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PUBLIC DOCUMENT

VIA HAND DELIVERY

The Honorable James J. Jochum
Assistant Secretary for Import Administration
Attn: Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

Attn: Becky Erkul, Office of Policy, Import Administration

Re: Antidumping Duty Proceedings: Rebuttal Comments Regarding the Treatment of 201 Duties and Countervailing Duties

Dear Assistant Secretary Jochum:

On behalf of Eurodif S.A., Compagnie Générale Des Matières Nucléaires, and COGEMA, Inc. (collectively, "Eurodif"), we submit the following rebuttal comments pursuant to the U.S. Department of Commerce's (the "Department") September 9, 2003 notices soliciting initial and rebuttal comments regarding the appropriateness of deducting Section 201 and countervailing duties from gross unit price in order to determine the applicable export price or constructed export price (hereafter "EP and CEP"), as required by the antidumping duty statute,

19 U.S.C. § 1677a.[1] By way of these rebuttal comments, we urge the Department to maintain its long-standing policy of refusing to deduct remedial duties, such as antidumping and countervailing duties and deposits, in its calculation of EP and CEP. To do otherwise would impose a second, punitive duty on foreign producers and exporters that participate in U.S. antidumping duty proceedings.

The Department Must Maintain Its Long-Standing Policy of Refusing to Impose the Double Remedy Inherent in Deducting Countervailing Duties and Deposits from EP and CEP

Despite the comments of some parties[2], there is no justification for a reversal in the Department's long-standing policy of refusing to deduct remedial duties from the EP and CEP used in its antidumping duty calculation. The statute, 19 U.S.C. § 1677a(c)(2)(A), requiring the Department to calculate EP and CEP by reducing the gross price used by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States," remains the same. Nothing therein requires or instructs the Department specifically to treat specially countervailing duties or deposits imposed under Title VII, as a "cost," "expense" or "United States import dut[y]" for purposes of calculating EP and CEP, as suggested by the parties in

[1] *See* U.S. Department of Commerce, Request for Public Comments, 68 Fed. Reg. 53,104 (Dep't Commerce September 9, 2003).

[2] *See e.g.*, Letter from USEC to The Honorable James J. Jochum dated October 9, 2003 and Letter from Skadden, Arps, Slate, Meagher & Flom LLP and Dewey Ballantine LLP to The Honorable James J. Jochum dated October 9, 2003 (hereinafter, "parties in support").

support. Thus, the Department's interpretation that it lacks the statutory authority to make such adjustments remains appropriate.[3]

To this end, Eurodif specifically endorses the following October 9, 2003 comments submitted in response to the Department's September 9, 2003 solicitation for the same: Baker & Hostetler LLP, Gibson, Dunn & Crutcher on behalf of West Fraser Mills Ltd.; O'Melveny & Myers LLP; and Steptoe & Johnson LLP on behalf of Corus Group plc.

As indicated in the endorsed comments, the proper interpretation of the statutory calculation of EP and CEP is well-settled. Indeed, the Department's policy of refusing to deduct antidumping and countervailing duties and deposits as "United States import duties" or "additional costs, charges, or expenses" has been maintained by the Department in "[i]n hundreds of antidumping duty reviews" and explicitly endorsed by the U.S. Court of International Trade (the "Court")[4] and is consistent with the U.S.'s WTO obligations against "double-counting" and treating "duty as a cost," as well as the remedial, rather than punitive intent of the antidumping duty statute.[5] To depart from the Department's interpretation of the statute, as the parties in support argue, and allow such adjustments to EP and CEP, would result

[3] *See Antidumping Duties; Countervailing Duties: Proposed Rule*, 61 Fed. Reg. 7,308, 7,332 (Feb. 27, 1996) ("As with antidumping duties, the statute authorizes no adjustment to export price (or constructed export price) for countervailing duties imposed to offset other types of [non-export] subsidies.").

[4] *AK Steel Corp. v. United States*, 988 F. Supp. 594 (Ct. Int'l Trade 1997).

[5] *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea*, 62 Fed. Reg. 18,404, 18,421 (Dep't Commerce 1997) ("*Steel from Korea*") ("[i]n the hundreds of antidumping duty administrative reviews that Commerce has conducted since 1980, the Department has never deducted AD duties or CVDs from the starting price"). *See also infra* at p. 6.

in an "unending spiral of deductions," which would artificially and inappropriately inflate dumping margins, creating them where they do not in reality exist.[6]

The Department properly has been steadfast in its refusal to consider remedial duties as proper deductions under the statute, determining repeatedly that making additional adjustments to the EP and CEP for antidumping and countervailing duties would result in double-counting and the imposition of a second remedy not sanctioned by the statute.[7] According to the Department,

> antidumping and countervailing duties are unique. Unlike normal duties, which are an assessment against value,[8] antidumping and countervailing duties derive from the margin of dumping or the rate of subsidization found. Logically, antidumping and countervailing duties cannot be part of the very calculation from which they are derived . . . Such double counting, *i.e.*, including the same unfair trade practice twice in a single calculation, is unjustifiable.[9]

The Department's distinction of remedial duties from "United States import duties" (which are undefined by the statue) is solidly supported by the statute's legislative history, which distinguishes "special antidumping duties" from the ordinary customs duties that

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[6] *See* Issues and Decision Memorandum for the Final Results in the Antidumping Duty Administrative Review of *Granular Polytetrafluoroethylene Resin from Italy*, *cmt*. 2 (September 5, 2000). *See also Steel from Korea*, 62 Fed. Reg. 18,404 (Dep't Commerce 1997).

[7] *Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands,* 62 Fed. Reg. 18,475, 18,486 (Dep't Commerce 1997) ("*Steel from the Netherlands*").

