Willkie Farr & Gallagher LLP

1875 K Street, NW
Washington, DC 20006-1238
Tel: 202-303-1000
Fax: 202-303-2000

October 9, 2003

Honorable James S. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street, N.W.
Washington, D.C. 20230

Re: ***Comments of Japan Iron & Steel Federation***
On the Appropriateness of Deducting Section 201 Duties from the
Export Price in Antidumping Margin Calculations

Dear Mr. Jochum:

On behalf of the Japan Iron & Steel Federation (JISF), enclosed please find comments on the appropriateness of deducting Section 201 duties from the export price in antidumping margin calculations.

The enclosed comments are submitted in response to the Department's Request for Public Comments that was published in the *Federal Register* on September 9, 2003.

The comments are provided in the attached paper. In accordance with the Department's request, we also enclose a 3.5" diskette containing JISF's comments.

Please do not hesitate to contact the undersigned should you have any questions concerning the enclosed comments.

Respectfully submitted,

Daniel L. Porter

Counsel to JISF

Before the United States Commerce Department
International Trade Administration

Comments of Japan Iron and Steel Federation On the Propriety of Deducting Section 201 Duties in Antidumping Margin Calculations

Christopher Dunn
Daniel L. Porter
Miriam Bishop

WILLKIE FARR & GALLAGHER
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

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Introduction and Summary

This submission provides the comments of the Japan Iron and Steel Federation ("JISF") on the appropriateness of deducting Section 201 duties in antidumping duty calculations in response to the Request for Public Comments issued by the Department of Commerce on September 3, 2003.[1] JISF appreciates the opportunity to submit comments on this important issue.

In brief, JISF urges the Department to adopt its preliminary recommendation in *Steel Wire Rod from Trinidad and Tobago*[2] that 201 duties should NOT be deducted in calculating antidumping duty ("AD") margins. Section 201 duties are not "normal customs duties" nor do they fall within any of the other adjustments specifically enumerated in the statute. Moreover, there are important policy reasons for not deducting Section 201 duties, the principal one being that it would have the effect of dramatically exaggerating the effect of the actual Section 201 duties. Deducting Section 201 duties in the calculation of antidumping margins would convert a WTO-sanctioned, remedial measure proclaimed by the President into a distorted, artificial assessment that is contrary to the intent of both the antidumping statute and the statute implementing U.S. Safeguard Measures.

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[1] *See Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties*, 68 Fed. Reg. 53104 (September 9, 2003) (hereinafter "*Request for Comments*").

[2] *See* Memorandum to Bernard T. Carreau, Deputy Assistant Secretary for AD/CVD Enforcement II, from Gary Taverman, Director, Office 5, AD/CVD Enforcement, in Case No. A-274-804 regarding Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago dated August 13, 2002 (hereinafter "Recommendation Memorandum").

I. The Department's Preliminary Decision On This Issue Should Be Adopted.

The issue of whether Section 201 duties should be deducted from U.S. price in calculating the antidumping margin for specific entries arose in the context of *Steel Wire Rod from Trinidad and Tobago*.[3] In that case, the Department issued what was essentially a preliminary determination in the form of a Recommendation Memorandum in favor of NOT deducting Section 201 duties. Although the Department declined to decide the issue in its final determination because of the potential impact on other cases,[4] the Department's preliminary determination is well reasoned, arrives at the correct result, and should be adopted.

In the Recommendation Memorandum, the Department noted that it has a consistent, longstanding practice of not deducting AD duties from the export price ("EP") or the constructed export price ("CEP")[5] and that this practice has been approved by the Court of International Trade.[6] The Department also found that the rationale for NOT deducting AD duties supports a NON-deduction practice for Section 201 duties. Specifically, the Department found that neither the statute nor any policy consideration required such a deduction.

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[3] *See* Memorandum to Faryar Shirzad, Assistant Secretary for Import Administration, from Bernard T. Carreau, Deputy Assistant Secretary for AD/CVD Enforcement II, in Case No. A-274-804, Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago (hereinafter "Final Decision Memorandum").

[4] *See* Final Decision Memorandum at 4 *citing* 19 U.S.C. § 1677f 1(a)(2).

[5] *See* Recommendation Memorandum at 2.

[6] Id. at 3, *citing Hoogovens Staal v. United States*, 4 F.Supp. 2d 1213 (Ct. Int'l Trade 1998) and *Bethlehem Steel v. United States*, 27 F. Supp. 2d 201 (Ct. Int'l Trade 1998).

