October 9, 2003

BY HAND DELIVERY

Honorable James J. Jochum
Assistant Secretary for Import Administration
U. S Department of Commerce
International Trade Administration
Washington, D.C. 20230

Re: Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties

Dear Mr. Jochum:

These comments are submitted on behalf of the Consuming Industries Trade Action Coalition (CITAC) in response to the Department's September 9, 2003 notice requesting public comments on treatment of Section 201 duties and countervailing duties in an antidumping duty calculation. 1/ The issues of deduction of Section 201 duties and countervailing duties are related because both are trade remedy actions that are quite removed from the normal "cost, charges or expenses" or "import

1/ International Trade Administration, "Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties," 68 Fed. Reg. 53104 (September 9, 2003).

duties" "incident to bringing the subject merchandise from the original place of shipment . . . . to the place of delivery in the United States." 2/

INTRODUCTION

The Department has consistently taken the position in past cases that countervailing duties should not be deducted. This position has been repeatedly upheld in the Court of International Trade (CIT). 3/ The Department has provided no material change in circumstances that warrants revisiting this issue now.

The same rationale governing the deduction of countervailing duties (as well as antidumping duties) applies to Section 201 duties. Section 201 duties are extraordinary measures that cannot rationally be explained as "import duties incident" to bringing the merchandise to the U.S. Deducting them in antidumping calculations from export price (EP) or constructed export price (CEP) would distort the calculations, would violate international obligations of the United States, and would severely impair the ability of consuming industries to obtain competitively priced raw materials. Therefore, the Department should not deduct either

---

2/ 19 U.S.C. §§ 1677a(c)(2)(A) or 1677a(d)(1).

3/ A.K. Steel Corp. v. United States, 988 F. Supp. 594, 21 CIT 1265 (1997); U.S. Steel Group v. United States, 15 F. Supp. 2d 892, 22 CIT 670 (1998).

countervailing duties or Section 201 duties from U.S. price calculations in antidumping cases.

The Department recently addressed the issue of whether to deduct Section 201 duties in "Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago." 4/ In the Recommendation Memorandum in that case, the Department correctly took the position that Section 201 duties should not be deducted from EP or CEP because: (1) Section 201 duties, like AD and CVD duties, are not normal import duties (i.e., they are remedial duties); and (2) it would be inappropriate for the Department to double the amount and the impact of a remedial duty by deducting it from U.S. price. The position that the Department took in the Trinidad and Tobago Recommendation Memorandum is clearly the correct position and should be formally adopted. It is the only position that is consistent with the Department's established policy with respect to the non-deductibility of countervailing duties.

4/ Memorandum to Bernard Carreau from Gary Taverman: "Recommendation Memorandum—Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago" (Trinidad and Tobago Recommendation Memorandum") (August 13, 2002).

I. THE STATUTE NEITHER REQUIRES NOR AUTHORIZES AN ADJUSTMENT FOR COUNTERVAILING OR SECTION 201 DUTIES

The antidumping statute does not authorize any adjustment to U.S. price for either countervailing 5/ or Section 201 duties. Section 772(c) of the Tariff Act of 1930, as amended (the Act), requires that the Department deduct "United States import duties" from EP and CEP. This statutory deduction existed long prior to the passage of the Uruguay Round Agreements Act (URAA) and the URAA did not modify it in any respect. Several courts have reached the conclusion that "[t]he statute does not define the term 'United States import duties.' In the absence of such a definition, the Court will uphold Commerce's reasonable interpretation." 6/

Similarly, the Courts have held that remedial duties (i.e., antidumping and countervailing duties) are not expenses that would be deductible from U.S. price pursuant to either Section 772(c) or (d) of the Act. 7/

5/ See, "Antidumping Duties; Countervailing Duties; Proposed Rule," 61 Fed. Reg. 7308, 7332 (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 subsidies.")

6/ AK Steel Corp. v. United States, 988 F. Supp. 594, 607, 21 CIT 1265 (1997). Accord, Hoogovens Staal BV v. United States, 4 F. Supp 2d 1213, 1220, 22 CIT 139 (1998); U.S. Steel Group v. United States, 15 F. Supp. 2d 892, 899, 22 CIT 670 (1998).

7/ Id.

In the Trinidad and Tobago Recommendation Memorandum, the Department recognized that Section 201 duties, like countervailing duties, are not normal customs duties and are not selling expenses.

