Nos. 10-1433 and 10-1439

IN THE

Supreme Court of the United States

UNITED STATES STEEL CORPORATION,

Petitioner,

and

NUCOR CORPORATION,

Petitioner,

v.

UNITED STATES, ET. AL.,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TATA STEEL IJMUIDEN BV

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RULE 29.6 STATEMENT

Tata Steel IJmuiden BV is wholly owned by Tata Steel Nederland BV, which is wholly owned by Tata Steel Netherlands Holding BV, which in turn is owned by Tata Steel Global Holdings Pte. Limited whose ultimate parent is Tata Steel Limited, an Indian company whose shares are listed on the Bombay Stock Exchange and the National Stock Exchange of India. Two companies exist which own 10% or more of Tata Steel Limited's outstanding stock: Tata Sons Limited and Life Insurance Corporation of India.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Cited Authorities

Cited Authorities

ACTS AND AGREEMENTS

Cited Authorities

Page

STATUTES

BRIEF IN OPPOSITION

The petitions filed in this case present neither a novel nor a particularly important question of law: whether the Commerce Department's interpretation of a technical calculation provision of the U.S. antidumping law should be afforded the deference normally afforded such reasonable agency interpretations of statute under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).[1] The decision below affirmed straightforward efforts to comply with international law obligations by Executive Branch agencies, acting pursuant to domestic law and in consultation with Congress, and should not be disturbed by this Court.

In order to implement its obligations under international agreements establishing the World Trade Organization ("WTO") – obligations Congress has implemented by statute – the U.S. Trade Representative ("USTR") directed the Secretary of Commerce to take the steps necessary to discontinue the practice of "zeroing" in calculating dumping margins in antidumping investigations.[2] This practice, by which negative dumping

1. Separate petitions were filed on May 24, 2011, by United States Steel Corporation ("U.S. Steel") and Nucor Corporation ("Nucor").

2. Dumping exists where the U.S. prices for the category of merchandise under investigation are shown to be less than the "normal values," *i.e.*, less than the prices of comparable merchandise in the producing country or in a foreign third-country market or less than the constructed value of the merchandise (costs plus profit). The dumping margin is determined by subtracting the net U.S. price from the net normal value of comparable merchandise. Where the subtraction yields a negative value,

margins for particular products are eliminated from an aggregate calculation of a weighted average dumping margin for the entire class of merchandise at issue, had been widely criticized as distorting U.S. antidumping determinations and was found to violate U.S. obligations under international trade agreements. The impact of the Commerce Department's elimination of zeroing in determinations in antidumping investigations is relatively modest – it will not, by definition, result in an increase in cases where dumping is found because it eliminates negative dumping margins from the calculation. And in practical terms, it *has* had little real world impact in increasing the number of cases in which no dumping is found. Petitioners and their Amici Curiae grossly exaggerate the supposed adverse effect of the Executive Branch's implementation of the United States' WTO obligations, by ignoring the Commerce Department's actual history of cases after the change in policy, focusing instead on hypothetical and wholly speculative possibilities.

The underlying issue presents a rather pedestrian application of *Chevron*. Applying that well-established doctrine, the Federal Circuit concluded that the Commerce Department's elimination of zeroing in antidumping calculations – in order to implement a WTO decision and avoid potential retaliatory measures – was entitled to deference. The Federal Circuit has numerous times held that the relevant statutory language is ambiguous. That court also decided that the Commerce

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such that the U.S. price is higher, the practice of zeroing sets the negative number to zero when that value is aggregated with other values in the calculation of an overall weighted average dumping margin.

Department's interpretation of the statute, which focuses on the aggregate effect of dumping, rather than on any individual transaction, is a reasonable effort to balance the statute's purpose with U.S. international trade obligations. Especially given the dramatic effect of failing to comply with those obligations – including probable retaliatory measures by WTO-signatory states – this Court should be circumspect when considering further review.

Respondent Tata Steel IJmuiden BV ("Tata Steel"), formerly known as Corus Staal BV ("Corus"), respectfully requests that this Court deny the petitions for writ of certiorari. The issue presented was adequately addressed by the Federal Circuit – a court that regularly deals with issues arising under the U.S. antidumping law. And in light of the consistent voices of the Executive Branch and Congress in a matter of international trade affairs, the decision of the Federal Circuit should be permitted to stand.

