsistent with the President's expressed desire to insure a level playing field for domestic industries.[5]

I. 19 U.S.C. § 1677a(c)(2)(A) REQUIRES THE DEPARTMENT TO ADJUST U.S. PRICE DOWNWARD IN THE AMOUNT OF ANY COUNTERVAILING DUTY

Section 772 mandates that the Department make adjustments to U.S. price in order to account for the costs of selling in the United States. Under the provision, such adjustments must include countervailing duties imposed to offset domestic subsidies. Indeed, Congress amended subsection (c)(2)(A) to exclude from any adjustment countervailing duties imposed to offset export subsidies, making clear that countervailing duties imposed to offset non-export subsidies were included among those items to be adjusted pursuant to the language of subsection (c)(2)(A).

A. The Plain Language of the Statute Mandates That U.S. Price Must Be Adjusted to Account for Countervailing Duty Deposits Imposed to Offset Domestic Subsidies

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning . . . ."[6] The Supreme Court has held that "{t}he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific

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

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

6 See Robinson v. Shell Oil Company, 519 U.S. 337, 340 (1997).

context in which that language is used, and the broader context of the statute as a whole."[7] 19 U.S.C. § 1677a(c)(2)(A) states that:

> The price used to establish export price and constructed export price shall be—
> . . .
> (2) reduced by—
> (A) except as provided in paragraph (1)(C), the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States . . . .

Thus, the plain and unambiguous language of subsection (c)(2)(A) and the specific context in which this language is used, requires the Department to identify and adjust for "additional costs, charges, expenses or United States import duties" that a foreign producer incurs "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." The statute thus reflects the reality that certain expenses of selling and transport to the United States should be "included" in the U.S. price.[8] Through subsection (c)(2)(A), the Department is provided the tools by which to make a fair comparison and determine accurately dumping margins.

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[7] Id. at 341 (citing Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992); McCarthy v. Bronson, 500 U.S. 136, 139 (1991)).

[8] A countervailing duty deposit would be considered as "included" in the U.S. price if the duty deposit were imposed on the sale of merchandise into the United States and the U.S. price included all duties paid (e.g., the terms of sale were delivered or "ex dock duty paid"). In these situations, the countervailing duty deposit is an additional cost of selling into the U.S. market. An analogous scenario regarding appropriate adjustments to U.S. price was confronted by the Court of Appeals for the Federal Circuit in Daewoo Electronics Co. v. United States, 6 F.3d 1511 (Fed. Cir. 1993). In that case, the Federal Circuit reviewed the Department's practice of adjusting U.S. price upward by the full amount of home market taxes on merchandise that was subsequently forgiven at export. Id. at 1514-1519. The Department argued that the statute permitted an "accounting" method of determining that taxes were added to or included in the price of merchandise sold in the home country. Id. at 1514. The Court upheld the Department's practice.

(footnote continued)

There is no meaningful way to distinguish non-export countervailing duty deposits from any other cost, charge, expense or duty incurred by virtue of sale into the United States.[9] Whether a freight charge for transport to the United States, the duty rate specified in the Harmonized Tariff Schedule of the United States, or a countervailing duty deposit, such costs, charges, expenses or duties are incurred by a foreign producer with respect to its export sales.[10] If not accounted for and properly adjusted for, each cost will preclude an "apples to apples" comparison of a producer's home market and U.S. sales.[11]

(footnote continued)

Where the countervailing duty deposits are paid for by unrelated importers, subsection (c)(2)(A) would not be implicated as such deposits would not be "included" in the U.S. price. See Color Television Receivers from the Republic of Korea, 58 Fed. Reg. 50,333, 50,337 (Sept. 27, 1993) (Final Results of Administrative Review of Antidumping Duty Order) ("{E}stimated duties and duties assessed are paid by the importer, who is in some cases unrelated to the party whose sales are under review. In such cases, estimated duties are not paid by respondents in antidumping proceedings, and, therefore, cannot possibly be included in respondents' selling prices.").

9 The Department interprets (c)(2)(A) to require the reduction of a wide array of "costs, charges, and expenses" incurred incident to bringing subject merchandise to the United States. See, e.g., Structural Steel Beams from the Republic of Korea, 68 Fed. Reg. 53,129, 53,132 (Sept. 9, 2003) (Preliminary Results of Antidumping Duty Administrative Review) (adjustments under subsection (c)(2)(A) include "foreign inland freight," "foreign brokerage and handling expenses (i.e., loading and unloading charges, wharfage and lashing expenses, brokerage fees, and port renovation expenses), international freight, marine insurance, other U.S. transportation expenses (i.e., U.S. wharfage, brokerage, and handling charges), and U.S. customs duty").

10 Moreover, each of these costs, charges, expenses or duties are adjusted for under subsection (c)(2)(A) irrespective of the reason underlying their assessment. For instance, it is irrelevant to the adjustment made under subsection (c)(2)(A) that a particular foreign producer may be paying higher than average freight costs with respect to its shipments to the United States as the result of its poor credit history or that another producer pays a deeply discounted rate because of some favorable circumstance of timing or the like. The amount of the freight actually paid is the cost accounted for, and U.S. price is adjusted downwards for the full amount of the cost.

11 U.S. Steel observes that these points apply with equal force to the Department's consideration of how to treat Section 201 duties under subsection (c)(2)(A).

Just as the language of the statute and the specific context in which the language used support the conclusion that the statute is plain and unambiguous on its face, the "broader context of the statute as a whole" supports this conclusion as well. The Antidumping Act of 1921 first used the phrase "additional costs, charges, and expenses, and United States import duties" in identifying appropriate downward adjustments to purchase price (Section 203) and exporter's sales price (Section 204).[12] But Sections 203 and 204 are not the only places in the 1921 Act wherein this exact phrase was used in this enactment. In Title III of the 1921 Act, the "Emergency Tariff Act," relating to the "Assessment of Ad Valorem Duties," Congress included Section 302, a provision defining export value:

> That for the purposes of this title the export value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States, and plus, if not included in such price, the amount of any export tax imposed by the country of exportation on merchandise exported to the United States.

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12 See Public Law 67-10, 42 Stat. 9, Chapter 14, "Antidumping Act of 1921," (May 21, 1921), H.R. 2435. The Trade Agreements Act of 1979, by which 19 U.S.C. § 1677a was added to the Tariff Act of 1930, was intended by Congress to reenact the Antidumping Act of 1921 which it repealed, with modifications to bring it into accord with the Tokyo Round GATT Antidumping Code. See S. Rep. No. 96-249, at 15-16 (1979). No change in substantive antidumping rules was intended except as specifically noted in the Senate Report; administrative and judicial precedents were to continue under the new law; and the provisions regarding U.S. price merely reenacted provisions of the 1921 Act with one substantive change (regarding adjustments for countervailing duties imposed to offset export subsidies discussed below). Id. at 93, 107; see also Timken Co. v. United States, 11 C.I.T. 786, 812-13, 673 F. Supp. 495, 519-520 (1987).

Id. at § 302 (emphasis added).[13] "The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'"[14]

Thus, because of the use of the same language in all three provisions of the 1921 Act, it is clear that Congress intended that the downward adjustments made for "costs, charges, and expenses, and United States import duties," to purchase and exporter's sales price for the purposes of dumping calculations would be the same as the downward adjustments made to export value for the purposes Customs' assessment of duties. Yet, if the phrase "costs, charges, expenses, and United States import duties" was understood as not to include countervailing duties, Customs would be required to impose duties on duties, which would clearly be wrong.

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13 This provision amended the Tariff Act of 1913. See C.J. Tower & Sons v. United States, 25 C.C.P.A. 415, 416 (Cust. & Pat. App., 1938). Prior to the enactment of Title III of the 1921 Act, *ad valorem* duties were assessed on the foreign home market value. H.R. Conf. Rep. No. 67-79 at 12 (1921) ("Emergency Tariff Bill"). With the enactment of Title III, *ad valorem* duties were assessed on the basis of foreign home market value or export value, whichever was higher. Id. In administering the provision on export value, Customs understood that the export value of the product included "the value of the goods, cost, insurance, freight and duty paid" and adjusted the export value by deducting the amount of "United States import duties, costs, charges, and expenses incident to bringing the merchandise from the country of exportation to the place of delivery in the United States." Robinson & Co. v. United States, 13 Ct. Cust. App. 644, 646-647 (1926). Thus, the intent of the provision was to arrive at an amount for the good that reflected its costs in order to assess an *ad valorem* duty.

14 See Sorenson v. Secretary of the Treasury, 475 U.S. 851, 860 (1986) (quoting Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934), quoting, in turn, Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932)).

