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Assistant Secretary for Import Administration
Attention: Import Administration
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Washington, D.C. 20230

Attention: Weighted Average Dumping Margin

Dear Assistant Secretary Spooner:

On behalf of United States Steel Corporation, we hereby respond to the Department's March 6, 2006 notice requesting comments regarding its calculation of weighted average dumping margins in antidumping duty investigations.[1] Specifically, the Department requested comments on its proposal to no longer calculate dumping margins in investigations using average-to-average comparisons without applying offsets for non-dumped comparisons. The Department also requested comments on appropriate methodologies to be used by the Depart-

[1] See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11189 (Dep't Commerce Mar. 6, 2006) (request for comments) ("Request for Comments").

ment in future investigations.[2] The Department issued its request for comments in response to the WTO Panel's decision in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("*United States – Zeroing*").[3]

I. The Department May Not Apply Offsets for Non-Dumped Comparisons Without a Change in the Statute

In its notice requesting comments in this matter, the Department has proposed that it will no longer calculate dumping margins in antidumping duty investigations based on comparisons of weighted average normal values to weighted average export prices without applying offsets for non-dumped sales.[4] As shown below, however, the U.S. statute requires the Department not to apply offsets for non-dumped sales when calculating dumping margins based on average-to-average comparisons. Accordingly, the Department may not make its proposed change unless and until Congress amends the statute.

A. The U.S. Statute Requires Calculations of Dumping Margins to Be Performed Without Applying Offsets for Non-Dumped Sales

The U.S. statute requires the Department to calculate dumping margins without applying offsets for non-dumped sales. Indeed, the plain meaning of the statute as well as its structure and purpose demonstrate Congress' clear intent on this issue, and that intent is to require the Department not to apply such offsets.

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2 Id. at 11189.

3 See Report of the Panel, *United States – Zeroing*, WT/DS294/R, circulated Oct. 31, 2005.

4 Request for Comments, 71 Fed. Reg. at 11189.

In Timken Co. v. United States ("Timken"), the U.S. Court of Appeals for the Federal Circuit grappled with the issue of whether the denial of offsets for non-dumped sales was mandated by the statute.[5] Based solely on the statutory definitions of "dumping margin" and "weighted average dumping margin" in 19 U.S.C. §§ 1677(35)(A) and (B), the Federal Circuit concluded that the statute presented a "close question" on this point.[6] In fact, the Federal Circuit found that the statutory definitions of dumping margin and weighted average dumping margin "at a minimum" authorized the denial of offsets.[7]

Thus, the Timken court, based solely on the definitions in 19 U.S.C. §§ 1677(35)(A) and (B), found that it was a "close question" as to whether or not the statute mandated the denial of offsets for non-dumped sales. The Federal Circuit subsequently followed its holding in Timken in finding the denial of offsets for non-dumped sales to be authorized by the statute in Corus Staal BV v. Dep't of Commerce ("Corus Staal").[8] Significantly, however, certain key provisions

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5 354 F.3d 1334 (Fed. Cir. 2004), cert. denied, 543 U.S. 976 (2004).

6 Id. at 1341. The argument that the text of these sections requires the denial of offsets for non-dumped sales is as follows: (i) by defining the term "dumping margin" as the amount by which normal value "exceeds" U.S. price, the statute – under the most common meaning of the term "exceeds" – defines dumping margins as only positive margins and (ii) by providing that the numerator of the "weighted average dumping margin" is to consist of the aggregate of the "dumping margins," the statute provides for the elimination of negative margins from the numerator.

7 Id. at 1342.

8 395 F.3d 1343 (Fed. Cir. 2005), cert. denied, ___ U.S. _____, 126 S. Ct. 1023, 163 L. Ed.2d 853 (2006).

of the statute that relate to this issue were not brought to the Federal Circuit's attention in Timken and were not addressed by the Court in Corus Staal. Once these provisions are considered, it is clear beyond all doubt that the statute does not merely authorize the denial of offsets for non-dumped sales; it requires it.

The statutory provisions in question, which are in 19 U.S.C. § 1677f-1(d) and were enacted for the first time in the Uruguay Round Agreements Act ("URAA"), set forth the comparison methods to be used by the Department in calculating dumping margins. Specifically, Section 1677f-1(d)(1)(A) provides that in investigations without targeted dumping, the Department is to compare weighted average normal values to weighted average U.S. prices.[9] And Section 1677f-1(d)(1)(B) of the Act provides that in investigations where there is targeted dumping, the Department is to compare weighted average normal values to individual U.S. transaction prices.[10] As these provisions show, Congress specifically provided for different comparison methods to be used to calculate dumping margins (i.e., either comparing normal values to weighted average U.S. prices or to individual U.S. transaction prices) depending on the circumstances of the case. In turn, Congress clearly intended these comparison methods to achieve different results.

