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The Honorable James J. Jochum
Assistant Secretary for Import Administration
Attn: Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

Attn: Becky Erkul, Office of Policy
Import Administration

Re: Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties: Initial Comments in Response to Request for Public Documents

Dear Assistant Secretary Jochum:

These comments are filed on behalf of Carpenter Technology Corporation; Crucible Specialty Metals Division, Crucible Materials Corp.; Electralloy Corp.; Slater Steels Corp., Fort Wayne Specialty Alloys Division. Carpenter, Crucible, Electralloy and Slater are U.S. producers engaged in the production of stainless steel bar and Carpenter is engaged in the production of stainless steel wire rod, products that are currently subject to Section 201 duties and also subject to antidumping duties. These comments are submitted in response to the U.S. Department of Commerce's (the "Department") request for public comments regarding the treatment of Section 201 duties and countervailing duties in antidumping proceedings pursuant to Section

772(c)(2)(A) of the Tariff Act of 1930. 19 U.S.C. § 1677a(c)(2)(A). Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, 68 Fed. Reg. 53,104 (Sept. 9, 2003).

The stainless steel bar and wire rod domestic industry respectfully requests that in its calculation of dumping margins for U.S. sales in investigations and administrative reviews the Department adjust U.S. price by deducting the amount of any section 201 duties imposed in accordance with 19 U.S.C. § 1677a(c)(2)(A).

I. EXECUTIVE SUMMARY

By statute, 19 U.S.C. § 1677a(c)(2)(A), United States import duties must be deducted from export price and constructed export price, and the increased import duties that are in place because of the section 201 order are regular United States import duties that are subject to this provision. Accordingly, the statute specifically directs Commerce to make these deductions. Furthermore, policy reasons fully support this specific statutory directive. The section 201 duties that are put into place to redress serious injury caused by imports are a separate and distinct proceeding and a separate and distinct remedy from duties that are imposed pursuant to the antidumping statute. The President's decision establishing the size of a section 201 duty is based on different considerations and does not correspond to the method used to calculate the dumping duty; thus the two remedies are not intended to overlap or provide the same remedy to the domestic industry. Indeed, if the Department were to decide not to deduct section 201 duties, the injury being experienced by the domestic industry under either provision would not fully be redressed. Stated differently, a failure to deduct the section 201 duties would serve to undermine the effectiveness of both remedies, thereby simply sustaining, rather than remedying, the injury suffered by the domestic industry. Accordingly, for both statutory and policy reasons, section 201 duties should be deducted from U.S. price for purposes of calculating antidumping duties.

II. THE STATUTE REQUIRES DEDUCTION OF INCREASED CUSTOMS DUTIES CAUSED BY THE PRESIDENT'S SECTION 201 ORDER

The statute is clear that all Customs duties should be deducted from U.S. price. Specifically, in calculating export price ("EP") and constructed export price ("CEP"), section 772(c) of the statute instructs that EP and CEP shall be reduced by

> 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 . . . .

19 U.S.C. § 1677a(c)(2)(A) (emphasis added). Notably, this provision is mandatory, requiring Commerce to make deductions for import duties, and is broad in scope, directing the agency to deduct "any" United States import duties that are incident to the transaction. The statute does not contemplate any exception to this rule, and certainly does not explicitly or implicitly exempt section 201 duties. Based on the plain language of the statute, the Department must deduct section 201 duties from EP and CEP in the margin calculation. The Department enjoys no Chevron deference in this regard as section 201 duties are plainly "United States import duties." See Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

Commerce has never directly addressed the issue of how to treat section 201 duties (as opposed to other analogous duties) in calculating U.S. price in any final determination. In a recent investigation of Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, the Department deferred making any substantive ruling on the issue. Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, 67 Fed. Reg. 55,788 (Aug. 30, 2002) (Decision Memorandum at 4-5).

There is, however, relevant Department precedent supporting deduction of section 201 duties in the margin calculation. In Softwood Lumber From Canada, for example, lumber imports were subject to a quota-based fee as a result of the Softwood Lumber Agreement ("SLA"). The SLA fees operated much as the 201 duties operate in this case, and Commerce deducted this fee from U.S. price. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products From Canada, 66 Fed. Reg. 56,062, 56,067 (Nov. 6, 2001).[1] Thus, Softwood Lumber stands for the proposition that duties similar to those resulting from section 201 should be deducted from U.S. price.