> Rather, just as antidumping duties derive from a special calculation of price discrimination (and countervailing duties derive from a special calculation of countervailable subsidization), Section 201 duties derive from a special calculation of the amount necessary to "facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs." 19 U.S.C. § 2253(a)(1)(A). In addition, Section 201 duties are not treated as normal customs duties in the Harmonized Tariff Schedule of the United States (HTSUS); they appear in a separate schedule for temporary duties at subchapter II of chapter 99. 8/

II. TREATING COUNTERVAILING OR SECTION 201 DUTIES AS DEDUCTIBLE SELLING EXPENSES OR IMPORT DUTIES WOULD, IN EFFECT, DOUBLE THE IMPACT OF THE COUNTERVAILING DUTY OR SECTION 201 REMEDIES

In upholding Commerce's determination not to deduct antidumping or countervailing duties, the Courts have been persuaded by the desire to avoid a double remedy for the domestic industry. This consideration dictates against the deduction of both duties at issue in this proceeding—countervailing and Section 201 duties.

8/ Trinidad and Tobago Recommendation Memorandum at 3.

The CIT has recognized that it is not appropriate to provide a second remedy for countervailable subsidies. In particular, the CIT has stated:

> Logically, the deduction of a countervailing duty, whether export or non-export, from the U.S. price used to calculate the antidumping margin would result in a double remedy for the domestic industry. Commerce has already corrected for the subsidies on the subject merchandise in the countervailing duty order, thereby granting the domestic industry a remedy. To deduct such countervailing duties from U.S. price would create a greater dumping margin, in effect a second remedy for the domestic industry. 9/

Concerns about double-counting are equally relevant with respect to Section 201 duties. Deducting Section 201 duties from U.S. price would effectively double the impact of the Section 201 tariffs. To artificially increase the amount of any antidumping duty by deducting 201 duties from the U.S. price would effectively inflate the dumping margin by the amount of a 201 duty, when the latter has already remedied serious injury. Doubling the impact of these Section 201 duties by deducting them from U.S. price would alter the President's Section 201 decision through an AD proceeding. Clearly this cannot be what the law intended. The reference in the statute to import duties "incident" to bringing merchandise to the

---

9/ U.S. Steel Group v. United States, 15 F. Supp. 2d 892, 900; 22 CIT 670 (1998).

place of delivery in the United States simply cannot be read to compel such an unjust and illogical result.

III DEDUCTING SECTION 201 OR COUNTERVAILING DUTIES WOULD BE COUNTER TO PUBLIC POLICY CONSIDERATIONS

Deducting Section 201 or countervailing duties from antidumping U.S. price calculations would clearly prejudice the interests of U.S. consuming industries. It would have the practical effect of stopping all trade in these products by imposing a truly draconian tariff double the amount authorized by the President and effectively above the 50 percent maximum level permitted by the Safeguards Statute.

If the Department were to deduct Section 201 duties from the U.S. price for dumping calculations, this act would place all exporters to the U.S. in a situation of technical dumping. For example, for a 30% Section 201 duty, any exporter of steel would have to sell to the U.S. market at a price more than 30% *higher* than its domestic price in order to avoid dumping charges. Thus, imposing duties under a safeguards action would transform otherwise perfectly legitimate pricing behavior into an unfair pricing practice, i.e., dumping.

Finally, by assessing duties beyond the actual margins of dumping, the deduction of countervailing or Section 201 duties would also violate international agreements to which the United States is a party, including the Safeguards,

Antidumping and Subsidies Agreements. In the *U.S. Steel v. United States* case, Judge Restani noted that "As the U.S. antidumping laws are generally intended to be GATT consistent, Commerce's desire to avoid double remedies is legitimate." 10/ Applying this principle to the Section 201 duties, the Department should not permit the WTO-inconsistent deduction of Section 201 duties in anti-dumping calculations.

CONCLUSION

We believe that deducting countervailing and/or Section 201 duties from antidumping U.S. price calculations would unduly and unjustly punish U.S. consuming industries while providing the domestic industry double the antidumping remedy to which they are entitled by law and international agreement. If the Department were to change its consistent practice and deduct such duties, this would clearly prejudice the interests of U.S. consuming industries, and violate the WTO. We urge the Commerce Department to avoid this unnecessary and costly burden on American manufacturing and global trade.

10/ U.S. Steel Group v. United States, 15 F. Supp. 2d 892, 899, 22 CIT 670, 678 (1998); citing Article VI(5) of the GATT which provides that "[n]o product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization."

Please do not hesitate to contact the undersigned if there are any questions concerning this submission.

Very truly yours,

Lewis E. Leibowitz
Lynn G. Kamarck
Counsel for CITAC