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9 19 U.S.C. § 1677f-1(d)(1)(A) (2000). Section 1677f-1(d)(1)(A) also authorizes comparisons of prices of individual U.S. transactions to the prices of individual normal value transactions.

10 19 U.S.C. § 1677f-1(d)(1)(B) (2000).

The negotiating history leading to the adoption of the URAA confirms that the two comparison methods in 19 U.S.C. § 1677f-1(d) were intended to achieve different results. Prior to the GATT Multilateral Trade Negotiations for the Uruguay Round (the "Uruguay Round") and the URAA, the Department used only one comparison method in all circumstances: it compared individual export transaction prices to weighted average normal values.[11] During the Uruguay Round negotiations, the U.S. sought to retain its comparison method, while other nations sought to replace it with the use of weighted average export prices – as opposed to individual transaction prices – in all instances.[12]

The result reached was that weighted average export prices would be used only in investigations without targeted dumping. In investigations where there was evidence of targeted dumping, the dumping margins could be based on a comparison of the prices of individual export transactions to weighted average normal values.[13] Thus, both the change in the law effected through the Uruguay Round negotiations and the provisions of 19 U.S.C. § 1677f-1(d) them-

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11 See Statement of Administrative Action for the Uruguay Round Agreements Act ("SAA") at 810; reprinted in 1994 U.S.C.C.A.N. 4040, 4153 (stating that the provision of the WTO Anti-Dumping Agreement requiring weighted average to weighted average comparisons in investigations represented a "departure from {the then} current U.S. law").

12 See, e.g., Communication from Japan Concerning the Anti-Dumping Code, Uruguay Round Negotiating Group on MTN, MTN.GNG/NG8/W/81 (July 9, 1990), available at www.worldtradelaw.net.

13 See Agreement on Antidumping, Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994) at Article 2.4.2; SAA at 810, reprinted in 1994 U.S.C.C.A.N. at 4153.

selves show that the different comparison methods set forth in the statute were intended to achieve different results.

However, it would have been pointless for Congress to provide for the different comparison methods in the statute if the offsetting of dumping margins with non-dumped sales was allowed. This is because, if offsetting was allowed, the same dumping margin would always be achieved no matter which comparison method is employed. In other words, if offsetting is used, the Department would get the same result if it compared weighted average normal values to weighted average U.S. prices or to individual U.S. transaction prices. For example, in an investigation without targeted dumping, it would make no difference if the Department compared weighted average normal values to individual U.S. transaction prices or to weighted average U.S. prices. If offsetting is used, the margin would always be the same.

Plainly, there would have been no point for Congress to mandate in 19 U.S.C. § 1677f-1(d) that a particular comparison method be used, if the same result would be achieved using the alternative comparison method. This undeniable fact conclusively demonstrates that Congress intended for the Department not to offset dumping margins with non-dumped sales. It is the only way that the comparison methods specified by Congress make sense.

B. The Denial of Offsets for Non-Dumped Sales Is Necessary to Give Effect to the Different Comparison Methodologies in 19 U.S.C. § 1677f-1(d)

As the above analysis shows, it was Congress' intent that the two alternative comparison methodologies in 19 U.S.C. § 1677f-1(d) yield different results. This, in turn, demonstrates

Congress' clear intent to require that the Department not offset dumping margins with non-dumped sales. This is because if such offsetting is performed, it does not matter which of the two comparison methodologies (i.e., weighted average U.S. prices or individual U.S. transaction prices) is used: the resulting margin will always be the same. This conclusion is true to a mathematical certainty and cannot be disputed.

That 19 U.S.C. § 1677f-1(d) is rendered meaningless if offsetting is employed can be readily demonstrated with the example set forth in Figures 1 and 2. Figure 1 shows three product types, X, Y, Z, that are sold in the United States and in the foreign market. The foreign market price, i.e., weighted average normal value, for X, Y, and Z is \$30, \$25, and \$20 per net ton, respectively. See Figure 1, column A. There are five U.S. transactions of one ton each of Product Type X, four U.S. transactions of one ton each of Product Type Y, and two U.S. transactions of one ton each of Product Type Z. The price of each U.S. transaction is set forth in Figure 1, column B. The weighted average U.S. price for each product type is set forth in Figure 1, column C.