II. The Antidumping Statute Does Not Require the Deduction of Section 201 Duties

Section 772(c) of the Trade Act of 1930 requires the Department to deduct certain costs and expenses from the starting price in the United States (EP or CEP). The statute specifically provides as follows (19 U.S.C. § 1677a(c)(2)):

> **(c) Adjustments for export price and constructed export price**
>
> The price used to establish export price and constructed export price shall be--
>
> . . . .
>
> (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.

As detailed below, Section 201 duties do not meet the definition of any of the statutory deductions from export price (or constructed export price).

A. Section 201 Duties Are Not Normal Customs Duties

Following the analysis in past cases dealing with the deductibility of AD duties, the first question is whether Section 201 duties should be considered a “United States import duty” within the meaning of the statute. The term "United States import duties" first appeared in section 203 of the 1921 Act (42 Stat. 12). However, neither the 1921 Act nor its legislative history defined the term.[7] The Senate Report accompanying the legislation uniformly refers to antidumping

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7 *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews,* 62 Fed. Reg. 18404 (April 15, 1997).

duties as "special dumping dut[ies]" and uniformly refers to ordinary customs duties as "United States import duties." The rigorous use of these distinct terms indicates that the new "special dumping duties" (payable only to offset dumping) were considered to be distinct from the existing "United States import duties." [8]

Because the statute does not define the term "United States import duties" or "costs, charges or expenses" which are incident to bringing the merchandise to the United States," the Department has the discretion to define these terms so long as the definition is based on a permissible construction of the statute.[9] In fact, the Department has long interpreted "United States import duties" to mean "normal import duties" which do not include special duties applied to offset particular trade situations. For example, the Department has argued and the courts have agreed that Section 772(c) of the Act requires the deduction of "normal import duties" and that cash deposits of estimate antidumping duties are not normal import duties.[10] Indeed, the Department's Recommendation Memorandum in the *Wire Rod* case frames the deductibility analysis in terms of whether Section 201 duties should be considered "normal import duties."

In our view, Section 201 duties cannot be considered normal import duties. Section 201 duties are a special, remedial device (also known as Safeguard Measures) that are intended to facilitate the domestic industry's adjustment to

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8 *Id.*

9 *See Hoogovens Staal*, 4. F. Supp. 2d at 1220; see *also AK Steel Corp. v. United States*, 21 C.I.T. 1265; 1279, 988 F. Supp. 594, 607 (Ct. Int'l Trade 1997).

10 *See, e.g., Federal Mogul Corporation v. United States*, 17 C.I.T. 88; 813 F. Supp. 856, 872 (Ct. Int'l Trade 1993).

import competition.[11] Both the process by which Section 201 duties are determined and how they are applied distinguishes them from normal customs duties.

Normal import duties are *ad valorem* rates of general application, which are statutory and published in Chapters 1-97 of the Harmonized Tariff Schedules of the United States.[12] In contrast, Section 201 duties are based on a finding by the U.S. International Trade Commission ("ITC") that an industry in the United States is experiencing serious injury due to increased imports. The duties represent a determination of the amount of duties necessary to "facilitate efforts … to make a positive adjustment to import competition."[13] Indeed, the statute provides the ITC with specific guidelines for calculating the duty rates. The duties themselves are implemented through Presidential proclamation and therefore represent a finding by the President as to the level of protection from import competition that is warranted and in the public interest.

As the Department noted in the Recommendation Memorandum, the fact that Section 201 duties are remedial in nature make them similar to AD and CVD duties. Specifically, the Department found that "just as antidumping duties derive from a special calculation of price discrimination, Section 201 duties derive from a special calculation of the amount necessary to 'facilitate efforts to make a positive adjustment to import competition."[14]

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[11] *See* 19 U.S.C. § 2253(a)(1)(A).

[12] *See* 19 U.S.C. §§ 1202 and 3004.

[13] *See* 19 U.S.C. § 2253(a)(1)(A).

[14] Recommendation Memorandum at 3.

The remedial nature of Section 201 duties is also apparent from the fact that they may be applied to duty free merchandise. The Department has found that because antidumping duties can be applied to "duty-free" merchandise, they are out of the realm of "normal customs duties." [15] The same logic can be applied to Section 201 duties. That is, the fact that Section 201 duties can be applied to "duty-free merchandise" also evidences their special, remedial purpose, which makes them different from normal import duties.

