No. 10-1433

In The
Supreme Court of the United States

UNITED STATES STEEL CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA AND TATA STEEL IJMUIDEN BV (FORMERLY KNOWN AS CORUS STAAL BV),
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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Petitioner United States Steel Corporation ("U.S. Steel") submits this Reply Brief in response to arguments raised by the United States (the "Government") and by Dutch steel producer Tata Steel Ijmuiden BV, formerly known as Corus Staal BV ("Corus").

In this case, the Court of Appeals for the Federal Circuit has sanctioned a methodology – offsetting – that grossly dilutes or eliminates the antidumping remedy expressly enacted by Congress.[1] In so doing, the Federal Circuit has overridden the express terms and plain language of an unambiguous statute and has rendered meaningless other statutory provisions that were enacted to effect an important change in U.S. law. There is absolutely no valid reason why the antidumping statute should not be enforced exactly as written and as Congress plainly intended.

As a result of the Federal Circuit's decision, foreign producers and exporters – including companies with a proven track record of dumping – will now be able to sell massive quantities of merchandise in the United States at less than fair value (*i.e.*, at dumped prices) without remedy. This will cause severe economic harm to a wide range of

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[1] Under offsetting, the U.S. Department of Commerce ("Commerce") grants a foreign producer or exporter an offset, or credit, for the non-dumped sales that it makes in the United States.

U.S. industries and their workers. Such a result is the exact opposite of what Congress intended.

A decision granting the Petition for a Writ of Certiorari is essential to restore the statute to what Congress expressly enacted and avoid the devastating impact of the lower court's plainly erroneous holding.

A. The Statute Is Not Ambiguous and the Term "Exceeds" Does Not Mean "Less Than"

Both the Government and Corus argue that the statute is ambiguous and, therefore, that the Federal Circuit properly afforded deference to Commerce's decision to offset dumped sales with non-dumped sales. Specifically, they contend that the term "exceeds" – contrary to its ordinary usage and every known dictionary definition – can properly be understood to mean "less than." They are wrong.

The section of the statute at issue is 19 U.S.C. § 1677(35)(A). This section defines the term "dumping margin" as the "amount by which the normal value {*i.e.*, the price in the foreign market} *exceeds* the export price {*i.e.*, the price in the United States}." The plain language and the ordinary meaning of the words that Congress used mandate that a "dumping margin" can occur only where normal value exceeds, *i.e.*, is greater than, U.S. price. Given this Court's bedrock principle that a

statute's plain language and ordinary meaning are to be given effect, *see* Pet. at 25-26,[2] it is clear that when Congress defined a dumping margin as the amount by which normal value "exceeds" U.S. price, it did not mean that a dumping margin could also be the amount by which normal value is less than U.S. price.

Because the statute provides that a dumping margin must be a positive amount (*i.e.*, the amount by which normal value is greater than U.S. price) and instructs that only "dumping margins" may be used in Commerce's calculations, the statute expressly prohibits the inclusion of negative amounts for non-dumped sales (*i.e.*, sales where normal value is less than U.S. price). Thus, the plain language of § 1677(35), standing alone, forbids offsetting. Significantly, prior to this case, this is the exact interpretation of the statute that was repeatedly adopted by Commerce and the Government in numerous cases and decisions. *See, e.g.*, Pet. at 12, 23; *Structural Steel Beams from Spain*, 67 Fed. Reg. 35482 (Dep't Commerce May 20, 2002) (final determ.) at Cmt. 15.

To the extent there can be any conceivable doubt regarding the meaning of § 1677(35), it is

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[2] Petition for Writ of Certiorari, No. 10-1433, filed by U.S. Steel on May 24, 2011 ("Pet.").

conclusively resolved by the statute's structure and context:

- The statutory section immediately preceding the definition of "dumping margin" in § 1677(35) defines the terms "dumped" and "dumping" to "refer to the sale or likely sale of goods at less than fair value." 19 U.S.C. § 1677(34) (2006). Reading this definition together with the definition of "dumping margin," the statute provides that dumping occurs when the normal value exceeds the U.S. price and a dumping margin is the amount by which the normal value exceeds the U.S. price. Therefore, any U.S. sale made at greater than fair value (*i.e.*, where normal value does not exceed U.S. price) is not a dumped sale and does not, under the statute's express terms, have a dumping margin.

