Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties
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EXECUTIVE SUMMARY

The U.S. Department of Commerce (the "Department" or "Commerce Department") maintains a long-standing policy of refusing to deduct WTO-sanctioned remedial duties in the calculation of export price and constructed export price ("U.S. price"). Whether expressed in terms of the need to avoid "double-counting," or to refuse to engage in a "circular logic," or to refrain from imposing a "double remedy," the Department's consistent practice is based upon its recognition that deducting such duties from U.S. price results in the imposition of two remedies to address a single problem: a first, WTO-sanctioned remedy in the form of the remedial duty itself and a second, unauthorized remedy in the form of a deduction from U.S. price for such remedial duties, resulting in an increase in or, in some cases, the creation of a liability for antidumping duties. Both as a matter of administering U.S. trade remedy laws in a fair and equitable manner and as a matter of complying with the WTO obligations of the United States, the Department's practice should be continued with respect to countervailing duties and should be made specifically applicable to Section 201 duties.

The Department's policy of avoiding the magnification of WTO-sanctioned remedial duties through their deduction from U.S. price has most often been reflected in its consistent practice, upheld by the courts and approved by Congress, of refusing to deduct antidumping duties from U.S. price. However, the Department has also consistently refrained from deducting countervailing duties from U.S. price, a policy upheld by the courts and reflected in several provisions of U.S. antidumping law. Both the policy with respect to antidumping duties and the policy with respect to countervailing duties are not just permitted, but are indeed required by

U.S. WTO obligations and the need to interpret the antidumping law in a way that is equitable, not punitive.

Substantive fairness and compliance with WTO obligations also dictate that the Department should apply to Section 201 duties its long-standing policy of refusing to deduct WTO-sanctioned remedial duties from U.S. price. Both the WTO Safeguard Agreement and numerous provisions of U.S. law demonstrate that Section 201 duties, like antidumping duties and countervailing duties and in contrast to normal import duties, are remedial in purpose and effect. Moreover, the deduction of Section 201 duties from U.S. price would result in the same type of inequitable "double remedy" as the deduction from U.S. price of antidumping duties and countervailing duties. In addition, the deduction of Section 201 duties from U.S. price would be inconsistent with the WTO Agreement on Safeguards because it would magnify the impact of the safeguard remedy in excess of the amount determined by the President to be required to prevent or remedy serious injury, and extend the impact of the safeguard measure beyond its three year limit. Finally, public policy concerns dictate that the Department should exclude safeguard duties from the antidumping calculation. It is beyond question that antidumping duties are not deducted from U.S. price; it would be anomalous if the duty imposed on fairly-traded imports were double the duty on unfairly-traded imports. Finally, if the Department nonetheless determines that WTO-sanctioned Section 201 duties may be deducted from U.S. price without violating U.S. WTO obligations, the Department should not extend that policy to safeguard duties that have been found to violate U.S. WTO obligations.

I. INTRODUCTION

On August 13, 2003, in a Recommendation Memorandum issued in conjunction with the antidumping duty investigation of *Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, the Department preliminarily determined that safeguard duties, like other WTO-sanctioned remedial duties such as antidumping and countervailing duties, should not be deducted from U.S. price in the calculation of antidumping duties.[1] Despite the fact that this preliminary determination was consistent with long-standing Department policy, the Commerce Department's position was heavily criticized. The domestic steel industry based its objection to the Department's preliminary determination on a number of arguments, most of which had been made and rejected in previous cases addressing the question of whether antidumping and countervailing duties should be deducted from U.S. price. Ultimately, the Commerce Department deferred its decision on the treatment of section 201 duties, and instead invoked its discretionary authority to ignore "insignificant adjustments" to U.S. price.

In July, 2003, the appropriate treatment of safeguard duties in the context of the antidumping calculation became the subject of written questions and answers between Sen. Jay Rockefeller and James Jochum, then nominee for the position of Assistant Secretary for Import Administration, U.S. Department of Commerce. On September 9, 2003, the Department published in the *Federal Register* a request for comments regarding the correct treatment of safeguard duties and countervailing duties in antidumping calculations.[2] These Comments respond to the Department's September 9, 2003, request.

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[1] *See* Department of Commerce Recommendation Memorandum – Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigations: *Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago* (Aug. 13, 2002)[hereinafter August 13 Memorandum].