Likewise, in Fuel Ethanol from Brazil, 51 Fed. Reg. 5,572 (Feb. 14, 1986), Commerce deducted a "special tariff" from U.S. price. Like the section 201 duties at issue in this case, in the Brazilian case, Congress had passed legislation imposing additional duties on the existing ad valorem tariff for a particular type of ethyl alcohol. While not resulting from a section 201 proceeding, this tariff resembled a safeguard measure because it resulted in a duty that exceeded the U.S. tariff binding. Section 201 duties are as much United States import tariffs as were the "special tariff" in the Fuel Ethanol from Brazil case. There has been no change in the relevant portion of the statute since 1984 on this issue that would warrant section 201 duties being treated differently in this case. Thus, the statute, together with the only relevant precedent, clearly favor the deduction of section 201 duties in this case.

Section 201 duties have always been treated as an increase in the regular ad valorem rate of duty in every context of trade and customs law. In announcing the section 201 relief on steel

[1] This methodology was affirmed in the final determination. See 67 Fed. Reg. 15,539 (Apr. 2, 2002) and accompanying decision memorandum referenced therein.

products, President Bush characterized section 201 duties as normal Customs duties when he explained that these duties constituted a safeguard measure in the form of "an increase in duties on imports." See, e.g., 67 Fed. Reg. 10,553 (Mar. 7, 2002). Similarly, in the proclamation granting a section 201 remedy to the carbon steel wire rod industry, President Clinton described the applicable duties as an "over-quota rate of duty." Presidential Proclamation 7273, 65 Fed. Reg. 8619, 8622 (Feb. 5, 2000). Thus, when imposing the section 201 duties, the past and current Administrations have apparently considered these duties to be simply an increase in the normally applicable ad valorem Customs duties. Failing to deduct section 201 duties, therefore, directly contradicts the manner in which the Administrations who have ordered section 201 relief have characterized section 201 duties.

In fact, Section 201 itself expressly authorizes the President to declare "an increase in, or the imposition of, any duty on the imported article." 19 U.S.C. 2253(a)(3)(A). While these duties are authorized for a remedial purpose, the statute makes clear that they are intended to be simply an increase to regular duties. Hence, they become part of the harmonized tariff schedule ("HTS") in Chapter 99.

Indeed, the Department need only look to the 2003 HTS to confirm that the current section 201 duties on steel products are treated like normal Customs duties. These duties are listed in Chapter 99 of the HTS, which covers, among other things "Temporary Modifications Pursuant to Trade Legislation." Thus, section 201 duties are always treated by the HTS as a temporary modification to the regular customs duties. U.S. Note 11 to Chapter 99 describes the section 201 duties that appear in subheadings 9903.72.30 through 9903.74.24 (which cover the steel products subject to the President's section 201 remedy). U.S. Note 11(a) to the HTS, states:

> The rates of duty in such subheadings either incorporate the duty rates specified for such goods in Chapters 72 and 73 of the tariff

> schedule or are unchanged from the pertinent provisions of such chapters.

HTSUS Chap. 99, Note 11(a) (2003). This language makes clear that any modification of duties in Chapter 99 due to a section 201 action are legally considered to be modifications of the regular duties specified in Chapter 72. Consistent with the description of the section 201 duties in the President's proclamation and the headnotes to the chapter, Chapter 99 first identifies the existing (i.e., normal) tariff rate for each product covered by the safeguard action and then simply notes an additional increase in that duty (e.g., the duty stated in HTS Chapter 72 plus 15 percent). For Customs purposes, therefore, section 201 duties, while temporary in duration, are like any other applicable duty assessed upon importation, such as the MFN duty rate or harbor maintenance fees. There is no suggestion that the inclusion of these duties as temporary duties under Chapter 99 somehow makes them unique. Rather, the critical point is that section 201 duties are stated with certainty in the tariff schedules; antidumping duties, by contrast, are not. Section 201 duties, therefore, should be deducted from U.S. price.

