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VIA HAND DELIVERY

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

Re: Comments on Treatment of Section 201 and Countervailing Duties

Attn: Section 201 Duties
Becky Erkul, Office of Policy (Room 3708)

Dear Mr. Assistant Secretary:

The Korea Iron & Steel Association ("KOSA") hereby submits comments in response to the Department of Commerce's ("Department") September 9, 2003 notice regarding the treatment of Section 201 duties and countervailing duties in the context of antidumping duty calculations. *See Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties*, 68 Fed. Reg. 53,104 (Sept. 9, 2003). KOSA strongly opposes the deduction of either Section 201 duties or countervailing duties from the calculation of export or constructed export price. Any methodology that were to deduct Section 201 duties and/or countervailing duties from the calculation of export or constructed export price would not only contravene the Department's longstanding practice, which

has been repeatedly endorsed by the courts, but also would violate U.S. law and the United States' obligations under the World Trade Organization ("WTO") Agreements.

The current inquiry into the treatment of the Section 201 and countervailing duties is, at least in part, the result of promises made to Congress during the confirmation proceedings for the Assistant Secretary position. During that confirmation process, Assistant Secretary Jochum accurately explained that "Commerce has not deducted antidumping and countervailing duties from U.S. price in calculating dumping margins since it began administering the antidumping and countervailing duty laws in 1980." *Jochum Pledges Review of AD Policy on Section 201 Duty Deduction,* INSIDE U.S. TRADE, Aug. 8, 2003, at 13 (www.InsideTrade.com).

The Department has itself expressed its position on this issue in even stronger terms:

> We have long maintained, and continue to maintain, that antidumping duties, and cash deposits of antidumping duties, are not expenses that we should deduct from CEP. To do so would involve a circular logic that could result in an unending spiral of deductions for an amount that is intended to represent the actual offset for the dumping. *See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews*, 63 FR 63860, 63865 (Nov. 17, 1988); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan: Final Results of Antidumping Duty Administrative Reviews*, 63 FR 2558, 2571 (Jan. 15, 1988); *Certain Cut-to-Length Carbon Steel Plate from Germany; Final Results of Antidumping Duty Administrative Review*, 62 FR 18390, 18395 (April 15, 1997); and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 FR 28360 (June 24, 1992).

Extruded Rubber Thread From Malaysia, 64 Fed. Reg. 12,967, 12,973 (Mar. 16, 1999) (final admin. rev.); *see also Certain Welded Carbon Steel Pipes and Tubes From Thailand*, 66 Fed. Reg. 53,388 at Comment 1 (Oct. 22, 2001) (final admin. rev.).

The Department has consistently accorded countervailing duties ("CVD") the same treatment as antidumping duties (based on the identical rationale)--refusing to deduct countervailing duties from the calculation of U.S. price for purposes of determining margins of dumping. *See, e.g., U.S. Steel Group v. United States*, 15 F. Supp. 2d 892, 899-900 (Ct. Int'l Trade 1998); *AK Steel Corp. v. United States*, 988 F. Supp. 594, 607-608 (Ct. Int'l Trade 1997); *Certain Cold-Rolled Carbon Steel Flat Products From Korea*, 63 Fed. Reg. 781, 786-787 (Comment 7) (Jan. 7, 1998) (final admin. rev.); *Certain Cut-To-Length Carbon Steel Plate From Germany*, 62 Fed. Reg. 18,390 at Comment 7 (Apr. 15, 1997) (final admin. rev.) (affirmed in relevant part by *U.S. Steel Group v. United States*, 15 F. Supp. 2d at 899-900). In either case, the Department and the courts have held that deducting either antidumping or countervailing duties from the calculation of U.S. price "would a result in a double remedy for the domestic industry," which is impermissible under U.S. law and contrary to the United States' obligations under the WTO. *See U.S. Steel Group v. United States*, 15 F. Supp. 2d at 899 (relying on Article VI.5 of the GATT to uphold the Department's "desire to avoid double remedies" and to prevent inconsistency between the U.S. antidumping laws and GATT); General Agreement on Tariffs and Trade (GATT 1994), Art. VI.5 ("No 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 for the same situation of dumping or export subsidization.").