[2] *Antidumping Proceeding: Treatment of Section 201 Duties and Countervailing Duties*, 68 Fed. Reg. 53104 (Dep't Comm. Sept. 9, 2003).

II. THE DEPARTMENT'S LONG-STANDING POLICY IS TO REFUSE TO IMPOSE AN UNAUTHORIZED DOUBLE REMEDY BY DEDUCTING WTO-SANCTIONED REMEDIAL DUTIES FROM U.S. PRICE

A. The Department's Long-Standing Policy Against Imposing Unauthorized Double Remedies is Reflected in its Practice, Upheld by the Courts and Approved by Congress, of Refusing to Deduct Antidumping Duties from U.S. Price

The Department has long recognized that it is improper to magnify the impact of WTO-sanctioned remedial duties by deducting such duties from U.S. price. This policy has been most frequently applied in the context of rejecting arguments that antidumping duties should be deducted from U.S. price. Whether expressed in terms of the need to avoid "double-counting" or to refuse to engage in a "circular logic," the many decisions by the Commerce Department refusing to deduct antidumping duties from U.S. price are based upon the sound policy that the remedial purpose of the antidumping law is fulfilled through the imposition of the antidumping duty itself. Deducting those same duties from U.S. price would, in effect, result in a magnified or second remedy beyond that authorized by U.S. law and the WTO Antidumping Agreement because the deduction of antidumping duties from U.S. price could increase or, in some cases, create a liability for antidumping duties.

There is no question that this policy is long-standing. Indeed, "{i}n the hundreds of antidumping duty administrative reviews that Commerce has conducted since 1980, the Department has never deducted AD duties or CVDs from the starting price."[3] While this policy has met resistance, the Department has unfailingly defended its practice. For example, in *Color Television Receivers from the Republic of Korea*, the Department explained that it would not

[3] *Certain Cold-Rolled Corrosion-Resistant Carbon Steel Flat Products from Korea,* 62 Fed Reg 18404, 18421 (Dep't Comm. Apr. 15, 1997)(final results) (hereinafter Cold-Rolled Corrosion-Resistant Carbon Steel Flat Products from Korea).

deduct antidumping duties from U.S. price, either as a "United States import duty" or as "additional costs, charges and expenses***incident to importation."[4] The Department reasoned that it would be inappropriate to both remedy dumping through the assessment of an antidumping duty and provide a second, unauthorized remedy by deducting such duties from U.S. price:

> … antidumping duties are intended to offset the effect of discriminatory pricing between two markets. In this context, making an additional deduction from USP for the same antidumping duties that correct this price discrimination would result in double-counting.[5]

In other cases, the Department has stated that, deducting antidumping duties from U.S. price 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."[6] Commerce's consistent policy has accordingly been not to reduce U.S. price by the amount of antidumping duties.[7]

The Department's policy has been upheld by the Court of International Trade in all cases.[8] The court has agreed with the Department that the deduction of antidumping duties from U.S. price would impose an impermissible double remedy because "deducting antidumping

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[4] *See Color Television Receivers from the Republic of Korea*, 58 Fed. Reg. 50333, 50337 (Dep't Comm. Sep. 27, 1993).

[5] *Id. see also Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom*, 60 Fed. Reg. 44009, 44010 (Dep't Comm. Aug. 24, 1995) (final results).

[6] Issues and Decision Memorandum for the Final Results in the 1998/1999 Antidumping Duty Administrative Review of Granular Polytetrafluoroethylene Resin from Italy at cmt. 2, DOC Position (Sept. 5, 2000). *See also 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*; 63 Fed. Reg. 63860, 63865 (Dep't Comm. Nov. 17, 1998) (final results); *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;* 63 Fed. Reg. 2558, 2571 (Dep't Comm. Jan. 15, 1998) (final results); *Certain Cut-to- Length Carbon Steel Plate from Germany*, 62 Fed. Reg. 18390, 18395 (Dep't Comm. Apr. 15, 1997) (final results); *Extruded Rubber Thread From Malaysia*, 64 Fed. Reg. 12967, 12974 (Dep't Comm. March 16, 1999) (final results); *Porcelain-on-Steel Cookware From Mexico*, 63 Fed. Reg. 38373, 38381 (Dep't Comm. July 16, 1998) (final results); *Certain Cut-to-Length Carbon Steel Plate From Belgium*, 63 Fed. Reg. 2959, 2960 (Dep't Comm. Jan. 20, 1998) (final results).