REASONS WHY THE PETITIONS SHOULD BE DENIED

I. PETITIONERS' EXPRESSIONS OF ALARM CONCERNING POSSIBLE POLICY OR ECONOMIC CONSEQUENCES ARE BASELESS

The Petitioners and Amici Curiae have presented no persuasive arguments that adverse policy or economic consequences will occur if the decisions below are left undisturbed. The pictures they paint are purely speculative. In contrast, the actual facts demonstrate that the effect of the Commerce Department's methodological change has been minimal, and is expected to stay so.

Perhaps most important is that the facts of the present case actually refute Petitioners' argument that, without the use of zeroing, the antidumping law will be eviscerated. The adverse WTO decision that spawned this case resulted in the Commerce Department recalculating the dumping margins in 12 antidumping investigations.[3] Upon recalculation of the investigation margins, without zeroing, the Commerce Department revoked only two antidumping duty orders; the other 10 antidumping duty orders stayed in place, at least in part. 72 Fed. Reg. at 25,262-63; 72 Fed. Reg. at 54,640.[4] Hence, as a practical matter, the change in methodology altered the ultimate relief that had been afforded to domestic industries in only 2 of 12 cases.

Further, as to the antidumping duty order against hot-rolled steel from the Netherlands here at issue (one of the two orders which was revoked in the contested May 2007 decision), the dumping margin originally calculated for Corus was a mere 2.59% – barely above the 2.0% *de*

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3. *Implementation of the Findings of the WTO Panel in U.S. Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261 (Dep't of Commerce May 4, 2007) (11 investigations); *Implementation of the Findings of the WTO Panel in US-Zeroing (EC); Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils From Italy*, 72 Fed. Reg. 54,640 (Dep't of Commerce Sept. 26, 2007).

4. For three of the 10 orders that stayed in effect, one respondent was released from each order; as to one other order, three respondents were released from the order.

minimis threshold which would have left the U.S. industry with no relief in the first instance.[5] Antidumping duties can range as low as 2.0%, to well over 100%; thus, order revocation – when the order was based on a rate of 2.59% – is a barely perceptible harm. Furthermore, as a result of a Commerce Department five-year sunset review decision later in 2007, the antidumping duty order on hot-rolled steel from the Netherlands was revoked under a different statutory provision. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of the Sunset Review of Antidumping Duty Order and Revocation of the Order*, 72 Fed. Reg. 35,220 (June 27, 2007). Moreover, and very significantly, neither Petitioner claims that it has suffered any serious harm as a result of the revocation of the antidumping duty order on hot-rolled steel from the Netherlands.

Rather, both Petitioners spend substantial time discussing the supposed dangers to U.S. industries caused by imports from non-market economy countries, such as China. However, neither of the petitions identifies a single antidumping duty order covering imports from China that has either been revoked or not issued due to the Commerce Department's having ended its zeroing practice in investigations in early 2007. In point of fact, during the period March 2, 2007 to the present, the Commerce Department has completed 62 antidumping investigations and has rendered final affirmative findings of dumping, and has thus issued antidumping duty orders, in 61 of the

5. *See* 19 U.S.C. §§ 1673b(b)(3) (2006) and 1673d(a)(4) (2006), defining *de minimis* as below 2% in antidumping investigations and requiring that *de minimis* margins be disregarded.

62 investigations.[6] In other words, in only one of the 62 antidumping investigations conducted subsequent to the change in policy, even without zeroing, has Commerce made a finding of no dumping and thus not issued an order. Moreover, in that one case, there is no evidence to suggest that there would have been a different result if zeroing were employed. Notably, 38 of the 61 antidumping duty orders were issued against imports from China. Hence, it appears that, despite the Commerce Department's change in practice with respect to zeroing, the antidumping law is being robustly applied against imports from China and other countries. Obviously, the cessation of zeroing has not eviscerated the U.S. antidumping law.

Amicus Curiae the Southern Shrimp Alliance cites two examples of order revocations as a result of two adverse WTO decisions on zeroing other than the one that led to the Commerce Department determination challenged in this case. One order revocation was complete – as to shrimp from Ecuador, while the other was partial – only as to two Thai exporters. However, the fact that shrimp from Ecuador and from two Thai exporters can now be imported without the payment of additional dumping duties does not elevate the zeroing issue to one of supreme national importance.