The first step is to determine the "dumping margin." This is simply the amount by which normal value exceeds U.S. price (19 U.S.C. § 1677(35)(A)). If the weighted average-to-weighted average method is used, the results are set forth in column D of Figure 1. If the weighted average-to-individual U.S. transaction price method is used, the results are set forth in column E. As shown in column E, some of the U.S. transactions in Product Types X and Y are dumped

Figure 1
Comparison of Export Price with Normal Value

Weighted Average Normal Value **A**	Transaction-Specific Export Price* **B**	Weighted Average Export Price **C**	Dumping Margin (based on weighted avg. export price) **D** **(A – C)**	Dumping Margin (based on transaction-specific export price) **E** **(A – B)**
Product Type X: $30/NT	$24			6
	$33			-3**
	$32	$26	4	-2**
	$20	$\left(\frac{24+33+32+20+21}{5}=26\right)$		10
	$21			9
Product Type Y: $25/NT	$18			7
	$15	$19	6	10
	$26	$\left(\frac{18+15+26+17}{4}=19\right)$		-1**
	$17			8
Product Type Z: $20/NT	$22	$23		-2**
	$24	$\left(\frac{22+24}{2}=23\right)$	-3**	-4**

* Assume one ton for each export transaction.

** When the comparison between normal value and export price results in a negative number, this shows that no dumping has taken place and the negative number is not a "dumping margin."

sales (i.e., sales where normal value exceeds U.S. price) and some are not dumped (i.e., sales where normal value does not exceed U.S. price).

The second step is the calculation of the "weighted average dumping margin" (19 U.S.C. § 1677(35)(B)). As Figure 2 demonstrates, when offsetting is not used, the different comparison methods produce different results. More specifically, when weighted average U.S. prices are used, the weighted average dumping margin is 17.46% (Box 1); when individual U.S. prices are used, the weighted average dumping margin is 19.04% (Box 2). On the other hand, when offsetting is used, the different comparison methods produce the same result. With respect to the example depicted in Figure 2, that result is 15.08% (Boxes 3 and 4). In other words, if offsetting is used, the different comparison methods have no impact whatsoever; the results are the same. Significantly, this will always be the case no matter what values are used for U.S. price and no matter how many U.S. transactions are involved or the quantities of those transactions. When dumping margins are offset with non-dumped sales, the results of the two comparison methods will always be the same.[14]

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14 The reason for this is that, if offsetting is performed, then all non-dumped sales (i.e., negative values) will offset the margins on all of the dumped sales (i.e., positive values). It makes no difference mathematically whether the calculation of the final margin is based on comparing weighted average U.S. prices to weighted average normal values, or on comparing individual U.S. prices to weighted average normal values. In both cases, the sum total of the positive margins will be offset by the sum total of the negative values, and the results will be the same. This will always be the case no matter how many sales or product types are involved and no matter what their value or quantity. Exhibit 1 hereto provides a demonstration and proof that this will always be the case.

Figure 2
Calculation of Exporter's Final Overall Dumping Margin

Offsetting Not Used	**Offsetting Used**
1. **Comparison Method: Weighted Average Export Price** **(Figure 1, Column D)*** $\frac{5(4) + 4(6) + 2(0)}{252^{**}} = 17.46\%$	**3.** **Comparison Method: Weighted Average Export Price** **(Figure 1, Column D)** $\frac{5(4) + 4(6) + 2(-3)}{252} = 15.08\%$
2. **Comparison Method: Transaction-Specific Export Price** **(Figure 1, Column E)** $\frac{6 + 0 + 0 + 10 + 9 + 7 + 10 + 0 + 8 + 0 + 0}{252} = 19.04\%$	**4.** **Comparison Method: Transaction-Specific Export Price** **(Figure 1, Column E)** $\frac{6 + (-3) + (-2) + 10 + 9 + 7 + 10 + (-1) + 8 + (-2) + (-4)}{252} = 15.08\%$

* As noted in Figure 1, the quantity of every export transaction is one ton. When calculating the final overall margin using the weighted average export price method (Boxes 1 and 3), the numerator must be multiplied by the quantity of that product type sold in the export market (i.e., five tons for Product Type X; four tons for Product Type Y; and two tons for Product Type Z). Where the transaction-specific export price method is used (Boxes 2 and 4), such multiplication is not shown because the quantity of every transaction is one.