B. Congress' Exclusion of Countervailing Duties to Offset Export Subsidies Demonstrates that the Department Must Adjust for Countervailing Duties Imposed to Offset Domestic Subsidies

While the plain and unambiguous language of the statute on its face clearly includes countervailing duties as an adjustment, the matter was made even more clear by Congress. The Trade Agreements Act of 1979 added two additional rules: the mandate that the amount of any countervailing duty imposed to offset an export subsidy be used to increase U.S. price, and the prohibition on decreasing U.S. price by the amount of any such duty under Section 772.[15] Thus, Congress expressly amended subsection (c)(2)(A) to exclude an adjustment to U.S. price for countervailing duties imposed to offset export subsidies.[16]

Congress' action in amending the language of subsection (c)(2)(A) demonstrates that the legislature understood that the downward adjustment called for initially in the Antidumping Act of 1921 included countervailing duties. Had Congress meant for countervailing duties not to be included among the downward adjustments within the phrase "any additional costs, charges, and expenses, and United States import duties . . . ." of subsection (c)(2)(A), there would have been no reason to exclude one type of countervailing duty from the reach of the provision. In other words, the exclusion of countervailing duties imposed to offset export subsidies from the downward adjustment would be superfluous unless countervailing duties generally were intended to be deducted and to be within the meaning of "United States import duties."

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15 See H. Rep. No. 96-317 at 100 (1979).

16 Compare Section 772(d)(1)(D) with Section 772(d)(2)(A) located in H. Rep. No. 96-317 at 100-101.

The Department has improperly adopted "an interpretation of a congressional enactment which renders superfluous another portion of that same law."[17] This is unreasonable.[18] "{E}ffect must be given, if possible, to every word, clause, and sentence of a statute."[19]

Similarly, an application of the "familiar canon" of *expressio unius est exclusio alterius* demonstrates that Congress intended for the Department to account for countervailing duties imposed to offset non-export subsidies. Congress expressly excluded countervailing duties imposed to offset export subsidies from the "costs, charges, or expenses and United States import duties" to be deducted pursuant to the provision. Congress, however, did not provide that countervailing duties imposed to offset non-export subsidies be excluded from the provision. "Where {Congress} did not so provide, it is reasonable to conclude that {Congress} did not so intend."[20]

While the Supreme Court has recently noted that *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping, the Court has noted that the canon "properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the

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17 See Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 837 (1988) (citing Massachusetts v. Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 142 (1985); FEC v. National Conservative Political Action Committee, 470 U.S. 480, 486 (1985); Park 'N Fly, Inc. v. Dollar Park and Fly, Inc, 469 U.S. 189, 197 (1985); United States v. Generix Drug Corp., 460 U.S. 453, 458-459 (1983); and Dickerson v. New Banner Institute, 460 U.S. 103, 118 (1983)).

18 See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 698 (1995).

19 See 2A Sutherland Statutory Interpretation § 46:06 (N. Singer, 6th ed. 2000).

20 BMW Mfg. Corp. v. United States, 241 F.3d 1357, 1361 (Fed. Cir. 2001). See also Cook v. Principi, 318 F.3d 1334, 1339 (Fed. Cir. 2002).

contrast enforces the affirmative inference."[21] Here, where Congress has explicitly exempted from the downward adjustment countervailing duties imposed to offset export subsidies, it is reasonable to conclude that countervailing duties imposed to offset non-export subsidies "were excluded {from the exemption} by deliberate choice, not inadvertence."[22]

The Department has previously asserted that the exception for countervailing duties imposed to offset export subsidies in subsection (c)(2)(A) was enacted by Congress merely to ensure that the adjustment mandated by 19 U.S.C. § 1677a(c)(1)(C) was not directly offset by a deduction under subsection (c)(2)(A).[23] This misses the point. If countervailing duties were not within the ambit of the deduction for "additional costs, charges, or expenses, and United States import duties" as described in subsection (c)(2)(A) in the first place, then there would obviously be no need to specifically exclude countervailing duties imposed on export subsidies from the deduction -- no countervailing duties would be deducted in the first place, precluding the possibility that the upward adjustment could be offset.

C. The Department's Effort to Restrict Subsection (c)(2)(A) to "Normal" or "Regular" Duties is Unsupported by the Statute

In declining to adjust for countervailing duties imposed to offset non-export subsidies, the Department has juxtaposed countervailing duties with "normal" or "regular" import duties in an effort to explain why, under subsection (c)(2)(A), it adjusts for the latter but not the former.[24]

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21 Barnhart v. Peabody Coal Co., 537 U.S. 149, ___, Slip Op. at 18 (Jan. 15, 2003) (quoting E. Crawford, Construction of Statutes 337 (1940)).

22 Id. (citing United States v. Vonn, 535 U.S. 55 (2002)).

23 See U.S. Steel Group v. United States, 22 C.I.T. 670, 677, 15 F. Supp. 2d 892, 899 (1998), rev'd on other grounds, 225 F.3d 1284 (Fed. Cir. 2000).

24 See Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands, 61 Fed. Reg. 48,465, 48,469 (Sept. 13, 1996) (Final Results of Antidumping Duty Administrative

(footnote continued)

In other words, the Department argues that the statute only contemplates "normal" duties as being encompassed within the "costs, charges, or expenses, and United States import duties" language of subsection (c)(2)(A). Yet, such a limiting reading of the statute is unsupported as a matter of law, inconsistent with the Department's interpretation of the provision for other purposes, and is economically vacuous.

The legislative history of the 1921 Act demonstrates that subsection (c)(2)(A) cannot be limited to only so-called "normal" duties, but instead includes all duties not expressly excluded. The Department's assertion that the legislation "uniformly refers to antidumping duties as 'special dumping dut{ies},'" and, implicitly, countervailing duties as additional duties, and "uniformly refers to ordinary customs duties as 'United States import duties,'"[25] is patently incorrect. The 1921 Act used five different terms when discussing distinct types of duties: "special dumping dut{ies}" (see, e.g., 1921 Act § 202(a) at 11), "free of duty" (see, e.g., 1921 Act § 202(a) at 11), "duties imposed thereon by law"[26] (see, e.g., 1921 Act § 202(a) at 11),

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(footnote continued)
Review) ("Netherlands Cold-Rolled"); Federal-Mogul Corp. v. United States, 17 C.I.T. 88, 108, 813 F. Supp. 856, 872 (1993).

25 See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea, 62 Fed. Reg. 18,404, 18,421 (Apr. 15, 1997) (Final Results of Antidumping Administrative Reviews) ("Korea Cold-Rolled and Corrosion-Resistant").

26 Neither the 1921 Act nor its legislative history specifically discuss countervailing duties. The Senate Report, however, notes that the special antidumping duties referred to in the Act are imposed "in addition to the duties imposed by existing law . . . ." See S. Rep. No. 67-16, at 10 (1921). The first general countervailing duty law was enacted in the Tariff Act of 1897. See 30 Stat. 151, 205 (July 24, 1897). See also Zenith Radio Corp. v. United States, 430 F. Supp. 242, 250-251 (Cust. Ct. 1977) (J. Newman, concurring) (noting that general countervailing duty law was first enacted in Section 5 of the Tariff Act of 1897). Courts have previously recognized that countervailing duty laws were in place previous to the 1921 Act. See United States v European Trading Co., 27 C.C.P.A. 289, 297 (Cust. & Pat. App., 1940) ("it may be said also that at the time of passage of the
(footnote continued)

"regular customs duties" (see, e.g., 1921 Act § 211 at 15), and "United States import duties" (see, e.g., 1921 Act § 204 at 13). Only in Section 211 of the 1921 Act did Congress clearly discuss "regular" or "normal" customs duties, deeming them "regular customs duties." In that same Section, Congress also expressly distinguished between a "special dumping duty" and "regular customs duties," demonstrating that the two concepts were distinct. Congress, however, did not use the phrase "regular customs duties" in Sections 203 and 204, the predecessor of Section 772(c)(2)(A). Instead, Congress referred to "United States import duties."[27] Plainly, the use of different language, "United States import duties," suggests that this provision was not limited to either "special dumping duties" or "regular customs duties."

Thus, the statute only juxtaposed "special dumping duties" with "regular customs duties." It is therefore reasonable to conclude that "United States import duties," as it appears in the 1921 Act, must have referred to something other than "special dumping duties" or "regular custom duties." The phrase "United States import duties" should, therefore, include all duties imposed by the United States on imports. This reading of the statute is, of course, consistent with the basic tenet of statutory construction that "effect must be given, if possible, to every word, clause, and sentence of a statute."[28] Thus, where "the legislature uses certain language in one part of the

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(footnote continued)

antidumping act in 1921, the 1913 tariff act, which contained a countervailing duty provision (though not so far-reaching as that of the 1930 act) was in force and continued in force for sometime thereafter"). Thus, countervailing duties were "duties imposed by existing law . . . " at the time of the enactment of the 1921 Act.

Conversely, Section 201 or safeguard duties were not contemplated in the 1921 Act.

27 Thus, the fact that countervailing duties may not be considered "regular" or "normal" customs duties is completely irrelevant to the question of whether such duties are "United States import duties" pursuant to subsection (c)(2)(A).