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6. The new methodology was first utilized in an ongoing investigation on March 2, 2007. *See Final Determination of Sales at Less than Fair Value: Certain Activated Carbon From the People's Republic of China*, 72 Fed. Reg. 9,508 (Dep't of Commerce Mar. 2, 2007), *as amended* at 72 Fed. Reg. 15,099. Tata Steel has prepared a table, listing all antidumping duty orders and negative investigation decisions beginning with *Certain Activated Carbon from China*, and through August 15, 2011. The table is attached as Appendix 1.

The supposed possible harm focused on by the Coalition for Fair Lumber Imports is also highly speculative and purely hypothetical. First, while the brief notes that the WTO Dispute Settlement Body ultimately rejected the Commerce Department's use of zeroing in the softwood lumber antidumping investigation, the brief does not state whether a recalculated margin without zeroing would have led to order revocation. Second, as the brief acknowledges, the softwood lumber antidumping dispute between the United States and Canada was resolved via a settlement that will be in effect until 2013. It is thus pure speculation for the Coalition to assert: a) that dumping will recur if and when the settlement expires, b) that the absence of zeroing will result in a finding of no dumping/no remedial order, and c) that the U.S. industry will be able to prove the injury necessary to enter an antidumping duty order. Certainly, a writ of certiorari cannot be granted based on such speculation.

The United Steelworkers[7] – which was one of the petitioners in the investigation that led to issuance of the antidumping duty order covering hot-rolled steel from the Netherlands – points to no specific harm from revocation of that order. Such an omission is telling indeed. It highlights the fact that, notwithstanding the hypothetical possibility that some modest degree of economic harm may flow from the Commerce Department's new practice, no harm can be shown in this case.

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7. The full name of the Amicus Curiae is the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC.

II. THE COURT BELOW CORRECTLY FOUND THAT THE COMMERCE DEPARTMENT ADOPTED A PERMISSIBLE INTERPRETATION OF THE ANTIDUMPING LAW

Stripped of their effort to inject speculative policy and economic considerations, Petitioners' case rests entirely on a dictionary-based contention that the antidumping statute requires the use of zeroing in the computation of a respondent's weighted average dumping margin. That contention is inconsistent with the principle of deference to an administrative agency's determination on matters within its field of expertise.

A. The Challenged Statutory Interpretation Is Permissible

Petitioners argue that the statute is unambiguous and that negative margins are not contemplated to be used in the weighted average dumping margin calculation. This argument is inconsistent with repeated decisions of both the U.S. Court of International Trade ("CIT") and the Federal Circuit. Both courts, on multiple occasions, since as early as 1987, and as recently as during the last several months, in *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) and *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011),[8] have held that a plain reading of the statute is inconclusive, and that the statutory language is ambiguous and susceptible to more

8. *See, e.g., Serampore Industries Pvt. Ltd. v. United States Dep't of Commerce,* 675 F. Supp. 1354 (Ct. Int'l Trade 1987); *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004) ("*Timken*"); *Corus Staal BV v. Dep't of Commerce,* 395 F.3d 1343 (Fed. Cir. 2005) ("*Corus Staal*").

than one interpretation. Indeed, the Federal Circuit's jurisprudence on the zeroing issue is fulsome.

With one exception,[9] every Judge currently in regular active service on the Federal Circuit has had an opportunity to consider the issue of zeroing, as have four of the court's five current Senior Judges.[10] The conclusions have all been the same. Not a single Federal Circuit Judge has dissented from the holdings on zeroing. While some opinions have simply relied on precedent, many others have addressed the zeroing issue at length. Notably, the panels in the seminal decisions – *Timken* and *Corus Staal* – plus the panel herein, included Federal Circuit Judges Newman, Bryson, Prost, Lourie, Linn and Dyk, as well as Senior Circuit Judges Mayer and Plager. Hence, six of the Federal Circuit's ten Judges in regular active service and two of the Federal Circuit's five Senior Judges have weighed in during the key decisions on this issue.

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9. The exception is Circuit Judge Reyna, who has only recently been sworn in as a Federal Circuit Judge.