- When the term "exceeds" is used elsewhere in the antidumping statute, it has its ordinary meaning of "greater than" and cannot possibly mean "less than." *See* Pet. at 27-28.

- Unless zeroing is used, other critical provisions of the antidumping statute, set forth in 19 U.S.C. §1677f-1(d)(1)(A)(i), that were expressly enacted to implement an important change in U.S. law are rendered meaningless. *See* Pet. at 29-30.

The legislative history and Congress' overarching purpose are equally conclusive. Indeed, prior to the current case, zeroing was used consistently by Commerce for decades, and its consistent use was known to Congress at the time that the statutory provisions at issue were enacted. *See United States Steel Corp. v. United States*, 621 F.3d 1351, 1362-63 (Fed. Cir. 2010) (Pet. at App. A, 27a-28a). By contrast, there is *no* legislative history showing that Congress ever considered, much less approved of, offsetting as an alternative to zeroing.

This Court has also recognized that the fundamental purpose of the antidumping law, as expressed by Congress, is to "protec{t} our industries and labor against a now common species of commercial warfare of dumping goods on our markets . . . until our industries are destroyed." *Eurodif v. United States*, 555 U.S. 305, 129 S. Ct. 878, 884 (2009) (citations omitted). The use of offsetting, which would afford a significant and unwarranted benefit to foreign companies at the expense of U.S. producers, is utterly inconsistent with this purpose.

Notwithstanding the above, the Government maintains that the statute is ambiguous. It cites to no legislative history, no customary usage or dictionary definitions, no inconsistent statutory provisions and no legislative purpose to justify giving the statute something other than its plain meaning. Its argument boils down to the mere

assertion that the term "exceeds" must be accepted as ambiguous and, as such, can properly be interpreted to mean "less than." Its position is indefensible.

According to the Government, U.S. Steel's plain language argument under § 1677(35)(A) falls short because the definition of "dumping margin" contained therein does not directly address the precise question at issue, "namely, what the dumping margin should be when the export price (say, $3) is higher than the normal value (say, $2)." Government's Brief in Opposition to Petition for Writ of Certiorari, Nos. 10-1433, 10-1439 (Aug. 19, 2011) ("Gov't Br.") at 14. But that is exactly what the statute addresses. The statute defines "dumping margin" as the amount by which the normal value exceeds the U.S. price. If the normal value does not exceed the U.S. price, then, under the express terms of the statute, there is no "dumping margin." Period.

The Government is also incorrect that the definition of "dumping margin" in § 1677(35) should not be read in the context of the definition of "dumping" in § 1677(34). Gov't Br. at 13. Relying on *Burgess v. United States*, 553 U.S. 124, 129 (2008), the Government contends that the meaning of the term "dumping" should not be incorporated into the term "dumping margin" because the definition of "dumping margin" does not repeat the term "dumping." But in *Burgess*, the Court emphasized the importance of considering the structure of the

statute and the context of the two definitions under review. 553 U.S. at 130, 131, n.3. Whereas the two definitions at issue in *Burgess* were separated by over 30 intervening provisions and there were other reasons to consider them separately, in this case, the two definitions are directly adjacent to one another in the statute's text and were plainly intended to be read together. Therefore, both the statute's structure and context – not to mention the ordinary meaning of the words Congress chose – demonstrate that it intended the definition of "dumping margin" to coincide with the definition of "dumping" and to exclude negative amounts.

Nor can the Government successfully argue that it is not highly relevant that the term "exceeds" is used elsewhere in the antidumping statute to mean "greater than." Gov't Br. at 15-16. While the Government may be able to argue that the contexts of the statute's provisions are different, it cannot show, and has not even attempted to show, why this difference matters or why it would lead anyone to conclude that "exceeds" in §1677(35)(A) can mean "less than" – the very opposite of every dictionary definition of that term. As this Court has emphasized, "{w}e have stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Bank v. Germaine*, 503 U.S. 249, 253-54 (1992).