28 See 2A Sutherland Statutory Interpretation § 46:06 (N. Singer, 6th ed. 2000).

statute and different language in another," an agency implementing the statute should "assume {} different meanings were intended."[29]

The legislative history of the 1921 Act is silent as to the definition of "any . . . United States import duties." See S. Rep. No. 67-16, at 10-14. The drafters' failure to provide in either the 1921 Act or its history a distinct definition for the term "United States import duties"[30] -- in contrast to the definitions provided for other terms -- indicates that Congress intended no meaning other than the ordinary one for this term -- all import duties imposed by the United States, whether they be "special" import duties or regular import duties. Given the specific definition for "special" duties, Commerce has no basis for interpreting the "United States import duties" language narrowly.

The Department, however, has previously asserted that Section 211 of the 1921 Act demonstrates that countervailing duties are not to be considered "United States import duties." Specifically, the Department has argued that the section's language stating that "special dumping dut{ies} . . . shall be treated in all respects as regular customs duties" for the purposes of duty drawback indicates that Congress did not believe "special dumping duties" to be "regular customs duties."[31] This argument is inapposite. Regardless of whether "special dumping duties" are properly subsumed within "regular customs duties," the cited language does not address the phrases "countervailing duty" or, more importantly, "United States import duties." As shown above, "special dumping duties" and "regular customs duties" are not synonymous with "United

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29 Id.

30 See, e.g., 1921 Act §§ 202 at 11 (defining "special dumping duty"), 206 at 13-14 (defining "cost of production"), and 207 at 14 (defining "exporter").

31 See Korea Cold-Rolled and Corrosion-Resistant, 62 Fed. Reg. at 18,421.

States import duties." In order to have any meaning, "United States import duties" must mean more than just "regular customs duties" -- the phrase, therefore, must encompass countervailing duties as well.

In fact, a contemporaneous court was asked to interpret the statute in light of Section 211 of the 1921 Act and concluded that "special dumping duties" were intended by Congress to be treated "as duties for all purposes." In C.J. Tower & Sons v. United States, the Court of Customs and Patent Appeals ("CCPA") was required to address the intentions of the drafters of the 1921 Act, specifically the assertion that 1921 Act created "penalties" for importers which deprived such importers of their property without due process of law.[32] Like the Department currently, plaintiffs pointed to Section 211 of the 1921 Act, which stated that "special dumping duties" would be considered as "regular customs duties" in drawback cases, and argued that this Section meant that "special dumping duties" were not "regular customs duties" but rather "penalties" under the statute.[33] The CCPA expressly rejected this argument and held that special "additional duties" were "desired and intended" by Congress to "be considered as duties for all purposes."[34] Thus, the CCPA rejected the notion that the 1921 Act established "special" duties which were not to be treated as "duties" for other purposes includes, presumably, "United States import duties." Instead, the CCPA held that Congress intended that these "additional" duties were to be

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32 See C.J. Tower & Sons v. United States, 71 F.2d 438, 442 (Cust. & Pat. App., 1934).

33 Id. at 445.

34 Id. (emphasis added). See also PQ Corp. v. United States, 11 C.I.T. 53, 66 n.15, 652 F. Supp. 724, 736 n.15 (1987) (quoting C.J. Tower & Sons, 71 F.2d at 445); Imbert Imports, Inc. v. United States, 331 F. Supp. 1400, 1406 n.10 (Cust. Ct. 1971), aff'd 475 F.2d 1189 (1973).

treated "as duties for all purposes."[35] Thus, Section 211 of the 1921 Act provides no support for the contention that "United States import duties" was meant to encompass only "regular" or "normal" customs duties. Its interpretation by the courts is to the contrary.

The Department has failed to offer any other support in the statute for a distinction between "normal" and countervailing duties. Indeed, the Department's legal analysis with respect to countervailing duties is contradicted by its own analysis regarding other "special" duties. Specifically, the Department has previously interpreted the "additional costs, charges, or expenses, and United States import duties" language of subsection (c)(2)(A) as encompassing more than just "normal" U.S. customs duties as it seeks narrowly to define them for this purpose. In Fuel Ethanol from Brazil, the Department was confronted with subject merchandise which was subject to Congressionally imposed special additional duties.[36] In response, the Department, pursuant to the statute, made "deductions from the selling price for special custom duties" and for "regular customs duties."[37] Foreign producers contested the adjustment made by the Department, and the Department responded that it was "required to subtract from the exporter's sales price any United States import duties incident to bringing the merchandise from the place

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35 This interpretation of the statute is particularly meaningful as "{a} statute is best explained by following the construction put upon it by judges who lived at the time it was made, or soon after." Black's Law Dictionary at 1626 (7th ed. 1999) ("contemporanea expositio est optima et fortissimo in lege" or "{a} contemporaneous exposition is the best and most powerful in the law").

36 See Fuel Ethanol from Brazil, 51 Fed. Reg. 5,572 (Feb. 1986) (Final Determination of Sales at Less than Fair Value). In the Omnibus Reconciliation Act of 1980, Congress imposed an additional duty on imports of ethyl alcohol to be used in fuel on top of the existing duty on most-favored-nation (MFN) and non-MFN tariffs imposed on imports of ethyl alcohol for non-beverage purposes (including ethyl alcohol imported to be used in applications other than fuel). See Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499 § 1161, 94 Stat. 2695 (1980).

37 Id. (emphasis added)

of shipment to the place of delivery in the United States."[38] The Department further explained that the "special additional" duty "is a cost incurred by" the foreign producer.[39] Thus, the Department has, itself, recognized that the statute does not limit the reach of subsection (c)(2)(A) to "normal" duties, and, moreover, that the plain and unambiguous language of the statute requires the Department to adjust U.S. price for any United States import duty that is a cost incurred incident to bringing merchandise from the place of shipment to the place of delivery in the United States.[40]

D. The URAA Does Not Support the Department's Practice as it Relates to Non-Export CVD Duties Under Subsection (c)(2)(A)

Alternatively, the Department has asserted that in enacting the Uruguay Round Agreements Act (the "URAA"), "Congress put to rest the issue of antidumping and countervailing duties as a cost."[41] The Department cites to the following language in the Statement of Administrative Action (the "SAA"): "{t}he duty absorption inquiry would not affect the calculation of margins in administrative reviews. This new provision of the law is not

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38 Id. (emphasis added).

39 Id.

40 Insofar as the Department is required to make adjustments to U.S. price under subsection (c)(2)(A) for all United States import duties, regardless of whether they be "regular," "normal," "special," or "additional" duties, the Department is required to make such adjustments for both countervailing duties imposed to offset non-export subsidies and Section 201 duties alike.

41 See Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands, 61 Fed. Reg. 48,465, 48,469 (Sept. 13, 1996) (Final Results of Antidumping Duty Administrative Review); and Certain Cut-to-Length Carbon Steel Plate from Germany, 62 Fed. Reg. 18,390, 18,394-395 (Apr. 15, 1997) (Final Results of Antidumping Administrative Review).

intended to provide for the treatment of antidumping duties as a cost."[42] First, whatever the merits of this argument with respect to antidumping duties, the cited language does not address countervailing duties.[43] Once again, the plain and unambiguous language of the statute, a meaningful review of the legislative history, and the *expressio unius* doctrine demonstrates that countervailing duties imposed to offset non-export subsidies were intended to be included under subsection (c)(2)(A). Moreover, this language states simply that the duty absorption text is not, itself, an answer to the AD duty as a cost question.

II. ACCOUNTING FOR COUNTERVAILING DUTY DEPOSITS REFLECTS THE REAL COST OF SELLING INTO THE U.S. MARKET

Assuming *arguendo* that the plain language of subsection (c)(2)(A) did not demand that countervailing duty deposits be considered a cost, charge, expense or U.S. import duty and that Congress had not acted to amend subsection (c)(2)(A) to exclude only countervailing duties imposed to offset export subsidies from the adjustments which the Department must make, the provision makes clear that the Department is to account for the real costs of selling into the U.S. market in establishing U.S. price. Indeed, it is only by accounting for and adjusting U.S. price to reflect these costs that a "fair comparison" may be made between U.S. price and normal value.

A. Countervailing Duty Deposits Are Real Expenses Incurred In Selling In the United States

Foreign producers selling products affected by countervailing duties on a delivered basis in the United States must pay to Customs the amount of the countervailing duties as a condition of that merchandise entering the United States. Absent payment, such merchandise could not

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42 See Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, at 885 ("SAA").