[8] For this reason, the arguments of the parties in support contrasting Customs valuation methodologies with the EP and CEP are inapposite. Customs specifically reduces transaction value by "customs duties" in order to avoid imposing duties on duties. The same principal applies to the antidumping duty calculation of EP and CEP, as reducing the EP and CEP by the amount of countervailing duties or deposits would be tantamount to imposing a further punitive duty as a result of the imposition of countervailing duties under the same statute. The error would be even more egregious if antidumping duty obligations were affected by mere deposits.

[9] *Steel from the Netherlands,* 62 Fed. Reg. at 18,486 (footnotes added).

are referred to throughout as "United States import duties."[10] Further, according to the Department, "there is absolutely nothing in the legislative history to indicate that Congress intended to change the standard practice of not deducting either AD or CVD duties from the starting price in the United States as 'United States import duties.'"[11] As accepted by Congress, the Department's interpretation and distinction of remedial duties continue to be appropriate today.

In this regard, the Department's proper refusal to make price adjustments for countervailing duties and deposits has been universally endorsed and upheld as reasonable by the "Court", which the parties in support seek to dismiss. For example, in *AK Steel Corp. v. United States*, 988 F. Supp. 594, 607-08 (Ct. Int'l Trade 1997), the Court held that the Department's policy to avoiding double-counting, "is a reasonable explanation for Commerce's decision to exclude antidumping duties from its definition of 'United States import duties'" and that a "similar explanation would apply to Commerce's refusal to deduct countervailing duties from the United States price." In this connection, the Courts have never directed or even suggested that the Department change this policy and it need not do so now.

Further, assertions that altering the Department's practice would not contravene the obligations and policy commitments undertaken by the United States in the WTO Uruguay Round Agreements ("URAA"), are erroneous. As noted in the comments endorsed above, the WTO, which arguably should serve as a barometer for changes in U.S. trade policy given the

[10] *See Steel from Korea*, 62 Fed. Reg. 18, 421.

[11] *See id.*, 62 Fed. Reg. 18,421.

U.S. commitments thereto, has expressly addressed its disapproval of national policies which result in the "double counting of adjustments in calculating antidumping duties,"[12] *i.e.*, the result of deducting countervailing duties and deposits from the EP and CEP. Thus, a change in the Department's policy to that endorsed by the parties in support would be inconsistent with U.S. obligations.[13] Also, the Statement of Administrative Action explicitly provides that antidumping duties are not to be treated as "a cost."[14] The principal is equally applicable to countervailing duties and deposits, as there is no basis for interpreting this statement differently with respect to antidumping duties or deposits on the one hand, and countervailing duties or deposits on the other.[15]

Indeed, to argue that deposits should be deducted in determining EP and CEP simply reveals the transparent attempts of the parties in support to artificially inflate dumping margins, if any, to their "maximum," by any means and undermine the Department's mission to calculate "as accurately as possible" unfair trade remedies.[16]

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[12] URAA, Antidumping Agreement, Article 2.4, n. 7.

[13] *See U.S. Steel v. United States*, 15 F. Supp. 2d 892, 899 n.7 (Ct. Int'l Trade 1998) (explaining that double counting would result if antidumping and countervailing duties were deduced from EP and CEP, as "United States import duties" or "additional costs, charges, and expenses, the Court cited Article VI(5) of GATT stating: "As the U.S. antidumping laws are generally intended to be GATT consistent, Commerce's desire to avoid double remedies is legitimate."), *rev'd on other grounds*, 225 F.3d 1284 (Fed. Cir. 2000).

[14] URAA, *Statement of Administrative Action* at 823 ('This new [duty absorption] provision of law is not intended to provide for the treatment of antidumping duties as a cost.").

[15] *Certain Cut-To-Length Carbon Steel Plate From Germany*, 62 Fed. Reg. 18,390, 18,396 (Dep't Commerce 1997) (demonstrating the identical treatment of AD and CVD duties, as "the treatment of AD and CVD duties (already paid or to be assessed) as a cost from the export price is an issue that was arduously debated during the passage of the URAA and . . Congress put a rest to the issue of AD and CVD duties as a cost," by alternatively adopting the duty absorption provision of the statute).

[16] *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Ct. Int'l Trade 1995).

Countervailing duty deposits are not "duties" at all, but merely provisional measures that are collected to protect the revenue should countervailing duties be ultimately assessed, but are refundable to the importer with interest if they are not. Thus, they may not be properly construed as a "cost" or "expense" under the statute. The Department has long recognized that deposits are "not selling expenses" that should be deducted from EP and CEP.[17] Deposits are calculated based upon out of date information and have nothing to do with the actual duties, if any, that may be due. Thus, they are not an accurate reflection of a subsidization rate, if any. The Department properly has not allowed the amount of deposits to alter its determination of present dumping margins.[18] If the Department were to do otherwise, it would frustrate fair trade by creating a dumping margin where none exists or otherwise inflating a margin, not based upon any practice pertinent to the review period, but, rather, based upon an out of date evaluation of practices in a prior period.

Conclusion

For all these reasons above, the Department should reject the arguments of the parties in support and continue to refuse to deduct countervailing duties and deposits from the EP and CEP in making antidumping duty calculations.

[17] *Federal-Mogul Corp. v. United States*, 813 F. Supp. 856, 872 (Ct. Int'l Trade 1993) (citing the Department's argument against the deduction of antidumping duty deposits from EP and CEP). *See also Antifriction Bearings (Other Tapered Roller Bearings) and Parts Thereof From France*, 60 Fed. Reg. 10,900, 10,918 (Dep't Commerce 1995).

[18] *PQ Corp. v. United States*, 652 F. Supp. 724, 737 (Ct. Int'l Trade 1987).

Respectfully submitted,

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