10. *See, e.g., Timken* (Newman, Bryson & Prost, JJ.); *Corus Staal* (Mayer, Plager & Prost, JJ.); *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007) (Rader, Bryson & Moore, JJ.); *NSK Ltd. v. United States*, 510 F.3d 1375 (Fed. Cir. 2007) (Lourie, Dyk & Prost, JJ.); *SKF USA Inc. v. United States*, 537 F.3d 1373 (Fed. Cir. 2008) (Mayer, Schall & Linn, JJ.); *Koyo Seiko Co. v. United States*, 551 F.3d 1286 (Fed. Cir. 2008) (Michel, Friedman & Walker, JJ.); *U.S. Steel Corp. v. United States*, 621 F.3d 1351 (Fed. Cir. 2010) (Lourie, Linn & Dyk, JJ.); *SKF USA Inc. v. United States*, 630 F.3d 1365 (Fed. Cir. 2011) (Gajarsa, Linn & Dyk, JJ.; Judge Linn partially dissenting on a different issue); *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) (Linn, Plager & Prost, JJ.); *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011) (Dyk, Moore, O'Malley, JJ.).

When the Federal Circuit first addressed the issue of zeroing, it grappled with the meaning of "exceeds" as used in the antidumping law, at 19 U.S.C. §§ 1677(34) and (35). In *Timken*, it was argued, as it is here, that the following provisions require the use of zeroing:

> **(A) Dumping margin**
>
> The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.
>
> **(B) Weighted average dumping margin**
>
> The term "weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

19 U.S.C. §§ 1677(35)(A) & (B)(2006). It was also urged (as it is here) that the word "exceeds" must be read to mean "greater than." Moreover, the Federal Circuit was asked to consider the ordinary dictionary definition of the term "exceeds." *See Timken*, 354 F.3d at 1341-42.

The Federal Circuit, however, upon examining the statutory language in context, concluded that:

> Recognizing this as a close question, we are reluctant to find these dictionary definitions so clear as to compel a finding that Congress

> expressly intended to require zeroing. Even using the above "greater than" [dictionary] definitions, the statute does not plainly require consideration of only those dumping margins with a positive value. At least in a mathematical context, "exceeds" does not unambiguously preclude the calculation of a negative dumping margin. . . . Rather, the word "exceeds" could arguably allow for negative dumping margins because it guides the manner in which to set up the mathematical equation—x "exceeds" y = x-y. . . . Accordingly, we conclude that Congress's use of the word "exceeds" does not unambiguously require that dumping margins be positive numbers.

354 F.3d at 1341-42.

Notably, the Federal Circuit often must determine how to interpret specific words in various contexts, since such analyses lie at the heart of so many of the patent cases which that court considers. Furthermore, both the Federal Circuit and the CIT are specialized courts that routinely address the technical nuances of the antidumping law, and the Commerce Department is the master of the antidumping law. The antidumping law is complex and technical; mathematical, economic, and accounting issues form its core. This Court has recognized that ordinary dictionary meanings are not always the correct meanings of words used in particularized statutory contexts. *See Piedmont & Northern Ry. Co. v. Interstate Commerce Comm'n*, 286 U.S. 299, 311 (1932) ("[T]he purpose of the statute . . . requires a broader and more liberal interpretation than that to be drawn from mere dictionary

definitions of the words employed by Congress.") (citation omitted). Thus, given the Federal Circuit's expertise and the numerous times it has consistently interpreted this very word in this very context, Respondent submits that interpretation of the word "exceeds" in the context of one provision of the antidumping law is not an important question of federal law warranting an opinion from this Court.

Moreover, there is good reason in the antidumping context to interpret "exceeds" in 19 U.S.C. §§ 1677(34) and (35) to mean "greater than or less than" or as encompassing both negative and positive values. The U.S. antidumping statute is remedial in nature. *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) ("[T]he antidumping laws are remedial not punitive."). It allows for the imposition of equalizing antidumping duties, but only where overall dumping has been found, at above a *de minimis* level, and where such dumping is found to cause substantial injury to a U.S. industry. The law also clearly contemplates that some transactions may be made at dumped prices, others may not be dumped, and others may be dumped at very low (*de minimis*) levels. It further recognizes that some dumping may not be injurious. Hence, there is no absolute requirement that dumping duties be imposed merely because some individual sales are dumped.

