EUROPEAN UNION
DELEGATION OF THE EUROPEAN COMMISSION
Head of Trade Section

Washington, October 8, 2003

Mr. James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Attention: **Section 201 Duties**
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street N.W.
Washington, D.C. 20230

Dear Mr. Jochum,

Subject: Anti-Dumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties.

By notice published in the Federal Register of 9 September 2003, the US Department of Commerce is requesting 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 anti-dumping calculations.

- **The US DOC should not depart from its consistent practice**

  As a threshold matter, the European Communities wishes to express its surprise at the US DOC's decision to revisit its long-standing practice regarding the non-deduction of remedial duties from the export price. Indeed, the US DOC's consistent practice is to reject the deduction of remedial duties such as anti-dumping and countervailing measures from the export price, because they are not normal import duties and it would be inappropriate to double the impact of a remedial duty by deducting it from the export price. The US DOC expressed the view that the same approach should be adopted regarding 201 duties in the recommendation memorandum in connection with the anti-dumping investigation on carbon and certain alloy steel wire rod from Trinidad and Tobago of 13 August 2002.

  The European Communities does not believe that there has been any recent development justifying a departure from the practice reflected in this memorandum.

Any departure at this point in time would furthermore frustrate the legitimate expectations of the economic operators who relied on the US DOC longstanding practice when setting their prices for sale on the US market of products subject to 201 and/or CVD duties.

- **The deduction of remedial duties from the export price would result in excessive protection against the same imports**

The US DOC and ITC have consistently considered that it would be unreasonable to deduct any type of remedial duty from the export price in dumping margin calculations because such deduction would effectively double the effect of the remedial duty concerned and give excessive protection to the US industry. The European Communities shares this view. Indeed, the deduction of the 201 duties from the export price would result in applying the 201 duties twice: a first time as 201 duty and a second time, in the form of anti-dumping duties.

The "excessive protection" is evident when one considers the purpose of anti-dumping and 201 duties. 201 duties are intended to remove serious injury, which is a higher standard than the material injury required for imposing or maintaining anti-dumping duties.

In this regard, the ITC's reasoning in the *cold-rolled steel* case[1], a **new investigation** completed after the imposition of the 201 duty, needs to be given due consideration.[2] In that case, the ITC effectively held that the 201 duties had been sufficient to remove any injury, and that there was therefore no justification for additional anti-dumping protection.

On this basis, to artificially increase the amount of any anti-dumping duty by deducting 201 duties from the export price, in either a new investigation or a review, would be even less justifiable, since it would effectively add an inflated dumping margin on top of a 201 duty, the latter having already removed serious injury.

- **The WTO Anti-Dumping Agreement only contemplates the deduction of anti-dumping duties to the exclusion of other remedial measures**

The WTO Anti-Dumping Agreement ("ADA") contains provisions on the deduction of anti-dumping duties from the export price (Article 9.3.3 ADA). The issue was the subject of long discussions during the Uruguay Round in particular between the EC and Japan.

The final compromise was to allow the deduction of anti-dumping duties, but only in a very restrictive way.

The ADA does **not** provide for the deduction of any other remedial duties (CVD/section 201) from the export price. The same is true for the EC Basic Anti-Dumping Regulation.

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[1] Investigations Nos. 731-TA-965, 971-972, 979, and 981 (Final), USITC Publication No. 3536, September 2002.

[2] The 201 duty was not in force in the IP.

- **The existing trade defence instruments were designed to deal with specific market situations and cross-fertilization must be avoided**

Each WTO trade defence instrument (anti-dumping, anti-subsidy and safeguard) was designed to address a particular phenomenon and provides the appropriate tools to counteract the injurious effects thereof. It was never contemplated that the application of a measure under one agreement could pave the way for the application of measures under another one. Yet, this is exactly the result that a deduction of 201/CVD duties would produce.

Let us take the case of 201 duties since it will best highlight the perversion of proposals to deduct such duties from the export price in dumping margins calculations.

Pursuant to the WTO Safeguard Agreement, safeguard measures are applied to all sources of export without discrimination[3] and irrespective of the market behaviour of specific exporting countries. This is because safeguard measures are not adopted to counteract unfair trade, but only unforeseen injurious import developments. If 201 duties are allowed to be deducted from the export price for the margin of dumping calculations, this would automatically put all exporters to the US in a situation of technical dumping. Indeed, if one considers the 201 measures on steel, any exporter of steel would have to sell to the US market at a price more than 30% higher than its domestic price in order to avoid dumping charges.

In other words, the adoption of a measure affecting fair trade (the 201 duties) would transform an otherwise perfectly legitimate pricing behaviour into an unfair pricing practice, i.e. dumping. This would constitute an unacceptable perversion of the WTO rules.

Petros Sourmelis

Counselor, Head of Trade Section

[3] Imports from developing countries are excluded from the scope of the measures under certain conditions.