** The denominator is the sum of the individual export transaction prices for all products:
$24 + 33 + 32 + 20 + 21 + 18 + 15 + 26 + 17 + 22 + 24 = 252$

Thus, as Figure 2 demonstrates, if offsetting is not employed, the provisions of 19 U.S.C. § 1677f-1(d) have consequence and practical effect. If offsetting is employed, the provisions of § 1677f-1(d) are devoid of meaning and superfluous. Therefore, the provisions of the statute itself make clear that Congress intended to preclude the use of offsetting.

C. The United States and the WTO Panel Have Recognized the Truth of This Principle

The truth of the foregoing principle was expressly recognized by both the United States government and the WTO Panel in *United States – Zeroing* in conjunction with their analysis of Article 2.4.2 of the WTO Anti-Dumping Agreement, the provision corresponding to 19 U.S.C. § 1677f-1(d). Specifically, the United States government argued in *United States – Zeroing* that

> {i}f the offset requirement applies to both the average-to-average methodology and the average-to-transaction methodology, in both cases, non-dumped transactions would offset dumped transactions. Mathematically, the results of the two comparison methodologies would be identical. Despite a finding that average-to-transaction comparisons are appropriate, the result would be guaranteed to be the same as if average-to-average comparisons had been made.[15]

Likewise, the WTO Panel found that if offsetting was to be required in all circumstances, "the alternative asymmetrical comparison {(i.e., the weighted average normal value to individual U.S.

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15 See Opening Statement of the United States at the First Meeting of the Parties in *United States – Zeroing* (March 16, 2005) ("U.S. Opening Statement in *United States – Zeroing*") at 5, para. 13.

transaction price)} methodology would as a matter of mathematics produce a result that was *identical* to that of the first, average-to-average, methodology."[16]

However, both the United States government and the WTO Panel went on to apply this principle in a way that lacks any support in the Anti-Dumping Agreement and in the U.S. statute. Specifically, the United States government argued and the WTO Panel found that to achieve different results for the respective margin calculation methodologies, offsetting should be used when weighted average normal values are compared to weighted average U.S. prices, but not when weighted average normal values are compared to individual U.S. transaction prices.[17]

There is one fundamental problem with this analysis – there is no support for it in the provisions of either the Anti-Dumping Agreement or the U.S. statute. There is nothing in any of the provisions of the Agreement or the statute that would support the notion that offsetting is required for one margin calculation methodology but not for another. If the drafters of the Anti-Dumping Agreement or Congress intended this distinction in the use of offsetting, they would have specified it. Clearly, they did not. As a result, no such distinction may now be read into the Agreement or the statute. Rather, the only logical and, in fact, possible interpretation that would

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16 See Report of the Panel, *United States – Zeroing*, at para. 7.266 (underscoring supplied) (italics in original).

17 See U.S. Opening Statement in *United States – Zeroing* at 5, paras. 13-14; Report of the Panel, *United States – Zeroing*, at para. 7.266.

give effect to the applicable provisions of the Agreement and the statute is that offsetting may not be used for any of the margin calculation methodologies.

D. The Statute Cannot Be Construed to Contain a Meaningless Provision

It is well recognized that an interpretation of a statute that renders meaningless even a single word or phrase – much less an entire section – cannot be sustained. As the Supreme Court has repeatedly stated, "{i}t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.'"[18] The Supreme Court has also stated that "{i}t is our duty 'to give effect, if possible, to every clause and word of a statute,'" and "{w}e are thus 'reluctant to treat statutory terms as surplusage' in any setting."[19] The Federal Circuit has likewise recognized that "{t}he rules of statutory construction require a reading that avoids rendering superfluous any provision of a statute."[20]

Therefore, the statute in the instant case must be interpreted to give effect to the different comparison methods set forth in 19 U.S.C. § 1677f-1(d). Since the provisions of Section 1677f-1(d) have meaning only when dumping margins are calculated without the use of offsets – and

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18 TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (citations omitted).

19 Duncan v. Walker, 533 U.S. 167, 174 (2001) (citations omitted); see also Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) (holding that where Congress articulated two standards in the statute, using "traditional tools of statutory construction," it was clear that Congress did not intend the two standards to be the same).

20 Ishida v. United States, 59 F.3d 1224, 1230 (Fed. Cir. 1995).

are nullified if offsets are used – it is clear beyond all doubt that the statute requires the Department not to apply such offsets.

E. Conclusion

For the foregoing reasons, the statute clearly requires the Department not to apply offsets for non-dumped sales when calculating dumping margins based on average-to-average comparisons. Consequently, the Department may not make the change proposed in its March 6, 2006 request for comments without a change in the statute.

