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October 9, 2003

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

Attn: Section 201 Duties

Re: Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties; Initial Comments

Dear Mr. Jochum:

On behalf of BGH Edelstahlwerke GmbH ("BGH"), we hereby submit an original and six copies of our initial comments on the appropriateness of deducting section 201 duties and countervailing duties from gross unit price in order to determine the applicable export price or constructed export price used in antidumping calculations. *See* Request for Public Comments, 68 Fed. Reg. 53104 (Sept. 9, 2003). For the reasons set forth below, we do not believe such an adjustment is appropriate.

Section 1677a(c)) of title 19, United States Code, provides for certain limited adjustments in the computation of Constructed Export Price ("CEP") and Export Price ("EP"). Specifically, the price used to establish CEP and EP shall be

(1) increased by--

(A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States,

(B) the amount of any *import duties* imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States, and

(C) the amount of any *countervailing duty* imposed on the subject merchandise under subtitle A to offset an export subsidy, and

(2) reduced by–

(A) except as provided in paragraph (1)(c)), *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,* and
(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 771(6)(c)).

19 U.S.C. 1677a(c) (emphasis added).

The statutory mandates for (1) increasing CEP and EP by the amount of applicable import duties imposed by the country of exportation and/or countervailing duties imposed to offset an export subsidy, and (2) reducing CEP or EP by the amount of United States import duties predate the Uruguay Round Agreements Act (URAA). The URAA did nothing to modify these directives in any respect.

The phrase "import duties" has been interpreted consistently as meaning normal customs duties. Since the passage of the Trade Agreements Act of 1979, the Agency has uniformly refused to deduct remedial duties, such as AD or CVD duties from EP or CEP. The rationales for this longstanding practice apply equally to section 201 duties. *See, e.g., Hoogevens Stall BV v. United States*, 4 F. Supp. 2d 1213, 1220 (CIT 1998); *Bethlehem Steel Corp v. United States*, 27 F. Supp. 2d 201 (CIT 1998); *AK Steel Corp. v. United States*, 988 F. Supp. 594 (CIT 1997); *Federal Mogul Corp. v. United States*, 813 F. Supp. 856, 872 (1993); and *PQ Corp. v. United States*, 652 F. Supp. 724, 737 (CIT 1987).

Commerce's consistent practice makes sense in the section 201 arena since 201 duties have never been considered normal import duties or an "extra cost" or "expense" to the importer. *See Harmonized Tariff Schedules of the United States* (HTSUS) (201 duties appear in a separate schedule for temporary duties at subchapter III of chapter 99). Morever, unlike normal import

duties, these duties are specifically designed to remove serious injury to the domestic injury . If special duties were deducted from the CEP or EP, Commerce would effectively be "double counting" the section 201 duty (*i.e.*, the section 201 duty would be applied twice, once in the form of the 201 duty, and once in the form of the final antidumping duty).

A change in Commerce's consistent practice of deducting only normal import duties from U.S. price would ill-serve the remedial purposes of the antidumping and countervailing duty statutes and would effectively transform these otherwise remedial duties into punitive duties. *See AK Steel Corp. v. United States*, 988 F. Supp. 594, 607-08 (CIT 1997). In affirming Commerce's determination that "import duties" do not embrace antidumping duties, the Court remarked:

> Commerce's long-standing policy and practice is not to treat estimated or final antidumping or countervailing duties as import duties or costs under *19 U.S.C. § 1677a*(d). The Court has held that Commerce is "correct not to deduct [from U.S. price] cash deposits of estimated antidumping duties, which may not bear any relationship to the actual dumping duties owed" under § 1677a(d). *Federal-Mogul Corp. v. United States, 17 C.I.T. 88, 108, 813 F. Supp. 856, 872 (1993)* (estimated deposits of antidumping duties are not analogous to estimated deposits of "normal import duties"). "If deposits of estimated antidumping duties entered into the calculation of present dumping margins, then those deposits would work to open up a margin where none otherwise exists." *PQ Corp. v. United States, 11 C.I.T. 53, 67, 652 F. Supp. 724, 737 (1987)*. More recently, the Court sustained Commerce's decision not to deduct final assessed antidumping and countervailing duties as normal import duties from U.S. price in its margin calculation. *AK Steel Corp. v. United States, 988 F. Supp. 594, 1997 Ct. Intl. Trade LEXIS 167,* *39, 21 C.I.T. , Slip Op. 97-160 at 31 (Dec. 1, 1997) (Commerce's explanation that deducting antidumping duties as import duties from U.S. price would result in double-counting is rational).
>
> Commerce reasoned in its Final Determination that antidumping duties derive from a calculated margin of dumping, not from an assessment against value, as is the case for normal customs duties; further, deducting antidumping duties as costs or import duties from U.S. price would, in effect, double-count the margin. Final Determination at 48,469.
>
> This Court finds Commerce's rationale to be a permissible construction of the statute. If Commerce were to deduct existing antidumping duties as a matter of course in its administrative reviews, it would reduce the U.S. price -- and increase the margin -- artificially. As discussed earlier, an antidumping order is designed to raise the price of dumped goods to a fair level in the import market. It is not a

normal import duty or an extra "cost" or "expense" to the importer -- it is an element of a fair and reasonable price.

Hoogevens Stall BV v. United States, 4 F. Supp. 2d 1213, 1220 (CIT 1998).

The Court's reasoning applies equally to section 201 and countervailing duties and raises serious questions concerning the remedial purpose served by the continuation of the underlying antidumping proceeding. If section 201 duties have achieved their purpose (*i.e.*, the elimination of "serious injury" - - a higher standard than the material injury required for the imposition of antidumping duties), the remedial purpose for the continuation of the underlying antidumping proceedings becomes less apparent.

Furthermore, no legitimate reasons have been proffered to depart from Commerce's consistent longstanding practice of deducting only normal import duties from U.S. price. Absent a "reasoned analysis" for its departure from prior practice, an agency's new interpretation cannot be sustained.. *See Rust v. Sullivan*, 500 U.S. 173, 187, (1991) (citing *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).

Additionally, pursuant to well-established rules of statutory construction, the specific inclusion of the terms "import" and "countervailing duties" in the same section of the statute evidences that Congress was well aware of the different meanings ascribed to these terms. Had Congress intended that duties, other than normal import duties, be deducted from CEP or EP, it would have specifically so provided. *Russello v. United States*, 464 U.S. 16, 23 (1983) (citing *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Absent strong evidence to the contrary, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

For the foregoing reasons, we submit that Commerce should not depart from its consistent past practice of deducting only normal import duties from EP and CEP.

Very truly yours,

J. Kevin Horgan
A. David Lafer
Marc E. Montalbine