Furthermore, under 19 U.S.C. § 1677a(c)(1)(C), the payment of countervailing duties on export subsidies is an addition to (and thus increases) export or constructed export price. As a practical matter, in applying this provision, the Department deducts the *ad valorem* amount of export subsidies from the final calculated dumping margin. *See, e.g., Certain Cold-Rolled Carbon Steel Flat Products From Brazil*, 67 Fed. Reg. 62,134 at Decision Memorandum "Background" (Oct. 3, 2002) (final). While domestic parties have argued, off and on over the course of the last twenty years, that countervailing duties should be considered "costs," "charges," "expenses," or "import duties" requiring deduction from U.S. price under 19 U.S.C. § 1677a(c)(2)(A), both the Department of Commerce and U.S. courts have repeatedly disagreed with domestic producers. *See, e.g., Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea*, 62 Fed. Reg. 18,404, 18,422 (April 15, 1997) (final admin. rev.) ("In the hundreds of antidumping duty administrative reviews that Commerce has conducted since 1980, the Department has never dedcuted AD duties or CVD duties from the starting price in the United States, and courts have never directed the Department to change this practice. Congress has been well aware of this situation, and, despite numerous revisions of the antidumping law since 1921, has never amended the law to change this result.") Instead, the Department and the courts have found incongruous that the payment of countervailing duties on export subsidies reduces a dumping margin (*i.e.*, increases EP or CEP) but that the payment of countervailing duties on domestic subsidies could somehow be read to increase the dumping margin (*i.e.*, reduce EP or CEP). *See U.S. Steel v. United States*, 15 F. Supp. 2d at 899 (In rejecting domestic producers' arguments that the statute should be read to require a deduction for countervailing duties, the Court agreed with the Department's claims "that this addition of

export-subsidy countervailing duties to the price in the United States cannot be deprived of its logical effect by an offsetting deduction . . . .").

> Moreover, the treatment of AD and CVD duties (already paid to be assessed) as a cost to be deducted from the export price is an issue that was arduously debated during passage of the URAA and ultimately rejected by Congress. *See* H.R. 2528, 103rd Cong., 1st Sess. (1993). Alternatively, Congress directed the Department to investigate, in certain circumstances, whether AD duties were being absorbed by affiliated U.S. importers. 19 U.S.C. § 1675(a)(4). Thus, Congress put to rest the issue of AD and CVD duties as a cost. SAA at 885 ("The duty absorption inquiry would not affect the calculation of margins in administrative reviews. This new provision of the law is not intended to provide for the treatment of antidumping duties as a cost."). *See also* H. Rep. No. 103-826(I), 103rd Cong., 2nd Sess. 60 (1994).

Certain Cut-To-Length Carbon Steel Plate From Germany, 62 Fed. Reg. at 786-787 (Comment 7) (affirmed, in relevant part, by *U.S. Steel v. United States*, 15 F. Supp. 2d 892).

It is, therefore, now well established that a deduction to U.S. price for countervailing duties is impermissible under U.S. law. Absent a change in the law, the Department has no authority to reinterpret a statutory construct that has been consistently applied for twenty years. *See generally United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001) (agency "regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law").

Notwithstanding that the legality of the Section 201 duties on steel is specious and the subject of an ongoing international dispute before the WTO, the Department has also suggested, by its request for comments, that these excessive safeguard tariffs not only be collected on the value of imported merchandise but that they also be deducted from U.S. price in dumping proceedings–resulting in the creation of dumping margins where none exist and exacerbating the

windfall for domestic producers begun by the imposition of the Section 201 tariffs. Section 201 is, however, an "escape clause" action (a temporary lifting of a WTO member's commitment to eliminating trade barriers) intended to provide relief to an industry only in severe and extraordinary circumstances. *See Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, para. 66 (14 Dec. 1999) ("Article XIX:19a of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions.'"). Section 201 does not require a finding of an unfair trade practice, as does the antidumping law. For these reasons, a "Member shall apply safeguard measures *only to the extent necessary* to prevent or remedy serious injury and to facilitate adjustment." WTO Agreement on Safeguards, Art. 5.1. Members must also ensure that the measure is "not applied against 'fair trade' beyond what is necessary to provide extraordinary and temporary relief." *United States--Definitive Safeguard Measures on Certain Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, paras. 82 and 83 (15 Feb. 2002).

A decision to collect the Section 201 tariffs on the imports and then to deduct them again from U.S. price in calculating dumping margins is a decision to double the remedy afforded to the domestic industry in the safeguard proceeding–a decision that is inconsistent with the United States' commitments under the WTO to apply a safeguard measure "only to the extent necessary." *See id.*, para. 84; *see also U.S. Steel v. United States*, 15 F. Supp. 2d at 900 (prohibiting a "double remedy for the domestic industry"). Similarly, on the dumping side, the deduction of the Section 201 duties would create "additional price discrimination that did not exist" in further violation of U.S. law and

the WTO Agreements, which mandate that "the duty collected must not exceed the margin of dumping." *See Certain Cold-Rolled Carbon Steel Flat Products From Korea*, 63 Fed. Reg. 781 at 787 (Comment 7) (citing to the WTO Agreements and noting specifically that U.S. law "is designed to comport with" the WTO Agreements); Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement), Art. 9.3.