At no point in the antidumping statute or the Department's regulations is there any hint that increased duties under section 201 would be treated differently than ad valorem duties have otherwise been treated. The only part of the antidumping statute to discuss what "regular customs duties" are for purposes of the antidumping law states:

> For purposes of any law relating to the drawback of customs duties, countervailing duties and antidumping duties imposed by this subtitle shall not be treated as being regular customs duties.

19 U.S.C. § 1677h. Thus, the statute differentiates countervailing duties and antidumping duties as not being regular customs duties for purposes of duty drawback (though only in the context of duty drawback). An increase in ad valorem duties under a section 201 order is not mentioned as being other than regular duties in this section or any other section of the statute, in any context.

Customs regulations also are instructive on this point. These regulations clearly spell out the difference between regular and "special" duties. Specifically, 19 C.F.R. § 159, subpart D, includes a category entitled "special duties." Antidumping and countervailing duties are included in this category while section 201 duties are not. Thus, for purposes of customs law, 201 duties are regular duties.

Section duties are normal Customs duties "incident to bringing the subject merchandise from the original place of shipment" to the United States. Accordingly, consistent with the plain language of the statute to deduct customs duties from EP and CEP (19 U.S.C. § 1677a(c)(2)(A)), the President's characterization of these duties in his Proclamation, the treatment of such duties in the tariff schedule, and the treatment of section 201 duties in other portions of the statute and the Customs law, such duties must be deducted from U.S. price. There is no legal authority for the Department to treat them otherwise.

III. POLICY CONSIDERATIONS SUPPORT THE DEDUCTION OF SECTION 201 DUTIES IN THE ANTIDUMPING CALCULATION

In the only document in which the Department has considered the merits of deducting section 201 duties, a Recommendation Memorandum in Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, [2] the Department discussed two reasons for potentially not deducting section 201 duties from EP and CEP. First, the Department stated that section 201 duties should not be considered "normal" duties for purpose of the statute but should be treated like antidumping duties which are not deducted in the margin calculation. As discussed in detail above, there is no legal support for this position.

[2] Recommendation Memorandum – Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago (Aug. 13, 2002) (hereinafter "Trinidad and Tobago CASWR Recommendation Memo").

The second reason that the Department has previously posited is that the reasoning for not deducting antidumping or countervailing duties also applies to section 201 duties because deduction of these duties would somehow result in "double-counting" of the section 201 relief. See Trinidad and Tobago CASWR Recommendation Memo at 3. This reasoning is flawed, as section 201 duties are materially different from antidumping duties. Indeed, the double-counting concerns that allegedly justify the agency's practice of not deducting antidumping duties flatly do not apply with respect to section 201 duties.

Section 201duties are unlike antidumping deposits in that they are a fixed charge, an actual expense incurred on imports. Unlike antidumping duties, they are not estimates and they do not fluctuate from period-to-period and transaction-to-transaction. Rather, section 201 duties are an actual expense incident to, and paid upon, importation of the merchandise, and the amount of these duties is set forth in the HTS and known in advance. They also are not dependent upon the antidumping equation. In other words, section 201 duties, like other normal Customs duties, are an assessment against the ad valorem value that can be accurately determined, while antidumping duties can only be estimated at the time of importation.

The court cases that have upheld the Department's refusal to deduct antidumping duties dictate the opposite conclusion for section 201 duties based on the essential nature of these duties. The Court of International Trade's decision in Federal Mogul v. United States, 813 F. Supp. 856 (Ct. Int'l Trade 1993), establishes that it is the specific characteristics of antidumping duties – none of which are characteristic of section 201 duties – that justify the agency's practice of deducting antidumping duties from U.S. price. As explained in Federal Mogul, there is a clear distinction between antidumping duty deposits, which may not bear any relationship to the actual duties owed, and "deposits of the actual normal import duties owed which can be accurately

determined." Id. at 872. The Court also found that 19 U.S.C. § 1677a requires Commerce to deduct import duties from U.S. price, and it did so because the actual duties to be collected can be determined at the time Commerce is calculating the current antidumping margins. Id. Based on this decision, there is no basis on which to treat section 201 duties like antidumping duties.