43 This language is further unquestionably inapposite to the Department's treatment of Section 201 duties under subsection (c)(2)(A).

and would not enter the United States. In addition, there is an actual transfer of cash from the foreign producer to Customs, and the foreign producer does not have access to or legal control over the funds paid to Customs.[44] As such, these payments are real expenses that are borne by the foreign producer and affect the net return to that producer of that sale. The Department recognized this reality in the context of the "special additional" duty at issue in Fuel Ethanol from Brazil, and observed that such duties were a "cost incurred by" the foreign producer.[45] To the extent that the foreign producer increases his price to cover his expenses, including countervailing duties, dumping margins are not created or exacerbated. To the extent, however, that the foreign producer's price does not increase to cover all expenses, including countervailing duties, that difference will become part of the dumping margin calculated. There is no logical basis for accounting for freight or insurance expenses in an antidumping analysis but disregarding countervailing duties. Each is an expense of selling in the United States and each is a reduction of the total amount of cash available to the foreign producer.

B. Foreign Producers Treat Countervailing Duty Deposits as a Cost Incident to Selling Into the United States

A review of the public financial reports of foreign producers affected by countervailing duty deposits imposed to offset non-export subsidies demonstrates that such deposits are commercially considered "costs, charges, or expenses" within the meaning of subsection

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44 Overpayments of countervailing duties are repaid with interest. Interest is not paid on a contingency. See 19 U.S.C. § 1673f(b) (2000). Interest is paid to compensate a party for the time value of money during a period when that party has no legal control over certain funds. The fact that interest is paid on overpayments is further evidence that countervailing duties are real expenses and must be recognized in the Department's antidumping calculations.

45 See Fuel Ethanol from Brazil, 51 Fed. Reg. 5,572 (Feb. 1986) (Final Determination of Sales at Less than Fair Value).

(c)(2)(A). For example, Tembec, a producer of softwood lumber covered by a countervailing duty imposed to offset an export subsidy, reports in its second quarter 2003 financial statement that the countervailing duty deposits "negatively affected" its EBITDA and that such deposits were a "charge" "incurred" by the company. See Tembec Inc., Second Quarter Report 2003 at 5, 19. Slocan Forest Products Ltd., another softwood lumber producer covered by the same order, also reported in its first quarter 2003 financial statement that the company "expensed" the countervailing duty deposits made in the first quarter and that the amount of those deposits was "charged to earnings by a reduction in reported net sales." See Slocan Forest Products Ltd., First Quarter Report 2003 at 7 (unnumbered). Similarly, Abitibi-Consolidated Inc. reported that the company "paid and expensed" its countervailing duty deposits paid during 2003. See Abitibi-Consolidated Inc., Second Quarter Report 2003 at 5.[46]

The public financial statements of each of these companies treat countervailing duty deposits as charges incurred incident to selling in the United States. Other industries less affected by countervailing duties likely treat them similarly, even though the magnitude of those duties would not necessarily provoke separate discussion in their public financial statements. Thus, countervailing duty deposits are clearly within the type of "cost, charges, or expenses" incident to bringing subject merchandise to the United States contemplated by subsection (c)(2)(A).

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[46] There is no rational reason to conclude that foreign producers' treatment of Section 201 duties would differ in any respect from their treatment of countervailing duty deposits.

C. By Accounting For the True Costs of Bringing Subject Merchandise Into the United States, the Department Would Not Be Double-Counting

Deduction of countervailing duties imposed to offset non-export subsidies as advocated would not result in "double counting" of those duties. Countervailing duties paid would be recognized in the antidumping calculation as an expense and deducted from U.S. price. This recognition of an expense is the same as the recognition of other expenses such as freight, marine insurance, and "normal" import duties. There is no logical basis to conclude that recognizing the expense of countervailing duties in the calculation is "double counting" while similarly recognizing the expense of freight for example is not double-counting of freight. More simply, antidumping and countervailing duties are different remedies for different wrongs. Antidumping duties reflect all costs -- whether freight, "normal" duties, labor or countervailing duties. This is not giving a double remedy for a countervailing duty. In fact, the current practice effectively gives a significant exemption that permits companies subject to countervailing duties to offset domestic subsidies to dump with impunity. See Section VI.

Countervailing duties would arguably be double-counted only, if at all, where such duties are imposed to offset an export subsidy. This is because an export subsidy theoretically creates a direct and apparent price discrimination between markets. Accordingly, Congress amended Section 772 to ensure that the Department adjusted U.S. price so that the existence of an export subsidy would not "create" dumping. In consequence, Congress amended the statute to mandate that the amount of any countervailing duty imposed to offset an export subsidy be used to

increase U.S. price in the Trade Agreements Act of 1979.[47] The Department has explained its understanding of this provision as follows:

> The basic economic theory underlying this provision is that in parallel antidumping and countervailing duty investigations, if the Department finds that a respondent received the benefits of an export subsidy program, it is presumed the subsidy contributed to lower-priced sales of subject merchandise in the United States market by the amount of any such export subsidy. Thus, the subsidy and dumping are presumed to be related, and the assessment of duties against both would in effect be "double-application" or imposing two duties against the same situation. Therefore, Congress, through Section 772(c)(1)(C) of the Act, indicated that the Department should factor the subsidy into the antidumping calculations to prevent this "double-application" of duties.[48]

By comparison, a domestic subsidy has an equal impact in both domestic and export markets but the countervailing duty to offset such a subsidy is only assessed on U.S. sales.

The relief imposed to offset the benefits of an illegal non-export subsidy is wholly unconcerned with any price discrimination that may exist between markets. In result, such duties are indistinguishable from any other cost, charge, expense, or duty incurred incident to bringing subject merchandise into the United States. Thus, because dumping is an unfair trade practice separate from that resulting from the benefits of illegal non-export subsidies received, the Department can only discern the true cost of selling into the United States, for the purposes of an antidumping calculation, by accounting for the amount of any countervailing duty deposit imposed to offset a non-export subsidy.

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47 S. Rep. No. 96-249 at 94 (1979).

48 See Certain Cold-Rolled Carbon Steel Flat Products From Brazil, 67 Fed. Reg. 62,134 (Oct. 3, 2002) (Notice of Final Determination of Sales at Less than Fair Value) (emphasis added).

D. Use of Countervailing Duty Deposits to Make the Adjustment is Legal, Fair and Economically Sound

Regardless of whether countervailing duties are "deposited" or "assessed" on subject merchandise over a POI or POR, such countervailing duties are, if not "United States import duties," "costs, charges, and expenses" incident to bringing subject merchandise into the United States. As demonstrated in Section II.B, above, foreign producers generally treat countervailing duty deposits as costs incurred incident to bringing merchandise to the United States. For this reason, and for the additional reasons detailed below, the fact that these amounts are referred to as "deposits" is not dispositive to the question of their treatment under subsection (c)(2)(A). The Department, however, has previously attempted to base its refusal to appropriately adjust for countervailing duties deposited to offset domestic subsidies under subsection (c)(2)(A) on the basis that "deposits" were not included in the "costs, charges, or expenses, and United States import duties" language of the provision. This position has no basis in law or in the economic reality of the treatment of such deposits.

The issue of "deposits" versus "assessments" may be relevant only in a limited number of situations -- in many circumstances, the amount of the countervailing duty assessed on subject merchandise investigated or reviewed in an antidumping investigation or review will be known at the time of the Department's proceeding.[49] In other situations, under a proper application of

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[49] The amount of the countervailing duty rate is known in circumstances where Customs has liquidated entries upon which a countervailing duty has been imposed, or where a duty deposit rate has been imposed which remains unchanged at the time of the Department's liquidation instructions. As the Court of International Trade has recognized, while the amount of any antidumping or countervailing duty deposit "may be adjusted pursuant to a review under 19 U.S.C. § 1675, it may become the final assessed duty if no review is sought from Commerce or pursuant to the review by Commerce." Dynacraft Industries, Inc. v. United States, 118 F. Supp. 2d 1286, 1290 n.15 (Ct. Int'l Tr.

(footnote continued)

subsection (c)(2)(A), the Department would be required to make an adjustment to U.S. price to account for the countervailing duty imposed by using the amount of the duty deposit during some portion of the period of investigation or period of review. Using the deposit amount is appropriate and consistent with the statutory mandate of subsection (c)(2)(A).

First, foreign producers subject to a countervailing duty order generally treat duty deposits paid as a cost. As shown in Section II.B above, a review of the financial reports of foreign producers affected by countervailing duty orders demonstrates that countervailing duty deposits are commercially considered "costs, charges, or expenses" within the meaning of subsection (c)(2)(A).

Second, in a recent case before the Court of International Trade, the Department argued that it had the discretion to adjust U.S. price pursuant to 19 U.S.C. § 1677a(c)(1)(C) where the countervailing duty imposed had been "not yet finally assessed."[50] If the Department has the discretion to adjust U.S. price upwards in the amount of any countervailing duty deposit imposed to offset an export subsidy under 19 U.S.C. § 1677a(c)(1)(C), then, necessarily, the Department is adjusting U.S. price to reflect a rate which has not been finally established, as the rate ultimately used for assessment may be altered. By the same token, and of necessity, the Department also has discretion to adjust U.S. price downwards in the amount of any countervailing duty deposit imposed to offset a domestic subsidy under subsection (c)(2)(A).