It is also highly significant that the Government has failed to properly address U.S. Steel's point that, without zeroing, the critical provisions of 19 U.S.C. §1677f-1(d)(1)(A)(i) become meaningless. After extensive negotiations with U.S. trading partners, the United States agreed to revise U.S. law so that the "average-to-average" comparison method, and not the "average-to-transaction" comparison method, would be used in antidumping investigations like the one at bar. *See* Pet. at 29-30. Without zeroing, this critical change in U.S. law becomes meaningless because Commerce will always arrive at the same result regardless of whether the average-to-average method (now required) or the average-to-transaction method (now forbidden) is used. *Id.* The Government's response that it continues to use zeroing in other types of investigations is a non-answer. Gov't Br. at 17-18.

Regardless of what the Government does in other types of investigations, in the type of investigation that is at issue here, it is required to use the average-to-average method and not the average-to-transaction method. However, by using offsetting, it makes no difference which of these two methods is employed because the result is exactly the same. This is directly contrary to Congress' explicit requirement. Because the Government has had repeated opportunities to respond to this claim and has failed to do so each and every time, the only conclusion is that it has no response. In short, the requirement in the statute in § 1677f-1(d)(1)(A)(i)

has now been voided by dint of Commerce's statutorily indefensible decision to apply offsetting. This is yet another unassailable reason why the statute must be found to require zeroing.

Finally, Corus' claim that the Federal Circuit could properly abandon the accepted, ordinary meaning of the term "exceeds" in § 1677(35)(A) because to do so would be "more fair" or appropriate is utterly absurd. *See* Tata Steel Ijmuiden's Brief in Opposition, Nos. 10-1433, 10-1439 (Aug. 19, 2011) ("Corus Br.") at 12-13. It is the terms of the statute and Congress' clearly expressed intent that control, not any other party's sense of "fairness." Congress has recognized that dumping is a form of commercial warfare that, if left unchecked, can destroy American industries. *Eurodif*, 129 S. Ct. at 884. There is simply no reading of the statute or its legislative history to suggest that Congress intended the law to be interpreted in a manner that would pervert the plain language of the law for the sole purpose of providing a benefit to foreign firms who sell merchandise in this country at unfairly low prices. [3]

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[3] Corus' reference to the number of judges at the Federal Circuit who have rendered decisions consistent with its position is both irrelevant and misleading. *Timken v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), was the first Federal Circuit decision to find that the term exceeds could mean "less than." Zeroing was raised and upheld in numerous subsequent cases, and these panels were required to, and did, rely on *Timken* for the proposition that zeroing, while reasonable, was not

B. The Use of Offsetting Will Result in Enormous Commercial Harm to American Industries and Workers

Congress and this Court have recognized the importance of our country's antidumping laws in protecting U.S. industries and workers from severe economic harm. Bankruptcies, plant closures and the loss of U.S. jobs due to unfairly traded imports have all been well documented. *See* Pet. at 4. Without zeroing, the remedy that Congress intended is decimated, if not eliminated completely. Thus, zeroing is essential to ensure that the antidumping duties that are imposed reflect and address *all* of the injurious dumping that has taken place.

This point has not been lost on the U.S. Government. U.S. officials, including the U.S. Ambassador to the WTO, have made clear that the United States "would not accept a final Doha deal on rules {in the current round of trade talks} which did not sanction" its right to use zeroing in all antidumping cases. *WTO Reporter,* July 14, 2010; *see also Inside U.S. Trade,* Vol. 29, No. 10 at 17 (March 7, 2011) (stating that in the Doha round, the United States is demanding that zeroing be "explicitly allow{ed} ... in all antidumping

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statutorily mandated. *See* Fed. Cir. R. 35(a) ("only the court *en banc* may overrule a binding precedent").

proceedings"). Thus, there is clearly no basis to Corus' contention that this case raises only a minor technical issue that is not an important question of federal law or a matter of grave national interest. Corus Br. at 12, 15.