[7] *AK Steel Corp. v. U.S.,* 988 F. Supp. 594 at 607 (Ct. Int'l Trade 1997).

[8] *Id.* The only situation where the Department currently deducts antidumping from U.S. price has been in the context of duty reimbursement. The Department's regulations require that antidumping duties be deducted from U.S. price to the extent to which "the exporter or producer: (A) Paid {them} directly on behalf of the importer; or (B) Reimbursed to the importer." *See 19* C.F.R. § 351.402(f)(formerly at 19 C.F.R. § 353.26).

duties as costs or import duties from U.S. price would, in effect, double-count the margin."[9] For example, in *Hoogovens Staal BV v. United States*, the court upheld the Department's practice of not deducting either estimated or final antidumping duties from U.S. price, reasoning as follows:

> This Court finds Commerce's rationale to be a permissible construction of the statute. If Commerce were to deduct existing antidumping duties as a matter of course in its administrative reviews, it would reduce the U.S. price--and increase the margin--artificially.[10]

Similarly, in the first case to uphold the Department's policy, *PQ Corp v. United States*, the court was asked to order the Commerce Department to deduct the estimated antidumping duties reported by the respondent from the U.S. price, even though the Department had found no dumping in the administrative review. The court refused, noting that "{i}f deposits of estimated antidumping duties entered into the calculation of present dumping margins, then those deposits would work to open up a margin where none otherwise exists."[11] The Department's treatment of estimated antidumping duties was confirmed in *Federal Mogul v. United States*, where the court found that "the ITA was correct not to deduct cash deposits of estimated antidumping duties, which may not bear any relationship to the actual dumping duties owed, from USP."[12] While early cases on the treatment of antidumping duties in the dumping calculation dealt only with cash deposits, the courts' approval of the Department's practice was eventually extended to cover assessed antidumping duties. In *AK Steel v. United States*, the court held that the Department's desire to avoid the double-counting that would result from deducting actual duties from U.S. price was rational and upheld the Department's policy.[13]

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[9] *Hoogovens Staal BV v. U.S.,* 4 F.Supp.2d 1213, 1220 (Ct. Int'l Trade 1998); *see also Outokumpu Copper Rolled Products AB v. U.S.* 829 F. Supp. 1371, 1383 ("Absent evidence of reimbursement, the Department has no authority to make such an adjustment to U.S. price.").

[10] *Hoogovens Staal,* 4 F. Supp.2d at 1220.

[11] *PQ Corp v. U.S.,* 652 F. Supp 724, 737 (Ct. Int'l Trade 1987).

[12] *Federal Mogul v. U.S.,* 813 F. Supp. 856, 872 (Ct. Int'l Trade 1993).

[13] *AK Steel*, 988 F. Supp. at 608.

The Department's practice, moreover, has never been questioned by Congress despite the fact that Congress has had repeated opportunities to do so as part of its numerous amendments to the antidumping law. To the contrary, Congress has explicitly approved the Department's policy through the Statement of Administrative Action to the Uruguay Round Agreements ("SAA"). The SAA, which represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements," explicitly states that AD duties are not to be treated as "a cost" to be deducted from the starting price in the dumping calculation.[14] By approving the SAA, Congress has approved the Department's policy of refusing to impose a double remedy by deducting WTO-sanctioned remedial duties from U.S. price.[15]

B. The Department's Long-standing Policy Against Imposing Unauthorized Double Remedies is Reflected in Provisions of U.S. Antidumping Law Dealing with Countervailing Duties and in the Department's Long-standing Practice of Refusing to Deduct Countervailing Duties from U.S. Price

1. Export Subsidies are Added to U.S. Price to Avoid an Impermissible Double remedy

Section 772(c)(1)(C) of the Tariff Act of 1930 provides that U.S. price is to be increased by the amount of any countervailing duty imposed on the subject merchandise to offset an export subsidy.[16] In *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From the Netherlands*, the Department explained that Congress intended this provision to avoid the imposition of an impermissible double remedy:

> Domestic subsidies presumably lower the price of the subject merchandise both in the home and U.S. markets, and therefore have no effect on the measurement of any dumping that might also occur. Export subsidies, by contrast, benefit only exported

[14] *NTN Bearing Corp. v. U.S.*, 248 F.Supp.2d 1256, 1270 n.8 (Ct. Int'l Trade 2003) *citing* H.R. Doc. No. 103-316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040.