(footnote continued)

2000) (citations omitted). Similarly, the amount of Section 201 duties would always be known at the time of importation.

50 See DuPont Teijin Films USA, LP v. United States, Slip. Op. 03-79 at 10 n.11 (July 9, 2003) (Ct. Int'l Tr.). The Court did not pass on this claim, holding that the issue was not ripe for review, and instead remanded the Department's determination for reconsideration.

There is simply no logical, statutory, or policy basis to read subsection (c)(1)(C) as pertaining to deposits, and read subsection (c)(2)(A) as pertaining to final duties only. In fact, any such statutory interpretation would be blatantly unreasonable, as the Department would use a deposit when to do so works against the domestic industry, but refuse to do so in a parallel context when it supports more effective antidumping remedies.

Yet, in the Department's previous consideration of its treatment of antidumping and countervailing duties under subsection (c)(2)(A), the Department has distinguished between cash deposits of the estimated antidumping or countervailing duties made by importers and the actual duties ultimately paid by these importers at liquidation.[51] In Federal-Mogul Corp., the Court of International Trade upheld the Department's discretion to not deduct the amount of any cash deposits made for antidumping duties from U.S. price because such duties "are based on past dumping margins and may bear little relation to the actual current dumping margin."[52] Whatever the merits of this argument regarding antidumping duties, it is simply inapplicable to duties imposed to offset non-export subsidies. The Department is required to take account of countervailing duties imposed to offset non-export subsidies because such duties represent a cost, charge, expense, or U.S. import duty incurred incident to bringing subject merchandise to the United States. As any countervailing duty deposit is a cost, charge or expense incurred, the so-called "current" countervailing duty rate is irrelevant -- what matters is the amount expended

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51 See Television Receivers, Monochrome and Color, From Japan, 54 Fed. Reg. 13,917 (Apr. 6, 1989) (Final Results of Antidumping Administrative Review); Certain Corrosion-Resistant Carbon Steel Flat Products From Korea, 61 Fed. Reg. 18,547, 18,553 (Apr. 26, 1996) (Final Results of Antidumping Administrative Review); Federal-Mogul Corp. v. United States, 17 C.I.T. 88, 108, 813 F. Supp. 856, 872 (1993).

52 Federal-Mogul Corp., 17 C.I.T. at 108, 813 F. Supp. at 872.

by the foreign producer over the POI or POR. As explained below, the same would be true in a number of circumstances.

More generally, an argument that the cash deposits for countervailing duties are not "final"[53] is insufficient to justify a failure to adjust U.S. price accordingly. In fact, the "normal" customs duties deducted from U.S. price are, actually, "deposits of estimated normal import duties because liquidation has not yet occurred."[54] The Department has responded that the actual "normal" customs duty amount assessed at liquidation "is known and is equal to the amount of estimated normal duties deposited . . . ."[55] It is, however, not accurate to characterize the "normal" duties collected at liquidation as in all instances equal to the "estimated normal duties deposited." The actual duties assessed by Customs are, as discussed below, amenable to further adjustment for a variety of different reasons. Specifically, the rate of duty owed by an importer is not set by Customs until an import entry has been liquidated. 19 U.S.C. § 1500 (2000) instructs Customs to "fix the final classification and rate of duty applicable to" a good, "fix the final amount of duty to be paid on such merchandise and determine any increased or additional duties, taxes, and fees due or any excess of duties, taxes, and fees deposited," and "liquidate the entry and reconciliation, if any," of a good. 19 U.S.C. § 1504(a) (2000) affords Customs the discretion to liquidate an import entry within one year from the date of entry. This timeframe can be extended by Customs pursuant to 19 U.S.C. § 1504(b) to four years from the date of

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53 See Television Receivers, Monochrome and Color, From Japan, 55 Fed. Reg. 35,916 (Sept. 4, 1990) (Final Results of Antidumping Administrative Review). See also Color Television Receivers From the Republic of Korea, 58 Fed. Reg. 50,333, 50,336-337 (Sept. 27, 1993) (Final Results of Administrative Review of Antidumping Duty Order).

54 Federal-Mogul Corp., 17 C.I.T. at 108, 813 F. Supp. at 872.

55 Id.

entry.[56] Thus, the "normal" import duties actually paid by the importer may not be known for up to four years beyond when the imports were actually entered into the country. Moreover, pursuant to 19 U.S.C. § 1501 (2000), any liquidation made by Customs "may be reliquidated in any respect by the Customs Service, notwithstanding the filing of a protest, within ninety days from the date on which notice of the original liquidation is given . . . ."

19 U.S.C. § 1514 (2000) permits parties to protest the decisions of Customs. This provision allows for the protest of "the classification and rate and amount of duties chargeable," along with many other decisions of Customs which affect the "normal" duties actually assessed at liquidation. If an importer disagrees with Customs' assessment of duties after the entry has been liquidated, the importer may file a protest and application for further review on Customs Form 19 within 90 days after liquidation.[57] If the Customs Service denies the protest, the importer may then challenge the agency's assessment in federal court.[58]

In sum, it is flatly incorrect to assert that the actual "normal" duties assessed by an importer will be "known" at the time of import entry and will equal the estimated "normal" duties deposited or to suggest that countervailing duties are somehow different in kind. There are a range of potential reasons why the estimated and assessed amounts may differ. But it is

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56 Under 19 C.F.R. § 159.12 (2003), Customs may extend its liquidation of an entry in one-year increments up to three additional years (the sum total of three one year extensions).

57 See 19 C.F.R. § 174.12 (2003).

58 See 28 U.S.C. § 1581(a) (2000). Even where a valid protest was not filed pursuant to 19 U.S.C. § 1514, reliquidation of an entry is possible under 19 U.S.C. § 1520 (2000) where an importer is able to demonstrate, within one year of the date of liquidation, that a clerical error, mistake of fact, or other inadvertence impacted the final duty assessed. Thus, in some situations, if liquidation is extended until four years after the date of entry, 19 U.S.C. § 1520 permits any assessment to be further amended up to a year after liquidation finally occurs.

clear that the amount paid to Customs at the time of entry is an identifiable, quantifiable expense that can and should be accounted for in the Department's calculations and is in the case of "normal" duties or countervailing duties imposed to offset export subsidies under 19 U.S.C. § 1677a(c)(1)(C).

Further, the statute directs the Department to reduce the constructed export price ("CEP") by the amount of any "expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties . . . ."[59] In accounting for expenses related to guarantees and warranties, the Antidumping Manual notes:

> Since many warranties and guarantees extend over a period of time that is longer than the POI or POR or because complete information is not available at the time the questionnaire response is received, we often base our calculation of per-unit warranty costs on a weighted-average of the annual amounts for warranty expenses for three years prior to the POI or POR . . . The historical granting of warranties can be used to establish a link to the sales under consideration in the absence of warranty terms in a sales agreement.[60]

Thus, the fact that the Department does not know what the actual warranty and guarantee expenses are related to sales reviewed or investigated has not prevented the Department from adjusting U.S. price pursuant to the statute based on out-of-pocket cost.

III. THE DEPARTMENT'S PRACTICE IS INCONSISTENT WITH CUSTOMS' PRACTICE WITH RESPECT TO CALCULATING DUTIABLE VALUE

For Customs, the valuation of merchandise is governed by 19 U.S.C. § 1401a, which establishes a hierarchy of valuation methods to be used to determine the dutiable value of a good. Of these methods, the "transaction value" as defined under 19 U.S.C. § 1401a(b) is the preferred method. Pursuant to 19 U.S.C. § 1401a(b)(3)(B), the transaction value of imported merchandise

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59 See 19 U.S.C. § 1677a(d)(1)(B).

60 See AD Manual, at Chapter 8, p. 32 (Jan. 22, 1998).

does not include the "customs duties and other Federal taxes currently payable on the imported merchandise by reason of its importation . . . ." As with the terms contained in subsection (c)(2)(A), the use of the term "customs duties" in 19 U.S.C. § 1401a(b)(3)(B) is not defined.

Nevertheless, Customs has understood the phrase "customs duties and other Federal taxes currently payable on the imported merchandise by reason of its importation . . ." to include a countervailing duty, provided that the duty amount is reported separate from the price actually paid or payable for the merchandise.[61] Thus, the amount of any countervailing duty deposit is not included in the amount used to determine the dutiable value of a good.

Customs' practice is inconsistent with the Department's valuation technique and, in result, provides importers with an unfair advantage. Thus, on the one hand, an importer may report the value of merchandise with the countervailing duty deposit separately reported and Customs will establish the dutiable value of the merchandise net of the amount of the countervailing duty deposit. On the other hand, the importer will report the duty-paid sales price to the Department, thus masking the level of price discrimination occurring in the market because, by definition, the normal value does not include any countervailing duty.