In such a statutory framework, it is fully appropriate and by no means incorrect – from a policy perspective – to allow negative margins to carry their full mathematical weight. Doing so may mean that some weighted average margins are lower than they otherwise might have been. However, many aspects of the Commerce Department's

intricate margin calculation methodologies can mean that margins might be lower or higher than they otherwise might have been. Clearly, therefore, the end result of a higher or lower margin should not drive the methodology. Rather, the driver must be a fair calculation that is consistent with the statutory language and purpose.

Giving full mathematical weight to negative margins (or providing "offsets" as the Petitioners prefer to phrase it) is certainly fair. Indeed, several judges have commented that to do so may be more fair than to use zeroing.[11] The statute also expressly permits some dumping to be disregarded. Where the weighted average dumping occurs at an overall *de minimis* level (below 2% in investigations), even though some transactions have been dumped, or dumped at higher levels (or higher margins), the ultimate answer is that no dumping has occurred in the statutorily cognizable sense, and no antidumping duty order will be imposed. *See* 19 U.S.C. § 1673d(a)(4), directing the Commerce Department to disregard any *de minimis* weighted average dumping margin, and 19 U.S.C. § 1673b(b)(3), defining *de minimis* as less than 2%. Hence, to allow negative margins to affect the overall result is by no means inconsistent with the statutory purpose.

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11. *See U.S. Steel Corp. v. United States*, 637 F. Supp. 2d 1199, 1213-14 (Ct. Int'l Trade 2009) (Barzilay, J.: a non-zeroed methodology is "arguably more fair"), *aff'd*, 621 F.3d 1351 (Fed. Cir. 2010); *Corus Staal BV v. Dep't of Commerce*, 259 F. Supp. 2d 1253, 1263 (Ct. Int'l Trade 2003) (Restani, J.: describing zeroing as "manipulating the data of potentially equalizing sales"), *aff'd*, 395 F.3d 1343 (Fed. Cir. 2005); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1149-50 (Ct. Int'l Trade 1996) (Pogue, J.: noting that zeroing "introduces a statistical bias").

Thus, in an antidumping investigation, the Commerce Department's current methodology permits the level of dumping to be calculated using a true mathematical average, taking into account the actual mathematical results of all of the pricing comparisons made. The old method skewed the math by converting negative results for the equation, normal value minus U.S. price, to zeroes. Petitioners have failed to show how the term "exceeds," when used in the context of a determination of whether there is overall dumping, mandates that negative values be converted to zeroes.

Petitioners place substantial reliance on their contention that, in the statutory provision concerning antidumping suspension agreements in which the exporter agrees to eliminate completely sales at less than fair value – a provision that has almost never been used – it is difficult to argue that the word "exceeds" means anything other than "is greater than." Even if that contention were to be accepted, it is not logical to conclude that the same word can never have a different meaning in an entirely different context. *See Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 575-76 (2007) ("There is, then, no 'effectively irrebuttable' presumption that the same defined term in different provisions of the same statute must 'be interpreted identically.' Context counts.") (citation omitted); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) ("'[T]he meaning [of the same words] well may vary to meet the purposes of the law[.]'") (citation omitted) (*alteration in original*); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) ("[T]he term 'employees' may have a plain meaning in the context of a particular section – not that the term has the same meaning in all other sections and in all other contexts.").

In the present case, the meaning of "exceeds" is to be interpreted in the context of the statutory obligation to determine an overall weighted average dumping margin for each respondent (exporter or producer). Another aspect of the context is the WTO ruling finding that the computation of such a weighted average dumping margin requires *full* consideration of the extent to which *each* sale in the United States is priced above or below its normal value, a ruling that the USTR directed the Commerce Department to implement. In such a context, the court below found it permissible for the Commerce Department not to be constrained either by a dictionary definition of "exceeds" or by the use of that word in other provisions of the antidumping law. In contrast, the Petitioners have no explanation of how their rigid interpretation of "exceeds" would be consistent with computation of a non-distorted weighted average dumping margin.

Indeed, in opining on this question in this case, the CIT noted that a computation without zeroing yields an arguably fairer comparison than one using zeroing, because a non-zeroed computation focuses on a respondent's overall pricing behavior. *See U.S. Steel Corp.*, 637 F. Supp. 2d at 1213-15. Thus, the CIT concluded that the new non-zeroed method does not offend the purpose of the antidumping law, which is to level the playing field between subject imports and the U.S. industry. Moreover, the court found that the new method does not eviscerate the statute, but instead merely alters one aspect of the calculation methodology. *Id.* at 1213. It is this latter point, in particular, that highlights why this Court should not grant a writ of certiorari – a mere methodological change to one aspect of the complex antidumping calculation is neither an important question of federal law nor a matter of grave national interest.