[15] H.R. Doc. No. 103-316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040.

[16] *See* 19 U.S.C. § 1677a(c)(1)(C).

> merchandise. Accordingly, an export subsidy brings about a lower U.S. price, which could be ascribed to either dumping or export subsidization, as well as the potential for double remedies. Imposing both an export-subsidy CVD and an AD duty, calculated with no adjustment for that CVD, would impose a double remedy specifically prohibited by Article VI.5 of the GATT. Thus, the only reasonable explanation for Congress' decision to provide for the {addition to} U.S. price of export-subsidy CVDs is protection against double remedies.[17]

Thus, while technically providing for an addition to U.S. price, this section of the antidumping law further supports the Department's general policy of refusing to deduct WTO-sanctioned remedial duties from U.S. price and, specifically, the application of that policy to countervailing duties. If the Department were to deduct countervailing duties, U.S. price would be reduced by exactly the same amount as it is increased under Section 772(c)(2)(B), thereby completely frustrating the objective of that statutory provision and resulting in exactly the double remedy that Section 772(c)(2)(B) was enacted by Congress to avoid.

2. Export Taxes Levied to Offset a Subsidy are not Deducted from U.S. Price to Avoid an Impermissible Double Remedy.

Section 772(c)(2)(B) of U.S. antidumping law provides that export taxes specifically imposed to offset a countervailable subsidy are not to be deducted from U.S. price. Absent this provision, U.S. antidumping duty law would impose an unauthorized double remedy, the first, authorized remedy, through the export tax offsetting the countervailable subsidy and a second, unauthorized, remedy through the reduction of U.S. price for the payment of such a tax. Here again, a provision of U.S. antidumping duty law reflects the Department's policy of avoiding the imposition of a double remedy for a single trade practice.

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[17] *Cold-Rolled Corrosion-Resistant Carbon Steel Flat Products from Korea*, 62 Fed. Reg. at 18422.

3. Countervailing Duties Are Not Deducted from U.S. Price in the Antidumping Calculation to Avoid an Impermissible Double Remedy

The Department's policy of avoiding the imposition of a double remedy is further reflected in its steadfast refusal to deduct countervailing duties and countervailing duty deposits from U.S. price. In fact, the Department considered it a "standard practice" not to deduct countervailing duty deposits or payments from U.S. price in an antidumping case.[18] The Department's rationale for not deducting either estimated or actual countervailing duties from U.S. price is the same as the logic behind both Section 772(c)(1)(A) and Section 772(c)(2)(B), and its congressionally-sanctioned practice of refusing to deduct antidumping duties in calculating the margin of dumping. Deducting countervailing duties from U.S. price would unjustly magnify the impact of the countervailing duty remedy beyond that specifically authorized by U.S. countervailing duty law and WTO agreement.[19]

For example, in *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea*, the Department stated unequivocally that antidumping and countervailing duties should be treated identically in the context of the antidumping calculation:

> {in UK Lead and Bismuth, the Department had stated} that making an additional adjustment to USP for the same antidumping duties that correct the price discrimination between the U.S. and home markets would result in double-counting, and inconsistency with administrative and judicial precedent. The same principle applies with regard to countervailing duties.[20]

Consistent with its rulings regarding the deduction of antidumping duties, the Court of International Trade has confirmed that countervailing duties should not be deducted from U.S. price. In *AK Steel Corp., et al. v. United States*, the court held that the Department's desire to

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[18] *Id.* at 18421.

[19] *Id. at* 18421.

[20] *See Certain Corrosion-Resistant Carbon Steel Flat Products from Korea, 61 Fed. Reg. 18547, 18564 (Dep't Comm. Apr. 26, 1996) (emphasis added).*

avoid double-counting, which would result from making an additional deduction from U.S. price, "was a reasonable explanation for Commerce's decision to exclude antidumping duties from its definition of 'United States import duties'" and that a "similar explanation would apply to Commerce's refusal to deduct countervailing duties from United States Price."[21]

C. The Department's Long-standing Policy of Refusing to Deduct WTO-Sanctioned Remedial Duties from U.S. Price is Required by Applicable WTO Agreements

The Department's policy of refusing to impose double remedies by deducting WTO-sanctioned remedial duties such as antidumping duties and countervailing duties from U.S. price is not only permitted by relevant WTO agreements, it is required by them.