It is also instructive that, during the passage of the Uruguay Round Agreements Act, Congress, following the form and structure of the GATT 1994, separated "Tariff Modifications" (Title I, Subtitle B, Section III), which contained the negotiated duty rates for normal import duties from Safeguard Measures, or "import restrictions" (Title III, Subtitle A). If Safeguard Measures were ordinary, albeit temporary tariff modifications, they would logically fall within the purview of Section III on "Tariff Modifications."[16] However, Section 201 duties, because they are in purpose and definition not "normal" customs duties, were not listed on the U.S. schedule of tariff concessions and instead covered under Title III of URAA. Similarly, Section 201 duties do not appear in Chapters 1-97 of the Harmonized Tariff Schedules of the United States ("HTSUS"). Instead, they are listed as additional rates in a separate schedule for temporary legislation, temporary

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[15] In distinguishing antidumping duties from normal customs duties, the Department referred to section 202(a) of the Tariff Act of 1921, which "provided that 'special dumping duties' may be applied to 'duty-free merchandise.'" *See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 18404 (April 15, 1997).

[16] This section defines the President's authority to increase or reduce tariffs "as he determines to be necessary or appropriate to carry out U.S. Schedule XX annexed to the Marrakesh Protocol to GATT 1994 (*i.e.*, the U.S. schedule of tariff concessions.)." 103rd Congress S. Rpt. 103-412 at 17 (1994).

modifications proclaimed pursuant to trade agreements legislation, and additional import restrictions proclaimed pursuant to Section 22 of the Agricultural Adjustment Act.[17]

Based on the foregoing, it is clear that Section 201 duties are not normal import duties. As a result, based on the Department's longstanding construction of the statute, they are not "United States import duties" within the meaning of the statute. Therefore, the statute does not require that Section 201 duties be deducted in calculating U.S. price (EP or CEP).

B. Section 201 Duties Are Not Selling Expenses Or Additional Costs, Incident To Bringing Subject Merchandise To The United States.

As noted above, the statute directs the Department to deduct certain costs and expenses in AD calculations. Specifically, in determining EP or CEP, the Department is to deduct the amount "attributable to any additional costs, charges, or expenses . . . 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."[18] Section 201 duties, however, are not "additional costs, charges or expenses" incident to importing the merchandise to the United States. As a result, Section 201 duties should not be deducted from the U.S. price in calculating AD margins.

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[17] *See* Chapter 99, Harmonized Tariff Schedule of the United States (2003), Supplement 1 (July 1, 2003).

[18] 19 U.S.C. § 1677a(c)(2).

The intent of the language of "costs…incident to importing" is to cover charges necessary to transport the merchandise, such as port charges, ocean freight and insurance, and handling costs. It is not intended to cover extraneous charges, such as special duties, which are imposed by the U.S. government upon entry of the merchandise into the United States as a remedial trade measure.

III. There Are Important Policy Reasons for Not Deducting Section 201 Duties

There are also important policy reasons for NOT deducting Section 201 duties from U.S. price in a dumping calculation. Very simply, deducting Section 201 duties in AD margin calculations would dramatically increase the effect of 201 duties and therefore would upset the careful balancing between costs and benefits inherent the President's decision to impose Section 201 trade restraints.

Consistent with its remedial purpose, any import restraints imposed pursuant to Section 201 are *expressly limited* to only that level necessary to assist the domestic industry "make a positive adjustment to import competition." [19] Indeed, the statute specifically requires that proposed trade restraints be measured so that they provide greater economic and social benefits than costs.[20] Thus, when the Proclamation that establishes Section 201 trade restraints is issued, the President has made a determination of the precise amounts necessary to effectuate the statutory purpose.

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19 *See* 19 U.S. C. § 2253(a)(1)(A).

20 *Id.*

A. Deducting 201 Duties In AD Margin Calculations Would Greatly Increase The Amount Of Total Duties Charged

Deducting Section 201 duties from U.S. price in AD margin calculations would dramatically increase the effective rate of duty imposed on those foreign exporters that are subject to both antidumping and Section 201 duties, as detailed in the table below.

AD Margin w/o 201 Deduction (*assuming 30% 201 duties*)			
HM Invoice Price	110	U.S. Invoice Price	110
HM distribution costs	4	US distribution costs	7
HM selling expenses	6	U.S. selling expenses	5
		U.S. customs duties	2
Adjusted HM price	100	Adjusted U.S. Price	96
AD margin =	4		
AD duty rate (4/96) =	4.2%		
201 duty rate	30%		
Total (201 plus AD)	**34.2%**		
AD Margin with 201 Deduction (*assuming 30% 201 duties*)			
HM Invoice Price	110	U.S. Invoice Price	110
HM distribution costs	4	US distribution costs	7
HM selling expenses	6	U.S. selling expenses	5
		U.S. customs duties	2
		201 duties	30
		(f.o.b. price = 100)	
Adjusted HM price	100	Adjusted U.S. Price	66
AD margin =	34		
AD duty rate (34/66) =	51.5%		
201 duty rate	30%		
Total (201 plus AD)	**81.7%**		

The table above illustrates two scenarios. The first involves a situation in which the "normal" dumping rate using the Department's usual calculation methodology would result in a dumping margin of about 4 percent. In this case, the importer would pay Section 201 duties of 30 percent at the time of importation, and when the entries were liquidated, the AD assessment (without the deduction of Section 201 duties) would be an additional 4 percent.