B. By Statute, The Policy Decision Whether To Implement A WTO DSB Ruling Is Conferred On The Executive And Legislative Branches To Make, Through The Procedure That Was Followed In This Case

The petitions for certiorari seek to overturn determinations made by the USTR, and the Commerce Department, after statutorily required consultation with the Congress, to implement a ruling by the Dispute Settlement Body ("DSB") of the WTO. While leaving the Federal Circuit's decision intact would not have adverse consequences, the opposite is not true – to disturb the decision would be to cause political turmoil for the United States in the international trade arena.

The United States is a signatory to the Agreements establishing the World Trade Organization, including the Antidumping Agreement[12] and the Dispute Settlement Understanding ("DSU").[13] The United States' obligations under those Agreements were incorporated into U.S. law by enactment in 1995 of the Uruguay Round Agreements

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12. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Org., Annex 1A, Legal Instruments – Results of the Uruguay Round, *reprinted in* 33 I.L.M. 1125, 1141, 1154 (1994).

13. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, *reprinted in* 33 I.L.M. 1125, 1126 (1994).

Act ("URAA").[14] The substantive obligations of the WTO Agreements are binding on the United States, therefore, to the extent that: (a) they are embodied in provisions of the URAA, or (b) the United States implements a ruling made pursuant to the DSU.

Pursuant to the DSU and the URAA, the United States had several options as to how it would respond to the WTO ruling that the practice of zeroing in antidumping investigations is inconsistent with the provisions of the WTO Antidumping Agreement. It could have chosen not to cease the practice of zeroing. Had it done so, it could have offered trade compensation to other WTO Members or it could have accepted other WTO Members' trade retaliation. Alternatively, it could have chosen, as it did in this case, to implement the WTO ruling by abandoning the practice of zeroing and by changing the results of antidumping investigations in which zeroing had been used.

The URAA, however, is very explicit as to what steps need to be taken if the United States determines to implement a WTO ruling. Congress has, in the WTO implementation process, assigned to the Executive and Legislative Branches, various policy issues for analysis and resolution. Here, the procedure for executive/legislative consultation to evaluate such policy considerations was indisputably followed, not once, but twice, in the Section 123 consultations[15] concerning the promulgation of the

14. Uruguay Round Agreements Act, Pub. L. No. 103-465; 108 Stat. 4809 (1994) (enacted H.R. 5110; 103 enacted H.R. 5110 (Dec. 8, 1994)).

15. 19 U.S.C. § 3533(g) (2006).

Commerce Department's new investigation methodology for computing dumping margins, and in the Section 129 consultations[16] concerning implementation of the WTO decision with respect to the specific antidumping proceedings involved. No party hereto disputes that these consultation processes were conducted here.

Rather, the dispute relates to the choices made. But the decision on how to respond to the WTO ruling was quintessentially a policy decision. It is therefore appropriately made by the political branches – the Executive Branch and the Congress. As the Federal Circuit has explained, the Congress, in the URAA:

> has authorized the United States Trade Representative, an arm of the Executive Branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation.[17]

This is clearly correct. The decision whether and how to implement a ruling of an international body under an international agreement to which the United States is a signatory turns on considerations that are peculiarly appropriate for the Executive and Legislative Branches. These considerations include the trade policy of the United States, relations with our trading partners and the economic impact of implementation – or failure to implement – on U.S. producing and importing industries

16. 19 U.S.C. § 3538(b) (2006).

17. *Corus Staal*, 395 F.3d at 1349 (citations omitted).

and on U.S. consumers. As to such matters, the appropriate judicial approach is that "{w}e will not attempt to perform duties that fall within the exclusive province of the political branches . . . ."[18]

Petitioners obviously disagree with the conclusions reached by the Executive and Legislative Branches on the policy issues, which resulted in the USTR's determination to instruct the Commerce Department to implement the WTO ruling. But those policy issues have been resolved by the branches of government with responsibility for such resolution, using the procedures established by law to do so. Therefore, absent a violation of U.S. law (and here there has been no such violation), disagreement with or concern about the resolution of those policy issues cannot be a basis for this Court to accept these petitions.

