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November 7, 2003

Via HAND DELIVERY

The Honorable James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th St. and Constitution Ave. N.W.
Washington, D.C. 20030

Attn: Section 201 Duties

Re: **Rebuttal Comments on Treatment of Section 201 Duties in Antidumping Calculations**

Dear Assistant Secretary Jochum:

On behalf of Corus Group plc we submit the following rebuttal comments to the request of the Department of Commerce for comment on the treatment of Section 201 duties under 19 U.S.C. §§ 1677a(c)(2)(A) and (d). The Department's request for comment was made September 9, 2003 (68 Fed. Reg. 53104) and parties filed comments on October 9, 2003. The Department extended the deadline for rebuttal comments to November 7, 2003. (68 Fed. Reg. 60079, October 21, 2003). We have also have enclosed six copies of these rebuttal comments, as well as a copy of this submission on diskette.

I. Proponents of Deduction Are Incorrect in Asserting That the Antidumping Statute Requires Deduction of Section 201 Duties

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

Proponents of deduction assert that the statute is clear that Section 201 duties must be deducted from export price as "U.S. import duties," "costs," or "expenses of selling in the U.S. market."[1] In arguing that the statute is clear, proponents are asking Commerce to accept an

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[1] *See*, *e.g.*, Comments filed by Skadden, Arps LLP on behalf of U.S. Steel (October 9, 2003) (hereinafter "Skadden") at 2-6; Comments filed by Stewart & Stewart on behalf of

interpretation of the statue that has been rejected in every court review of the Department's refusal to deduct remedial duties. As opponents of deduction have documented in detail, the courts consistently have held that the term "U.S. import duties" has no precise meaning under the statute and that the Department has the discretion to interpret the term consistent with the purpose of the statute.[2] Likewise, the courts have upheld Commerce's rejection of remedial duties as costs or expenses. Proponents have no basis, therefore, in stating that the statute requires deduction.

B. The Nature of Section 201 Duties Distinguishes Them From "U.S. Import Duties"

Proponents further assert that the term "U.S. import duties" must be read to encompass any duty assessed upon entry. Again, such an interpretation is squarely in contrast to well-established court precedent that antidumping and countervailing duties lie outside the term "U.S. import duties." Much has been made by proponents of the fact that the Section 201 duties appear in the HTS.[3] Of course they do. The world must be put on notice what the duties are, and Customs must have an efficient means of collecting the duties. If anything, as opponents have noted, the fact that the duties appear in Chapter 99 of the HTS signals that they are not normal import duties.

The salient feature of Section 201, though, is that Section 201 duties are a rare safeguard imposed only after a finding of the International Trade Commission that increased imports cause or threaten serious injury to the domestic industry -- the highest standard of injury under U.S. trade law. Section 201 duties are an extraordinary remedy authorized by Art. XIX of the GATT and the WTO Agreement on Safeguards, together which, under limited circumstances, allow a WTO Member to derogate temporarily from WTO obligations. The fact that a Section 201 remedy may be imposed only in compliance with the detailed rules of the Agreement on Safeguards is proof unto itself that Section 201 duties are not ordinary import duties.

Also obvious is that Section 201 duties are not normal import duties within the WTO structure. Import duties are subject to tariff bindings, while special remedial duties (i.e., antidumping duties, countervailing duties, and safeguard duties) may be imposed, consistent with WTO rules, without violating tariff bindings.

International Steel Group, Inc. and the United Steelworkers of America (October 9, 2003) (hereinafter "Stewart") at 3.

[2] *See* Comments filed by Steptoe & Johnson LLP on behalf of Corus Group plc (October 9, 2003) at 3-5.

[3] *See*, *e.g.*, Comments filed by Wiley Rein & Fielding LLP on behalf of the Long Products Coalition, Nucor Corporation, and the Rebar Trade Action Coalition (October 9, 2003) (hereinafter "Wiley") at 4; Stewart at 5.

II. Deduction of Section 201 Duties Would Violate the Section 201 Statute

A. Deduction Would Impermissibly Extend the Life of Section 201

Due to the retrospective nature of the U.S. antidumping statute, the effects of deduction of Section 201 duties would be felt long after the expiration of the special duties. For example, administrative reviews of certain steel products currently being conducted by Commerce cover entries made during the first year of Section 201 duties. Even after the expiration of the 201 duties, entries of steel products subject to those duties may be examined in investigations or administrative reviews. Thus, the Section 201 remedy would live on in the large margins created by their deduction from export price. Extension of the Section 201 remedy in the steel cases through such deduction would violate the President's own proclamation announcing the steel relief, which specified that the remedy would last for three years and one day.[4] Likewise, for steel (or any product subject to both Section 201 and antidumping duties), deduction will run afoul of the time limits imposed on safeguard duties by both the U.S. statute and the Agreement on Safeguards.[5]

B. Deduction Would In Effect Re-Write the Remedy Provisions of The Section 201 Statute

In addition to impermissibly extending the duration of a Section 201 remedy, deduction of the 201 duties in the antidumping calculation in effect would rewrite the terms of the Section 201 statutory provisions governing the form and scope of the 201 remedy. These revisions would run afoul of both U.S. law and WTO obligations.

As a fundamental principle, both the Section 201 statute and WTO rules require that a safeguard remedy not exceed that which is necessary to remedy serious injury and facilitate adjustment of the domestic industry.[6] Deduction of the Section 201 duties automatically raises the Section 201 protection above the level determined by the President as appropriate to accomplish those purposes. The escalation of the impact of Section 201 through the antidumping deduction also, in many cases, would violate the statute's mandate that the remedy not increase a rate of duty (or to impose a rate) which is more than 50% *ad valorem* above the rate existing at the time the remedy is put into place.[7]

Deduction of 201 duties also would remold the Section 201 remedy into a form of remedy differing from that authorized by the statute. At its core, the purpose of Section 201,

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[4] *See* paragraph 9, President's Proclamation of March 5, 2002 (67 Fed. Reg. 10553, March 7, 2003).