The conflict in agency practice means that antidumping duties imposed or collected will never sufficiently address the level of price discrimination occurring in the market. For example, suppose subject merchandise is shipped to a customer in the United States on duty-paid terms by a foreign producer. Further suppose that the foreign producer's total duty-paid sales price in the United States for subject merchandise is $290. Assume that subject merchandise is subject to a

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61 See Headquarters Ruling Letter 545304 (citing Headquarters Ruling Letter 543963 (Sept. 11, 1987); Headquarters Ruling Letter 544552 (Sept. 20, 1990); Headquarters Ruling Letter 544596 (Nov. 23, 1990); and Headquarters Ruling Letter 544722 (June 4, 1991)).

zero rate for "normal" duties, but is subject to a countervailing duty deposit rate of twenty percent along with a freight expense of $45, and a brokerage/handling fee of five dollars. Presented with this factual scenario, Customs would assess duties on the value of subject merchandise derived by subtracting the invoiced amounts for (a) duty deposit, (b) freight and (c) brokerage/handling fees from the delivered price of $290 ($290 - $40 - $45 - $5). The dutiable value, then, would be $200. The Department, on the other hand, derives U.S. price by only subtracting two of the three invoiced costs, charges, or expenses considered by Customs. Under the Department's incorrect interpretation of the statute, the delivered price of $290 is reduced by the amount of the freight expenses ($45) and the amount of the brokerage/handling fee (five dollars) ($290 - $45 -$5). The net U.S. price (or "ex-factory" price), then, is considered to be $240.

In these circumstances, if the normal value of subject merchandise is found to be $300, the Department would find an antidumping margin of 25 percent (300-240/240 = .25). This margin would represent a sixty dollar difference between the U.S. price ($240) and the normal value ($300) of subject merchandise. Customs, however, would apply the 25 percent rate of an antidumping duty to the lower dutiable value of $200, thereby collecting only $50. In sum, there would be a 16.67 percent difference between what the Department intended to be collected ($60) and what Customs actually would collect ($50). The Department's failure to correctly apply the law means that the antidumping duties imposed will not sufficiently address the level of price discrimination occurring in the market. This inconsistency is demonstrated graphically below:

Inconsistent Treatment of CVDs for Calculation of Dutiable Value by Customs and Calculation of U.S. Price for AD Purposes			
U.S. Price (Customs Dutiable Value)		**U.S. Price** (Commerce AD Valuation)	
Delivered Price (Duty Paid)	$290	Delivered Price (Duty Paid)	$290
Freight Expenses	$45	Freight Expenses	$45
Brokerage/Handling	$5	Brokerage/Handling	$5
CVD Duty Deposit (20%)	$40	~~CVD Duty Deposit (20%)~~	~~$40~~
Dutiable Value	$200	U.S. Net Price	$240

U.S. Price used to Determine AD Margin

Normal Value =	$300

Calculated AD Margin	$60.00 ($300-$240)	**25%**
Actual Collection of Duties	$50.00	**($200 * .25)**

DIFFERENCE =	**-16.67%**	**(-$10.00)**

If the Department correctly accounted for the amount of the countervailing duty deposited, the antidumping duty imposed would actually address the level of price discrimination occurring in the market. Thus, the Department would reduce the sales price in the United States by the invoiced amounts for (a) brokerage/handling fees, (b) freight expenses, and (c) countervailing duties deposited. U.S. price would therefore be $200 (290-5-45-40 = 200). The dumping margin established would be 50 percent (300-200/200 = .5). An antidumping duty of $100 would be imposed and the level of price discrimination would be fully and adequately addressed.

Customs' interpretation of the statute is correct and is fully defensible. By deducting the amount of any countervailing duty deposit included in the gross U.S. price in order to determine the net dutiable value, Customs insures that it is not imposing a duty upon a duty. In other words, if, in the above example Customs did not account for the amount of the countervailing

duty deposit included in the U.S. price, Customs would assess a 25 percent antidumping duty upon a value that included the countervailing duty deposit imposed on the good. This is precisely the type of double-counting, as discussed further in Section V below, that the Department purports to be concerned with. That is, if Customs changed its practice to conform to the Department's current incorrect practice, it would result in a double-counting of the countervailing duty deposit -- once through the direct collection of that deposit, and again through the imposition of a 25 percent antidumping margin on a price including the countervailing duty deposit. Correctly understood, then, Customs' current practice (of deducting any countervailing duty deposit from the gross U.S. price to determine the net U.S. price/dutiable value) avoids any double-counting, while Commerce's current practice (of including any countervailing duty deposit in net U.S. price) would actually promote double-counting if employed by Customs.

Moreover, the statute does not envision Customs and the Department administering their respective statutory provisions in an inconsistent manner. The legislative history of the Trade Agreements Act of 1979 defines United States price as "the price at which merchandise is purchased, or agreed to be purchased prior to the date of importation."[62] The legislative history similarly defines transaction value as "the price actually paid or payable for the merchandise when sold for export to the United States."[63] Given that these two definitions are the equivalent of each other, any assertion that Congress intended for Customs and the Department to administer the provisions in a contradictory manner is indefensible. Certainly no one can

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62 See S. Rep. No. 96-249 at 93 (1979).

63 Id. at 114.

seriously maintain that Congress intended, as in the above example, that Commerce would find dumping of $60 but Customs would assess duties of only $50.

As demonstrated above, the Department's -- not Customs' -- administration of its respective provision is inconsistent with the plain language of the statute. As evidenced by the example, the Department's incorrect practice leads directly to inequitable results for any domestic industry affected by unfair trade practices in which the subject merchandise is sold on a duty paid basis.[64] This inequity must be addressed -- the fact that the courts have approved of the Department's current practice cannot be construed as an obstacle to such a correction.[65]

IV. A CHANGE IN THE DEPARTMENT'S PRACTICE WOULD BE CONSISTENT WITH THE WITH THE LAWS OF OUR MAJOR TRADING PARTNERS AND WITH THE UNITED STATES' INTERNATIONAL OBLIGATIONS

The Department has previously asserted that an adjustment for the amount of any countervailing duty imposed to offset a non-export subsidy would be inconsistent with this country's international obligations.[66] This position is wholly unsupported by the text of the relevant trade agreements. These agreements do not prohibit any such adjustment, and no such adjustment has ever been found to be either GATT- or WTO-inconsistent. In fact, the laws of the United States' major trading partners account for countervailing duties in their dumping calculations. Indeed, these countries not only account for non-export countervailing duties in

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64 The same inequitable result occurs when the Department fails to adjust U.S. price downward to reflect any Section 201 duties imposed.

65 See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan, 63 Fed. Reg. 2,558, 2,571 (Jan. 15, 1998) (Final Results of Antidumping Duty Administrative Reviews) (noting that "the Court's affirmance of our prior policy does not preclude us from following this new, reasonable policy").

66 See U.S. Steel Group v. United States, 22 C.I.T. 670, 678 n.7, 15 F. Supp. 2d 892, 899 n.7 (1998), rev'd on other grounds, 225 F.3d 1284 (Fed. Cir. 2000).

their dumping calculation, they additionally account for antidumping duties imposed in their dumping calculations. Accordingly, there can be no claim that the Department is precluded from appropriately adjusting U.S. price to account for non-export countervailing duties by this country's international obligations.

A. The United States' Major Trading Partners Account For Both Antidumping and Countervailing Duties in Their Dumping Calculations

The antidumping laws of the European Union, Canada, and Mexico require the deduction of import and other duties, and taxes.[67] Each of these administering laws permits adjustments based on the amount of the countervailing duty imposed. For example, Canada's Special Import Measures Act -- authorizing the imposition of anti-dumping and countervailing duties -- specifically requires, in certain enumerated circumstances, that the export price of the goods investigated be adjusted downward for "all costs, including duties imposed by virtue of this Act or the *Customs Tariff* and taxes."[68] The laws of these other WTO Members demonstrate that an adjustment for any countervailing duties imposed to offset domestic subsidies is consistent with the United States' international obligations.

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67 See Council Regulation (E.C.) No. 384/96 of 22 December 1995, Article 2(B)(9) (European Union) ("{t}he items for which adjustment shall be made shall include . . . any anti-dumping duties"); Special Import Measures Act, CH. S-15, Article 25 (1997) (Canada); and Foreign Trade Law Articles 50 and 54 (1995) (Mexico). See also Notifications of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements: Bulgaria; G/ADP/N/1/BGR/1, G/SCM/N/1/BGR/1 at 5 (Article 4(3)(2)) (Mar. 27, 1997) (Bulgaria reporting to the WTO's Committee on Anti-Dumping Practices that under its relevant laws constructed export price must be adjusted for "any anti-dumping duties").

68 Special Import Measures Act, CH. S-15, Article 25(1)(c)(i) (1997) (emphasis added) available at <www.canlii.org/ca/sta/s-15/sec25.html>.