The Department has itself explicitly agreed. In a public memorandum dated August 13, 2002, the Department issued the following recommendation:

> Deduction of section 201 duties from U.S. price in calculating EP or CEP would artificially increase antidumping duties, and thereby, double the impact of section 201 tariff remedies. For this reason, such a deduction is not consistent with Department policy and we therefore, preliminarily recommend that the 201 duties reported by the respondent in the wire rod from Trinidad and Tobago investigation, Caribbean Ispat Ltd., not be deducted from U.S. price in calculating EP and/or CEP.

See Memorandum Regarding Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, Inv. A-274-804 (Aug. 13, 2002). In making this recommendation, the Department analyzed further that:

> The Department's rationale for not deducting antidumping duties from EP and CEP, as approved by the Court of International Trade in Hoogovens[1] and Bethlehem Steel,[2] supports the conclusion that section 201 duties also should not be deducted. Section 201 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);

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[1] *See Hoogovens Staal v. United States*, 4 F. Supp. 2d 1213 (Ct. Int'l Trade 1998).

[2] *See Bethlehem Steel v. United States*, 27 F. Supp. 2d 201 (Ct. Int'l Trade 1998).

> they appear in a separate schedule for temporary duties at subchapter III of chapter 99.
>
> Moreover, treating section 201 duties as deductible selling expenses or import duties would, in effect, generally double-count (i.e., double the impact of) the section 201 remedy. For example, if the section 201 duty were 20 percent *ad valorem*, and the entered value of an entry subject to the duty were $10.00, one would expect the U.S. government to collect a $2.00 remedial duty. If the Department were to deduct the section 201 duty from EP and CEP, however, approximately $2.00 would be added to the antidumping duty, and the total impact of the section 201 remedy would be $4.00.

Id.

The distortion caused by deducting the Section 201 remedy from U.S. price would actually be far greater than expressed by the Department in that case, as the deduction would dramatically increase the percentage margin of dumping calculated for a given producer, as demonstrated in the following, simplified example:

Dumping Margin Calculation for Company A			
201 Duties Not Deducted		***201 Duties Deducted***	
HM Invoice Price	150	HM Invoice Price	150
less movement & selling expenses	11	less movement & selling expenses	11
Normal Value	139	Normal Value	139
U.S. Invoice Price	150	U.S. Invoice Price	150
less movement & selling expenses	16	less movement & selling expenses	16
		less 201 duties (30%)	45
Adjusted U.S. Price	134	Adjusted U.S. Price	89
Dumping Margin ($)	5	Dumping Margin ($)	50
Dumping Margin (%)	**3.73%**	**Dumping Margin (%)**	**56.18%**
201 Duty (%)	30.00%	201 Duty (%)	30.00%
Total Duty (%)	**33.73%**	**Total Duty (%)**	**86.18%**

The more than 50 percentage point increase to the dumping margin in the above example is the direct result of deducting 201 duties in the margin calculation.

Furthermore, the United States' trading partners have similarly recognized the danger of double counting safeguard remedies and anti-subsidy and/or antidumping measures. In fact, in March 2003, the European Union published a regulation addressing this very issue:

> . . . the combination of anti-dumping or anti-subsidy measures with safeguard tariff measures on one and the same product could have an effect greater than intended or desirable in terms of the Community's trade defence policy and objectives. In particular, such a combination of measures could place an undesirably onerous burden on certain exporting producers seeking to export to the Community, which may have the effect of denying them access to the Community market.
>
> (6) Consequently, exporting producers seeking to export to the Community should not be subject to undesirably onerous burdens and should continue to have access to the Community market.
>
> (7) It is therefore desirable to ensure that the objectives of the safeguard tariff measures and anti-dumping and/or anti-subsidy measures can be met without denying those exporting producers access to the Community market.

Council Regulation (EC) No 452/2003, *Official Journal of the European Union* (6 March 2002).

To avoid double counting, the regulation authorizes consideration of the following measures:

> (a) measures to amend, suspend or repeal existing anti-dumping and/or anti-subsidy measures;
>
> (b) measures to exempt imports in whole or part from antidumping or countervailing duties which would otherwise be payable;
>
> (c) any other measures considered appropriate in the circumstances.

Id.

Accordingly, any decision to deduct CVD or Section 201 duties from U.S. price in calculating dumping margins would be blatantly contrary to the Department's prior recommendations and twenty years of unwavering precedent. It also would most certainly be met with significant litigation and further alienation of the United States' trading partners and WTO

member countries (at least one of which has explicitly denounced the risks associated with combining antidumping or anti-subsidy measures with safeguard tariff measures on the same product). For these reasons, KOSA strongly opposes deduction of either Section 201 duties or countervailing duties from U.S. price in the Department's analysis of dumping.

Please contact the undersigned should you have any questions or need any additional information.

Respectfully submitted,

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