Corus' attempt to downplay the serious economic impact of offsetting is both incorrect and unseemly. *See* Corus Br. at 4-7. Corus is a firm that has repeatedly engaged in injurious dumping and has benefited enormously from offsetting. Corus has been found to sell hot-rolled steel at dumped prices (with margins as high as 4.80%) on at least four separate occasions,[4] and its dumping practices have been found to cause material injury to U.S. Steel and other domestic hot-rolled steel producers. USITC Pub. 3468, Inv. Nos. 701-TA-404-408 and 731-TA-898-908 (Final) (Nov. 2001). But as a result of offsetting, Corus will now be able to ship unlimited quantities of hot-rolled steel into this country at dumped prices causing injury to U.S. businesses and

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[4] This includes the investigation at issue in this case and three subsequent annual reviews conducted by Commerce. 69 Fed. Reg. 43801 (Jul. 22, 2004); 70 Fed. Reg. 18366 (Apr. 11, 2005); 72 Fed. Reg. 34441 (June 22, 2007). Corus' assertion that Commerce in 2007 decided to revoke the antidumping order on hot-rolled steel under the statutory "sunset" provision, *see* Corus Br. at 5, is also misleading since that revocation was based on the very decision that is being challenged in this case. *Certain Hot-Rolled Steel Products from the Netherlands,* 72 Fed. Reg. 35220 (Dep't Commerce June 27, 2007) (Final Results of Sunset Review).

workers with no duties whatsoever or any other negative repercussions.

Of the 12 antidumping duty orders that were part of Commerce's implementation of the decision to stop using zeroing and start using offsetting, two orders (including the one relating to Corus) were revoked completely. Thus, the U.S. hot-rolled industry and the U.S. steel wire rod industry are now exposed to massive dumping without any remedy.[5] In addition, a total of six producers were released from four other orders.[6] The release of these six firms – all of which are known sellers of dumped merchandise – creates gaping holes in Commerce's enforcement and destroys the level playing field the antidumping statute was intended to ensure. Moreover, for other foreign producers and exporters who remained subject to the orders, offsetting resulted in the reduction of the

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[5] In a subsequent implementation proceeding, Commerce revoked the antidumping duty order on warmwater shrimp from Ecuador, leaving this U.S. industry and its workers also completely exposed to unfairly traded imports. *See Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Ecuador*, 72 Fed. Reg. 48257 (Dep't Commerce Aug. 23, 2007) (notice).

[6] *See Implementation of the Findings of the WTO Panel in US – Zeroing(EC), Notice of Determination Under Section 129 of the URAA*, 72 Fed. Reg. 25261 (Dep't Commerce, May 4, 2007) (notice).

antidumping duty rates. Thus, Corus' statement that the use of offsetting altered the ultimate relief in only 2 out of 12 cases is flatly incorrect. *See* Corus Br. at 4. In any event, the ongoing harm to U.S. businesses due to offsetting is impossible to quantify since there is no way to know how many injured U.S. industries have decided not to go forward with antidumping investigations at all because of the uncertainty of relief caused by offsetting.

C. Commerce May Not Implement an Adverse WTO Decision That Is Contrary to U.S. Law

Corus also contends that this Court should be wary of granting certiorari in this case because any change in the implementation of the adverse WTO rulings involving zeroing would "cause political turmoil for the United States in the international trade arena." Corus Br. at 16.

In making its assertion, Corus overlooks two fundamental aspects of U.S. law that completely undercut its position. First, under the statutory framework for implementation of adverse WTO rulings, U.S. implementation is never mandatory. The Government always has the option of implementing only in part or not at all. 19 U.S.C. §§ 3533(f), 3538(b)(4) (2006). Second, under no circumstances may any implementation violate U.S. domestic law. 19 U.S.C. § 3512(a)(1)(2006) (*see* Pet. at App E at 154a). Because it is clear that the

antidumping statute explicitly prohibits offsetting, the implementation devised in this case to comply with the adverse ruling of the WTO is contrary to U.S. law and cannot be permitted.

CONCLUSION

For all of the above-stated reasons, U.S. Steel's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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