In contrast, if the Section 201 duties are deducted in the AD calculation (as depicted in the second scenario), the AD duty rate becomes 51.5%. In other words, even though the importer paid 30 percent Section 201 duties when the merchandise was imported, the importer would still pay an *additional 51 percent* in AD duties when the entries were liquidated because of the deduction of the Section 201 duties.

B. Deducting 201 Duties In Ad Margin Calculations Would Prolong The Effect Of 201 Restraints Beyond Three Years.

Deduction of 201 duties in this manner would not only **dramatically increase the amount** of duties collected, but **also** would **significantly prolong the time** the 201 duties would affect U.S. prices. The reason for this is because U.S. antidumping duties are assessed using a retrospective system; changes in AD cash deposit rates are not made until long after the entries of the merchandise are made. This can be seen by assuming (for illustration purposes) that an AD review period corresponded exactly to the annual period for the steel Section 201 duties, as detailed in the chart below.

Last year of 201 duties	April 1, 2004 – March 31, 2005
AD review initiated	April 2005
AD review final determination	April 2006 (high AD rate because 201 duties deducted)
Subsequent AD review period	April 1, 2005 - March 31, 2006
Subsequent AD review final determination	April 2007 (lower rate because no 201 deduction)

Under U.S. law, cash deposit rates can only be changed upon completion of an AD administrative review by the Commerce Department. Accordingly, as shown above, even though the 201 duties are scheduled to be terminated by March 31, 2005, their adverse effect -- through their incorporation in an increased AD duty rate -- would last until April 2007 -- a full two years later.

C. Deducting 201 Duties In AD Margin Calculations Would Create Differences Among Types of Section 201 Relief That Are Not Intended by The Statute.

Finally, we note that in a Section 201 case, under the law, if relief in the form of trade restraints is determined to be appropriate, the President has the option of establishing quotas or imposing additional duties (or a combination of the two, called a tariff-rate quota.) Needless to say, it would be virtually impossible for the Department to adjust EP or CEP to take into account a quota that had imposed as 201 relief.

Given that the underlying purpose of Section 201 relief is always the same (time for the domestic industry to adjust), the question then becomes why should certain types of 201 relief (i.e. when duties are imposed) be taken into account in the antidumping calculation when other types of relief (i.e. quotas) are not. The answer is that there is no good reason to treat Section 201 relief differently from one case to the next.

In short, deducting Section 201 duties in AD margin calculations would significantly exacerbate the effect of the Section 201 duties by extending Safeguard Measures beyond both the amount and time determined by the President to be appropriate to facilitate the domestic industry's adjustment to import competition without unduly burdening consumers or other aspects of the economy. As a result, Section 201 duties should NOT be deducted in AD calculations.

IV. Any Change In Policy Should Apply Only To Prospective Entries

If, notwithstanding these comments, the Commerce Department decides to deduct Section 201 duties in its AD calculations, the agency should implement this change in policy only with respect to sales that occur after the announcement of the policy. Companies cannot be labeled as "dumpers," and importers should not be subjected to higher deposit and assessment rates, based on a calculation methodology about which they had no knowledge at the time sales of the subject merchandise are made.

Immediate application of a new calculation methodology to ongoing investigations and administrative reviews would, in effect, amount to changing the rules in the middle of the game -- though the consequences would be far more severe than a mere game. The purpose of the antidumping law is not to punish. Rather, the antidumping law is intended to remedy a perceived imbalance in competition. Application of the proposed change in policy to ongoing investigations and administrative reviews would do nothing to remedy the imbalance and would instead simply punish unwitting companies.

The antidumping laws already have a sufficiently distortive effect on trade, in some instances cutting off trade entirely. Those companies that continue to trade despite the existence of an antidumping order can do so only if there is some modicum of predictability to the methods by which ultimately liability is assessed. Application of policy changes to past entries would remove any such predictability and make a mockery of the U.S. antidumping laws.