Respectfully submitted,

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On behalf of United States Steel Corporation

EXHIBIT 1

Exhibit 1

As shown in Figures 1 and 2 of the attached comments, the weighted average to transaction and weighted average to weighted average methodologies result in exactly the same dumping margin for a respondent when offsets are provided for non-dumped sales. This result is not dependent upon the specific example used in Figures 1 and 2. To the contrary, as demonstrated below, this result holds true regardless of the number of products sold, the number of transactions within a product, or the prices or quantities of the specific transactions involved.

As an initial matter, it is necessary to identify individual transactions and products by an index value in the equations used below. These index values are as follows:

Let i = index for individual transactions; and
j = index for individual products.

I. Calculation of the Dumping Margin Under the Weighted Average to Transaction Methodology When Offsetting Is Used

The calculation of the dumping margin using the weighted average to transaction methodology and applying offsets for non-dumped sales can be represented mathematically as follows:

$$(1) \qquad \frac{\sum_{i,j}[(NV_j - EXP_{i,j}) \times Q_{i,j}]}{\sum_{i,j}(EXP_{i,j} \times Q_{i,j})} \times 100 = \text{Overall Dumping Margin,}$$

where NV_j = Normal value for product j;
$EXP_{i,j}$ = Export price for transaction i, product j;
$Q_{i,j}$ = Export quantity for transaction i, product j; and
Σ = the symbol for summation across all transactions and products.

The numerator is the total value of the difference between the weighted average normal value and the individual export prices. The weighted average normal value does not vary by sale, only by product.

The denominator of Equation (1) is equal to the total value of all export transactions, which is the product of the transaction-specific export price times the transaction-specific export quantity summed across all export transactions and products.

II. Calculation of the Dumping Margin Under the Weighted Average to Weighted Average Methodology When Offsetting Is Used

The calculation of the weighted average to weighted average margin, when offsetting is used, can be represented in a similar manner:

(2) $$\frac{\sum_{j}(NV_j - WAEXP_j) \times Q_j}{\sum_{i,j}(EXP_{i,j} \times Q_{i,j})} \times 100 = \text{Overall Dumping Margin,}$$

where WAEXPj = weighted average export price for product j.

The denominator of this expression is equal to the total value of all export sales, the same as in Equation (1). The numerator is equal to the total value of the difference between the weighted average normal values and the weighted average export prices across all products. This value varies only by product, as the individual export sale information is incorporated into the product-specific weighted average export price.

III. Equality of the Dumping Margin Calculated Under the Two Methodologies When Offsetting Is Used

As shown in Figures 1 and 2 of the attached comments, when offsetting is used, the dumping margin will be identical for both the weighted average to transaction and the weighted average to weighted average methodologies. To generalize this point, only the numerator of Equations (1) and (2) must be shown to be identical, as the denominator is the same for both.

Beginning with the numerator of Equation (1), the first step is to separate the summation to add across all sales within a given product, j:

$$\sum_{j}\left(\sum_{i}(NV_j - EXP_{i,j}) \times Q_{i,j}\right)$$

Next, the price differences are arranged as the difference in the total value for product j as follows:

$$\sum_{j}\left(\sum_{i} NV_j Q_{i,j} - \sum_{i} EXP_{i,j} Q_{i,j}\right).$$

The second term within the parentheses is then multiplied and divided by Q_j – the total quantity of product j (because this is identical to multiplying by 1, the result does not change):

$$\sum_{j}\left(NV_j Q_j - \left(\left(\frac{\sum_{i} EXP_{i,j} Q_{i,j}}{Q_j}\right) Q_j\right)\right).$$

The second term within the parentheses is now equal to the product-specific weighted average export price, multiplied by that product's total quantity:

$$\left(\left(\frac{\sum_i EXP_{i,j}Q_{i,j}}{Q_j}\right)Q_j\right) = \text{WAEXP}_j \times \text{Q}_j$$

Simplifying the expression using this terminology yields:

$$\sum_j \left(NV_jQ_j - WAEXP_jQ_j\right)$$

Rewriting this by moving the quantity for product j (i.e., Q_j) outside the parentheses reveals the same expression as the numerator in Equation (2):

$$\sum_j \left(NV_j - WAEXP_j\right) \times Q_j .$$

The numerator of Equation (1) has thus been shown to be identical to that of Equation (2), proving the equality of the two margin calculation methodologies when offsets are provided for non-dumped sales. As demonstrated above, this principle holds true regardless of the number of transactions or products made by a respondent or the prices or quantities of the specific transactions involved.