Other cases which invoke the reasoning of Federal Mogul, also undermine the agency's proposed approach, as they show a clear difference between antidumping duties and other Customs duties. In both Hoogovens Staal v. United States and Bethlehem Steel v. United States, the court justified the agency's policy of not deducting antidumping duties on the basis that such duties were unique because they reflected estimates of the level of price discrimination. See Hoogovens Staal v. United States, 4 F. Supp.2d 1213, 1220 (Ct. Int'l Trade 1998); Bethlehem Steel v. United States, 27 F. Supp.2d 201, 208 (Ct. Int'l Trade 1998)). The fact that, unlike section 201 duties, the antidumping duties at issue are simply deposits of estimated duties, with the final assessed amounts to be determine later, following the administrative review process, is the overriding reason cited by the courts in support of Commerce's practice. As the court in Hoogovens explained, illustrating the important distinction between antidumping duties and section 201 duties, "antidumping duties derive from a margin of dumping" while normal Customs duties are "an assessment against value." Id. Because section 201 duties are an assessment against value and are not derived from a margin of dumping, they are not like dumping duties and the rationale for not deducting antidumping duties, on its face, does not apply to section 201 duties.

The calculation of section 201 duties has nothing whatsoever to do with price discrimination. Rather, the International Trade Commission ("ITC") and Commerce have conducted two different inquiries with the goal of providing two different forms of relief, one for

international price discrimination (antidumping) and one to address the need to provide the domestic industry with additional protection during a period of time to allow it to adjust to increased import competition. The Department itself has noted these differences, stating that antidumping duties "derive from a special calculation of price discrimination" while 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 . . . ." See Trinidad and Tobago CASWR Recommendation Memo at 3 (citing 19 U.S.C. § 2253(a)(1)(A)).

The Department, however, must recognize the critical significance of these differences. Section 201 duties offset injury resulting from import competition and antidumping duties offset the amount of price discrimination between the relevant markets. In turn, the alleged double-counting of the dumping margin that has prompted the courts to uphold the agency's practice of deducting antidumping duties does not exist with respect to the injury-related duties calculated in the section 201 context. See, e.g., Hoogovens, 4 F. Supp.2d at 1220 (deducting antidumping duties constitutes double-counting because it would reduce U.S. price and artificially increase the margin).

Rather than double-counting section 201 duties, the failure to deduct such duties from CEP and EP undermines the effectiveness of both the section 201 relief and the antidumping order. Foreign producers and their affiliated importers can choose to absorb the section 201 duties and effectively lower their prices to the first unaffiliated U.S. customer. In that instance, the section 201 duties would not be counted at all if they were not deducted from EP/CEP. Under such circumstances, the price discrimination between the two markets would be undervalued and there would be no increase in price, no penalty on the importer/foreign

producer, and, most important, no beneficial effect to the domestic industry as intended by the section 201 relief.

What appears to be driving the Department's concern over deduction of section 201 duties is the perception that it is somehow unfair that importers should pay section 201 duties and antidumping duties that take into account the section 201 duties. There is in fact nothing unfair about this. There is nothing different about these duties than any other duty, expense or fee inherent in bringing the product to the U.S. market that are routinely deducted pursuant to the statute. The President knew at the time he granted relief to the steel industry, including the stainless steel industry, under section 201 that many products were already covered by antidumping duty orders. He deemed that the steel industry, including the stainless steel industry, industry needed additional relief from imports in addition to the antidumping duties in place.

Failing to deduct section 201 duties, in fact, would be unfair to the petitioners and would fail to measure the actual price discrimination by the foreign producer. The 'apples to apples' comparison that is the essence of the antidumping duty calculation requires the Department to strip out all charges, expenses, and other differences between the two markets to determine whether price discrimination is occurring. Failure to deduct the section 201 duty would mean that the EP/CEP would contain a duty that is not a part of the normal value, meaning that the two elements of the dumping equation would not be measured on the same basis. This violates the fundamental tenant of the dumping law that antidumping duties be calculated on a fair basis.