B. An Adjustment For the Amount of Any Countervailing Duty Imposed to Offset a Non-Export Subsidy Is Fully Consistent With the United States' International Obligations

The practice of making adjustments for the amount of a countervailing duty imposed is consistent with the WTO Antidumping Agreement. Article 2.4 of the WTO Antidumping Agreement requires that "due allowance shall be made . . . for differences which affect price comparability" and specifically refers to "duties" as appropriate deductions. The SAA explains that Article 2.4 "includes a general requirement that comparisons be fair and provides specific requirements to achieve this, including requirements that comparisons be made at the same level of trade, normally at the ex-factory level . . . ."[69] Thus, under the Article, the United States is "to adjust for differences that affect price comparability . . . ."[70] An adjustment for any non-export countervailing duty imposed is, as demonstrated above, therefore, fully consistent with the United States' international obligations. No GATT or WTO dispute settlement body has ever interpreted the Antidumping Agreement to preclude adjustments for the amount of a countervailing duty imposed.[71]

Article 17.6(ii) of the WTO Antidumping Agreement provides that where a provision of the Agreement "admits of more than one permissible interpretation," and the Member's practice constitutes one such permissible interpretation, a WTO dispute settlement panel must find that the practice is in conformity with the Agreement. Providing for adjustments based on any

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69 See SAA at 809.

70 Id.

71 Similarly, an adjustment for Section 201 duties imposed is fully consistent with the United States' international obligations, and no GATT or WTO dispute settlement body has ever interpreted the Antidumping Agreement to preclude adjustments for the amount of any additional duties imposed pursuant to the implementation of a safeguard measure.

countervailing duty is clearly a reasonable interpretation of the Agreement. The consistent practice of major users of the AD remedy further supports this interpretation. See Section IV.A, supra. In the absence of a prohibition, the Antidumping Agreement permits deduction of countervailing duties.

In U.S. Steel Group, the Court of International Trade cited to Article VI(5) of the GATT as further evidence that the Department's current practice of not deducting countervailing duties was permissible.[72] The language cited, however, states that no merchandise shall be "subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization."[73] Therefore, to the extent that this provision is examined in light of the deduction advocated, this language refers to a situation where an illegal export subsidy is being countervailed. This language is therefore consistent with the statute and logical in that export subsidies are presumed to reduce the U.S. price below the home market price and, as such, would impact any dumping margin found if not properly accounted for. As with the statutory language precluding adjustments, however, this language relates expressly and solely to export subsidization and does not address non-export subsidies. Non-export subsidies cannot be presumed to have any particular price discrimination effect, as the producer benefits from the subsidy whether sales are ultimately made in the home market or elsewhere. Indeed, the fact that Article VI(5) was limited to the relationship between trade relief for export subsidies and dumping is yet another indication that the relationship between trade relief for non-export subsidies and dumping is distinct.

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72 See U.S. Steel Group, 22 C.I.T. at 678 n.7, 15 F. Supp. 2d at 899 n.7, rev'd on other grounds, 225 F.3d 1284 (Fed. Cir. 2000).

73 Id. (quoting Article VI(5) of the GATT) (emphasis added).

V. THE DEPARTMENT'S RATIONALE FOR NOT ACCOUNTING FOR ANTIDUMPING DUTIES UNDER SUBSECTION (c)(2)(A) DOES NOT APPLY TO COUNTERVAILING DUTIES

In previously declining to follow the statutory mandate of subsection (c)(2)(A) to adjust U.S. price to account for any duty imposed, the Department has repeatedly articulated arguments applicable only to antidumping, and not countervailing, duties. The concerns which the Department has identified with respect to accounting for antidumping duties under subsection (c)(2)(A), namely "double counting" and the "recursive" nature of any adjustment, are simply not applicable to countervailing duties. The two concepts of "double counting" and "recursiveness" have been often confused. In reality, these are two distinct concepts. "Double counting" represents a concern that the domestic industry might unfairly receive a "double remedy" if U.S. price is adjusted to reflect the cost of any countervailing duty imposed to offset a non-export subsidy. "Recursiveness" represents a concern regarding the calculation of antidumping margins where the margin itself is a factor in determining the amount of the margin (thereby resulting in a "recursive" loop). As demonstrated below, by conflating countervailing duties with antidumping duties, the Department has ignored the fundamental differences between the two. As countervailing duties and antidumping duties are imposed to address distinct unfair trade practices, the concerns expressed by the Department are relevant, if at all, only to antidumping duties imposed.[74]

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[74] Moreover, concerns regarding "double counting" and the "recursive" nature of any adjustment are equally inapposite with respect to Section 201 duties.

A. Antidumping Duties Are Imposed For Fundamentally Different Reasons Than Countervailing Duties and Serve Fundamentally Different Purposes

The Department has only been able to attribute its "double counting" and "recursiveness" rebuttals to countervailing duties as well as antidumping duties by ignoring the fundamental differences between the two distinct trade remedies. Duties imposed to counter illegal dumping and duties imposed to counter illegal subsidization, respectively, have fundamentally different purposes. Countervailing duties are designed to offset the amount of illegal subsidization benefiting the subject merchandise. In contrast, antidumping duties are imposed to offset the amount of illegal price discrimination engaged in by an exporter to the United States.

An individual company may be unfairly trading in the United States because it is dumping, even though it is not subsidized. Another company may be unfairly trading in the United States because it is subsidized, although not dumping. And yet another company may be unfairly trading because it is both dumping and subsidized. Thus, offsetting dumping does not necessarily offset the unfair trade resulting from non-export subsidization -- indeed, if this was not so, there would be no need for the distinct remedies of countervailing duties and antidumping duties. Put simply, dumping must account for all costs, whatever, the source -- whether labor, inputs, countervailing duties to offset domestic subsidies, transportation costs, etc.

Failing to do so is not to deny a double remedy, it is to impair the basic dumping remedy when one of the costs of selling in the United States happens to be a countervailing duty. Antidumping duties are imposed to address the amount by which a company's U.S. price is below the home market price. Such duties do nothing to address situations where the company is also benefiting from a non-export subsidy. Presumably, a domestic subsidy, unlike an export subsidy, would have the effect of reducing both the U.S. and home market prices. But the

countervailing duty applies only to export sales. Thus, as with transportation to the U.S. market, the dumping law requires that cost be reflected in U.S. price but not home market prices.

Alternatively, the fact that a company's subsidization may be fully offset by a countervailing duty does not necessarily mean that the company should be assumed to be fairly trading with respect to dumping. An adjustment to U.S. price under subsection (c)(2)(A) for the amount of any countervailing duty imposed to offset non-export subsidization is fully consistent with the purpose of the antidumping provisions of the statute and, as demonstrated below, does not implicate the "double-counting" and "recursiveness" arguments raised by the Department.

B. Adjusting For Non-Export Countervailing Duty Imposed Does Not Result in a "Double Remedy" For the Domestic Industry

In the past, the Department has disallowed adjustments for duties imposed to offset unfair trade by arguing that such adjustments made to U.S. price would constitute unfair "double-counting" of the unfair trade.[75] Yet, regardless of the merits of this argument with respect to antidumping duties, it is utterly inapplicable to countervailing duties.

The rationale of the statute and the international agreement is that prices should bear and account for all expenses. If a seller sets prices to cover all expenses and otherwise does not sell for export at a lower price than in the home market, then no dumping will be found. An accurate analysis of the existence and magnitude of dumping, however, requires that the normal value and the U.S. price be placed on a comparable footing, i.e., at the factory gate. Direct expenses incurred by either sale must be deducted. A delivered normal value must be adjusted for home market freight, for example, and a delivered U.S. price must be adjusted for foreign inland

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75 U.S. Steel Group, 22 C.I.T. at 678, 15 F. Supp. 2d at 899, rev'd on other grounds, 225 F.3d 1284 (Fed. Cir. 2000).

freight and international freight. If the U.S. price also included countervailing duty deposits, however, under the current Department analysis, no adjustment would be made despite the fact that the countervailing duty deposits are an expense of selling in the United States and despite the fact that not adjusting for the difference in expenses of selling in the two markets would leave the prices being compared on different bases. Recognizing and accounting for countervailing duty deposits in an antidumping calculation is no more double-counting than is recognizing and accounting for ocean freight or marine insurance, for example.