[5] *See* 19 U.S.C. § 2253(e)(1); Agreement on Safeguards, Art. 7.

[6] 19 U.S.C. § 2253(e)(2); Agreement on Safeguards, Art. 5.1.

[7] 19 U.S.C. § 2253(e)(3).

which is triggered by an increased volume of imports, is to facilitate adjustment by the domestic industry to import competition. Section 201 is not a price-based remedy. A Section 201 remedy, of course, may have effects on prices, but the purpose of the remedy is to address the injury caused by a volume surge, not to correct price discrimination. Consistent with that purpose, the Section 201 statute in no way requires the foreign exporter to pass along the full Section 201 tariff increase to the customer. Indeed, unlike the antidumping statute and regulations, the Section 201 statute contains no restrictions on the ability of the exporter to absorb the duty or reimburse the importer for the duty.

At the ITC's hearings during the investigation of steel products in 2001, economists from both sides presented arguments as to the expected effects of the Section 201 tariffs. The ITC majority recommending a 20% tariff predicted that such a tariff increase would have only a "small" impact on prices.[8] The staff economic study relied on by those Commissioners concluded that even a 40% tariff increase would result in increases of prices of less than 3%.[9] Not even petitioners argued that a 40% tariff (the tariff level that they requested) would result in a 40% price increase; rather, they predicted price increases of 8 to 12%.[10] Now these same domestic producers argue that the *only* interpretation of the Section 201 is that the full amount of the duty must be included in the U.S. price. *In their view of the statute, unless the full amount of the Section 201 duty is passed along to the customer, an existing dumping margin is increased by the amount not passed along, and -- even more perniciously -- a margin is created where otherwise there is none by mere payment of the 201 duty.* Such a result should not be read into the Section 201 statute by manipulation of the mechanisms of the antidumping statute.

Proponents of deduction are particularly off the mark when arguing that not deducting Section 201 duties would undermine both the Section 201 and antidumping remedies.[11] On the contrary, without deduction both duties are paid in full and accomplish their purpose. Proponents themselves acknowledge that the antidumping and Section 201 statutes serve fundamentally different purposes.[12] The only way that Commerce can respect those distinct purposes is not to deduct Section 201 duties. Otherwise, each remedy magnifies the effect of the other, thereby distorting both.

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[8] *Steel*, Inv. No. TA-201-73, USITC Pub. No. 3479 (Dec. 2001) at 367.

[9] Memorandum EC-Y-050 from Craig Thomsen and James Fetzer to the Commission, Public Version (Dec. 5, 2001) at 17.

[10] Domestic Producers' Prehearing Remedy Brief in Inv. No. TA-201-73 (October 30, 2001), Exhibit A at 1.

[11] *See*, *e.g.*, Comments submitted by Collier Shannon on behalf of Carpenter Technology Corporation, Crucible Specialty Metals Division, Crucible Materials Corp., Electralloy Corp., Slater Steels Corp., and Fort Wayne Specialty Alloys Division (October 9, 2003) (hereinafter "Collier Shannon") at 2; Skadden at 9; Stewart at 14; Wiley at 7.

[12] *See*, *e.g.*, Collier Shannon at 2. ("[T]he two remedies are not intended to overlap or provide the same remedy to the domestic industry.")

III. Deduction of 201 Would Result In a Double Remedy for the U.S. Industry

Proponents of deduction argue that no double remedy results from deduction of Section 201 duties. Their own mathematical examples detail that their denial of a double remedy is ludicrous. Deduction of the 201 duties results in the foreign producer/exporter bearing (1) the Section 201 duties themselves *and* (2) artificially increased antidumping duties -- *or antidumping liability where there was none before* -- resulting from mere payment of the Section 201 duties. Clearly there is a double remedy.

IV. The Retrospective Nature of the U.S. Antidumping Statute Makes Deduction Inappropriate

While the retrospective nature of the U.S. antidumping statute always creates uncertainties for exporters to the U.S. market, the framework of the statute, along with Commerce precedent in interpreting the law, provides a general guideline for foreign exporters who seek to compete in the U.S. market without incurring antidumping liability. The goal of U.S. policy makers should be to promote a fair and transparent administration of the antidumping statute so that foreign exporters can make judgments regarding prices. Here, Commerce should recognize that deduction of 201 duties under the retrospective antidumping system serves no purpose other than to suddenly and unfairly penalize exporters who had no knowledge that such a deduction would be made at the time of the sales.

Finally, given the retrospective nature of the system, Commerce must ask what purpose the deduction would serve given that the Section 201 duties are being phased down (and perhaps even may be terminated in advance of the original March 2005 expiration). For example, current administrative reviews on steel products subject to Section 201 duties cover entries for which a 30% Section 201 duty was paid. These administrative reviews will establish the margins for entries occurring long after the review, at a time when the Section 201 duties will have been reduced or eliminated. Commerce must ask what purpose would be served by establishing a large cash deposit rate that bears no relation to what Commerce knows will be the commercial reality at the time of entry. The answer is that there is no purpose.

For the foregoing reasons, we request that the Department not deduct Section 201 duties under 19 U.S.C. §§ 1677a(c)(2)(A) or (d).

Respectfully submitted,

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