An example illustrates the point. If one ton of stainless steel wire rod sold for $100 in the United States and $110 in the home market, the dumping margin would be 10 percent ((110-100)/100). If the unrelated purchaser acts as the importer, it would post the 15 percent 201 duty

of $15 on the transaction. The dumping margin would still be 10 percent, which it would also pay. The total cost to the consumer would be $125 per ton, accounting accurately for both the dumping and 201 remedy. In contrast, if an affiliate of the foreign producer acts as the importer and pays the $15 section 201 duty and passes the expense along to the end customer, the customer pays $115 per ton. If the Department refuses to deduct the $15 section 201 duty, the EP/CEP would now be $115 and the dumping margin would be zero and the total cost to the consumer would only be $115 per ton. Rather than having both antidumping duties and 201 duties as envisioned by the statute and as anticipated by the President when he issued the 201 Proclamation, the section 201 remedy would negate and/or replace the dumping relief. There is nothing in Title VII, the section 201 statute or the President's proclamation that would authorize such a result. Furthermore, the determination of whether dumping exists should not be different simply because in one instance the unrelated customer acted as the importer and in the other an affiliated of the exporter acted as the importer. It is only if the $15 section 201 duty in this example is deducted from the price charged by the affiliated importer to the unaffiliated customer that dumping is accurately measured and the imposition of the section 201 duties are methodologically neutral in the dumping calculation.

Furthermore, if one were to assume that the foreign producers' affiliated importer absorbed the 15 percent section 201 duty and did not pass it along to its customer (which we suspect to be the case in many instances), the failure to deduct section 201 duties in the dumping calculation ensures that the section 201 duties has no beneficial effect to the domestic industry. Using the example above, the price to the first unaffiliated U.S. customer would remain at $100, and the dumping margin would remain at 10 percent or $10 per ton, but there would be no increase in the price to the consumer for the section 201 duties and therefore those duties would

have no remedial effect, contrary to the intent of the President. Even worse, the affiliated importer could actually lower its base price to the U.S. customer by $5 to $95 per ton and pass along the $15 section 201 duty to the price customer, eliminating any dumping and reducing the effectiveness of the 201 duty by a third.

In the Wire Rod from Trinidad and Tobago case, the Department explained its concern that deducting the 201 duties in the dumping calculation would double the impact of the section 201 liability with the following example:

> Moreover, treating section 201 duties as deductable 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 remedy 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.

Trinidad and Tobago CASWR Recommendation Memo at 3. As should be clear from petitioners' examples above, concerns about double counting the section 201 remedy are misplaced because the Department's example is logically flawed. If the entered value were $10.00, the importer should be adding the $2.00 section 201 duty to the sale price so that the unaffiliated U.S. customer is paying a total of $12.00 per unit. When the Department then deducted the $2.00 from the sales price, the EP/CEP would fall back to $10.00. Thus, deducting the section 201 duties would have a neutral effect on the dumping margin and would not "double the impact of" the section 201 duty. Only in the case where the affiliated importer did not pass along the duty to the unrelated customer, would subtraction of the 201 duty increase the dumping margin. In that case, the dumping calculation would be giving the 201 duty the $2.00 effect that was intended by the President but which the affiliated importer had sought to negate.

Thus, subtraction of the section 201 duty in the dumping calculation gives the section 201 duty its intended effect and no more, while correctly measuring the price discrimination between the two markets.

IV. CONCLUSION

In the end, there are important differences in the purpose and operation of section 201 duties and antidumping duties that the Department must not overlook. These differences clearly establish that none of the concerns that allegedly justify Commerce's practice of not deducting antidumping duties from U.S. price apply with respect to section 201 duties. For these reasons, and consistent with the plain language of the statute, Commerce should deduct section 201 duties from U.S. price in antidumping investigations and reviews. Any other approach would be without support in law and contrary to the policies that underlie both the antidumping statutes and section 201.

We appreciate the opportunity to submit these comments. Please contact the undersigned if you have any questions concerning this submission.

Very truly yours,

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