The Department's recent articulation of its understanding of "double-counting" demonstrates how this concern cannot justify the Department's failure to adhere to its statutory obligations. In a recent memorandum regarding the treatment of Section 201 duties in dumping margin calculations, the Department stated:

> Moreover, treating section 201 duties as deductible selling expense or import duties would, in effect, generally double-count (i.e., double the impact of) the section 201 remedy. For example, if the section 201 duty were 20 percent *ad valorem*, and the entered value of an entry subject to the duty were $10.00, one would expect the U.S. government to collect a $2.00 remedial duty. If the Department were to deduct the Section 201 duty from EP and CEP, however, approximately $2.00 would be added to the antidumping duty, and the total impact of the section 201 remedy would be $4.00.[76]

The Department's example does not discuss how the appropriate antidumping duty is derived and, as such, thoroughly confuses the issue. For example, if in an investigation the normal value of subject merchandise is $12 and its U.S. price is $10, an antidumping duty of 20 percent would be imposed. If a countervailing duty of twenty percent is imposed to offset a non-export subsidy

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[76] See 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).

subsequent (or concurrent) to the imposition of an antidumping duty, and the U.S. duty-paid price remains $10 even after the countervailing duty is imposed, that price should be reduced by $2 in keeping with subsection (c)(2)(A). This does not mean that the effect of the countervailing duty is "doubled" if such duty is accounted for in a downward adjustment to U.S. price. While net U.S. price would be $8 and the dumping margin calculated would be 50 percent (12-8/8), the increased dumping margin would reflect the fact that the foreign producer's price did not reflect the additional cost of the countervailing duty, i.e., the producer did not raise its sales price in the Untied States to reflect the additional cost of the non-export countervailing duty imposed. If, instead, the foreign producer's duty-paid price increased to $12 subsequent to the imposition of the countervailing duty (reflecting the $2 countervailing duty), the foreign producer's net U.S. price would be reduced to $10 and no dumping would be found.

In sum, the Department's "double-counting" argument is inapposite to the question of the appropriate treatment of non-export countervailing duties under subsection (c)(2)(A). An appropriate adjustment for non-export countervailing duties imposed would not lead to the "doubling" of the impact of such duties.

C. Adjusting For Non-Export Countervailing Duty Imposed Does Not Implicate Concerns Regarding Potential "Recursive" Effects of the Duty Imposed

In addition to the argument forwarded by the Department regarding "double-counting," the Department has also rejected requests to make adjustments to U.S. price for countervailing duties imposed based on a related concern regarding the alleged recursive effect of accounting for antidumping duties in the very same calculation used to determine antidumping margins. The Department has also on occasion labeled this a concern regarding "double-counting," though the concern here is that adjustments for the antidumping duties imposed will themselves impact

the amount of dumping calculated.[77] In PQ Corp., the Court of International Trade explained that the Department "has been careful in its implementation of the Act not to allow the amount of estimated antidumping duties, based upon past dumping margins, to alter its determination of present dumping margins."[78] Elsewhere, the Department has added that "{t}o do so would involve a circular logic that could result in an unending spiral of deductions for an amount that is intended to represent the actual offset for the dumping."[79]

In short, according to the Department's logic, accounting for the antidumping duty in the calculation of the amount of dumping alters the amount of dumping as well as the amount of the antidumping duty to be imposed. This in turn alters the amount of the antidumping duty to be accounted for and the amount of dumping, and so on, in a recursive, never-ending cycle. Again, however, regardless of the merits of this position with respect to adjustments for antidumping duties, the reasoning simply does not apply to countervailing duties.

As a threshold matter, it is important to understand how an adjustment for the antidumping duties assessed may be considered "recursive" in nature. The problem is an extremely limited one that can be avoided even in the antidumping context by a rational application of the statute. If one of the determinants of the antidumping margin is the

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77 See Netherlands Cold-Rolled, 61 Fed. Reg. at 48,469 ("Such double counting, *i.e.* including the same unfair trade practice twice in a single calculation, is unjustifiable, except in limited circumstances provided for in section 353.26.").

78 See PQ Corp., 11 C.I.T. at 67, 652 F. Supp. at 737 (1987) (emphasis in original).

79 See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan, 63 Fed. Reg. 2,558, 2,571 (Jan. 15, 1998) (Final Results of Antidumping Duty Administrative Reviews). See also Korea Cold-Rolled and Corrosion-Resistant, 62 Fed. Reg. at 18,421 ("If the margin must first be subtracted from U.S. prices, then, as a matter of simple mathematics, the 'correct' margin could never be calculated.").

antidumping margin itself, then the Department will be faced with an unsolvable equation and an impossible task. That is, if the value of the antidumping margin ("X") is determined, in part, by the deduction of the antidumping margin ("X") from gross U.S. price ("USP"), then the agency will be faced with a calculation of the following sort: X = ((Normal Value) - (U.S. Price - X))/(U.S. Price -X). This is an equation to which there is no solution, as X is both a dependent and an independent variable.[80] Conversely, where U.S. price is adjusted to account for any countervailing duties deposited or assessed to offset a non-export subsidy, no issue of "recursiveness" is implicated. For example, if, in an administrative review, the Department makes a subsection (c)(2)(A) adjustment to U.S. price to reflect a non-export countervailing duty assessed, the calculation used by the Department would be X = ((Normal Value) - (U.S. Price - Y))/U.S. Price - Y, where X equals the antidumping duty assessment rate and Y equals the countervailing duty assessment or deposit rate. X and Y are unrelated in the calculation because the antidumping duty assessment rate does not impact the countervailing duty rate (i.e., there is no adjustment to the countervailing duty rate based on the antidumping duty assessment rate), as the countervailing duty rate will remain the same as that used to initially adjust U.S. price. Thus, the problem of "recursiveness" is not presented.

Moreover, a countervailing duty imposed to offset a non-export subsidy would be completely ignored where the duty amount is not "included" in U.S. price, e.g., where the terms

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[80] There is, however, no requirement that the Department use the assessment rate in adjusting U.S. price under subsection (c)(2)(A). If U.S. price is adjusted downward in the amount of the antidumping duty deposited in order to establish the antidumping duty assessment rate, there is no "recursive" problem. Here, the calculation made by the Department would be X = ((Normal Value) - (U.S. Price - Y))/U.S. Price - Y, where X equals the antidumping duty assessment rate and Y equals the previously established antidumping duty deposit rate.

of sale are ex-factory. On the other hand, the countervailing duty amounts actually deposited or paid by the foreign producer are relevant, as such amounts are a cost, charge, or expense incurred in bringing subject merchandise to the United States pursuant to subsection (c)(2)(A). A proper adjustment for countervailing duties imposed in conformity with subsection (c)(2)(A) is no more recursive in nature than an adjustment for any other cost, charge, expense or U.S. import duty incurred incident to bringing subject merchandise to the United States.

VI. COMMERCE MUST CHANGE ITS PRACTICE TO COMPLY WITH CONGRESS' ADMONITION THAT UNFAIR TRADE BE OFFSET TO THE MAXIMUM EXTENT POSSIBLE

Congress has expressed its intent that unfair trade practices be addressed to the fullest extent possible to address and remedy the harm of such practices to the domestic industry. As demonstrated above, the Department's failure to adjust U.S. price to account for the amount of any countervailing duty imposed pursuant to subsection (c)(2)(A) significantly diminishes the ability of the domestic industry to obtain relief sufficient to counter the injurious effects of dumping in the U.S. market.

Specifically, in enacting the Antidumping Act of 1921, Congress expressed its commitment to thoroughly addressing the problem of dumping by foreign producers in the United States market. The Committee on Ways and Means explained:

> The principle underlying the proposed additional duty to be added in prevention of dumping, partciularly {sic}, where the tariff valuations are upon foreign market values, is to add such an amount of duty as will equalize sales at less than the foreign home market value or foreign export value or cost of production with profit added, whichever may be the highest, thereby making it unprofitable to dump goods on the markets of the United States at lower prices. If the seller of the goods is compelled to add as duty the difference between the sales price and

> what he would receive by selling in the otherwise highest obtainable market, all reward or inducement to dumping is removed.[81]

"{A}ll reward or inducement" to dump was to be removed through the proper application of the antidumping laws. Congress was, therefore, clear that any dumping of foreign products into the United States market which materially injured a domestic industry was to be fully offset by the imposition of dumping duties. Because, as demonstrated above, the Department's current practice fails to fully offset dumping in the market where material injury is found, that practice is flatly inconsistent with the express intent of Congress in establishing the antidumping law.

Further, six decades later the same Committee observed, "{t}he countervailing duty and antidumping duty laws are vital to the maintenance of fair trade, because they offset and deter the use of predatory dumping and subsidization in the U.S. market by foreign governments or exporters."[82] By not fully offsetting pernicious unfair trade practices in the United States market, the Department has improperly weakened the tool by which Congress has sought to insure the "maintenance of fair trade."

In sum, accounting for the amount of any countervailing duty imposed to offset a non-export subsidy under subsection (c)(2)(A) is fully consistent with the intent of the antidumping laws in general. Moreover, it is only through such an adjustment that unfair trade can be fully and effectively offset.

VII. CONCLUSION

For all of the foregoing reasons, the Department must, consistent with subsection (c)(2)(A), adjust U.S. price downward to account for the amount of any countervailing duty

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81 See H. R. Conf. Rep. No. 67-1 at 23 (1921).

82 See H. R. Conf. Rep. No. 98-725 at 2 (1984).

deposit imposed on the subject merchandise to offset non-export subsidies in its calculation of dumping margins for U.S. sales.

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

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