C. Chevron Deference Is Owed To The Commerce Department And The U.S. Trade Representative

As discussed above, the word "exceeds" as used in the antidumping law is ambiguous. The statutory context supports the Commerce Department's current interpretation. This Court's precedent instructs the judiciary to yield to an agency's reasonable interpretation of an ambiguous statute. *See Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984). Importantly, the Commerce Department's interpretation was also vetted by the U.S. Trade Representative, to whom even more deference is owed in the realm of international affairs. *See Gilda Indus. v. United States*, 622 F.3d 1358, 1363 (Fed.

18. *Id.*

Cir. 2010) ("[T]his court affords substantial deference to decisions of the Trade Representative implicating the discretionary authority of the President in matters of foreign relations."). The fact that the Commerce Department has previously interpreted the statute differently in no way diminishes the deference due to the agency, as long as the agency provides a reasoned and sufficient explanation for its change in interpretation. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("*Brand X*"). A desire to comply with U.S. international obligations is certainly a reasonable explanation for a change in policy.[19] It is particularly reasonable when supported by 20 years of U.S. judicial interpretation of the relevant statutory language as neither requiring nor prohibiting zeroing. Clearly, it was more than reasonable for the Commerce Department to rely on such a long line of consistent judicial interpretations in revisiting the zeroing issue in light of more recent international obligations. Accordingly, this Court's *Chevron* principles support denial of the Petitioners' requests.

In this respect, this case is analogous to the situation in *United States v. Eurodif S.A.*, 555 U.S. 305, 129 S. Ct. 878 (2009) – the *only* antidumping case ever decided by this Court. Therein, the Court recognized that 19 U.S.C. § 1673:

> simply does not speak with the precision necessary to say definitively whether it applies

19. This Court held in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118, 2 L. Ed. 208 (1804), that, whenever possible, courts and agencies should interpret U.S. law in a manner consistent with international obligations.

> [to the facts of the *Eurodif* case].
>
> This is the very situation in which we look to an authoritative agency for a decision about the statute's scope, which is defined in cases at the statutory margin by the agency's application of it, and once the choice is made we ask only whether the Department's application was reasonable.

129 S. Ct. at 888.

In *Eurodif*, as here, the Commerce Department had changed its policy. Citing *Brand X*, this Court explained that a change in policy did not affect the application of *Chevron* deference, so long as a reasoned explanation for the change was provided. *Eurodif*, 129 S. Ct. at 886. Notably, in *Eurodif*, the CIT and the Federal Circuit disagreed with the Commerce Department's interpretation. Here, however, the Commerce Department's two reviewing courts not only upheld the agency, they have consistently held that the statute is ambiguous. Respondent submits that when three authoritative specialists agree that a statute is ambiguous, deference is particularly appropriate.[20]

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20. It is true that the Commerce Department, prior to 2007, had a consistent policy of zeroing. However, in no rule or regulation had the Commerce Department ever stated that the statute requires zeroing. Rather, only in briefs in litigation was such a position taken by the Commerce Department. *See* Nucor Petition at 4, 11, 25 (citing government litigation brief); U.S. Steel Petition at 12, 23 (citing government litigation brief). Litigation positions are entitled to less deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988). Moreover, as discussed herein, agencies may change their policies when it is reasonable to do so.

While a change in Commerce Department policy was at issue in both *Eurodif* and herein, the similarity between the two cases ends there. In *Eurodif*, national security and energy policy were implicated. Four government agencies sought review by this Court. Here, in contrast, the issue boils down to a question of math, and whether the Commerce Department is owed traditional *Chevron* deference when it decides to perform one aspect of the complicated antidumping calculation methodology in a manner consistent with years of Federal Circuit precedent, and consistent with U.S. international treaty obligations. The answer is simple and does not require intervention by this Court – classic *Chevron* deference is owed.

CONCLUSION

For the reasons stated above, Respondent respectfully submits that the petitions should be denied. This Court should not interpose its judgment to supplant that of the Executive and Legislative Branches in matters of policy and economics. The federal law at issue is a narrow one, involving interpretation by the agencies of an ambiguous statutory provision, and the calculation methodology implicated is but one small technical aspect of the administering agency's interpretation of that law. Review by this Court is not warranted.

Respectfully submitted,

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Dated: August 19, 2011

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