For example, Article VI.2 of GATT 1994 and Article 9.3 of the Antidumping Agreement state unequivocally that the amount of the dumping duty shall not exceed the margin of dumping. And yet, the deduction from U.S. price of antidumping duties would result in a liability for dumping duties in excess of the margin of dumping. For example, in Case One, assume a normal value of 115, a U.S. price of 115 and a dumping margin of 0. In Case Two, assume a normal value of 115, a U.S. price before the consideration of antidumping duties of 100 and a dumping margin of 15. If antidumping duties were deducted from U.S. price in Case Two, the dumping liability would increase to 30 (or more, if the larger dumping duty were then itself deducted, *ad infinitum*) even though the level of price discrimination justifies a remedy of only 15.

In addition to violating Article VI.2 of GATT 1994 and Article 9.3 of the Antidumping Agreement, the deduction of antidumping duties from U.S. price would also violate Article 2.4 of the Antidumping Agreement. The SAA notes that Article 2.4 of the Antidumping Agreement "admonishes national authorities not to double count adjustments" in calculating dumping

[21] *AK Steel,* 988 F. Supp. at 607.

margins,[22] and Congress correctly interpreted the Antidumping Agreement as prohibiting the deduction of antidumping duties from U.S. price.[23]

Similarly, Article VI.3 of GATT 1994 and Article 19.4 of the Agreement on Subsidies and Countervailing Measures provide that the amount of the countervailing duty levied shall not exceed the amount of the subsidy found to exist. The deduction of countervailing duties from U.S. price (or the failure to add such duties to U.S. price) would be inconsistent with this requirement because it would create a liability for dumping duties in addition to the countervailing duties imposed, thereby imposing a remedy in excess of the subsidy found to exist.

Finally, the deduction of antidumping and/or countervailing duties would additionally violate Article 18.1 of the Antidumping Agreement, which provides that "{n}o specific action against dumping of exports from another Member { } be taken except in accordance with the provisions of GATT 1994, as interpreted by {the Antidumping} Agreement."[24] As the deduction of antidumping and countervailing duties from U.S. price would be a practice that is both triggered by, or contingent upon, a situation in which the elements of dumping are present and has an adverse impact on exporters, it is an action that constitutes a "specific action against dumping of exports." Furthermore, such action is clearly not "in accordance with the provisions of GATT 1994, as interpreted by {the Antidumping} Agreement."[25] As noted above, the deduction of antidumping duties from U.S. price violates Article VI.2 of GATT 1994 by creating a dumping duty that is in excess of the margin of dumping. Moreover, the deduction of

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22 *Cold-Rolled Corrosion-Resistant Carbon Steel Flat Products from Korea*, 62 Fed. Reg. at 18421, *citing* Statement of Administrative Action at 139 and Article 2.4 of the Antidumping Agreement at 7.

23 H.R. Doc. No. 103-316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040.

24 Implementation of Article VI of GATT 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], art. 18.1.

25 *Id.*

countervailing duties from U.S. price results in the imposition of duties in excess of the amount of subsidization found to exist, in contravention of Article VI.3 of GATT 1994, and would subject merchandise to both countervailing duties and antidumping duties to "compensate for the same situation of dumping," in contravention of Article VI.5 of GATT 1994.

D. The Department's Policy of Refusing to Deduct Countervailing Duties from U.S. Price Should be Continued

The Department's policy of refusing to deduct countervailing duties from U.S. price is consistent with its policy of avoiding the deduction of antidumping duties from U.S. price in order to avoid an impermissible double remedy. The Department's policy with respect to countervailing duties, consistently upheld by the courts, is also supported by two statutory provisions enacted to prevent the imposition of precisely the type of double remedy that deducting countervailing duties from U.S. price would create. Moreover, changing the Department's policy would both undermine its efforts to administer the antidumping law in an equitable manner and be inconsistent with U.S. WTO obligations. For these reasons, the Department should continue its policy of refusing to deduct countervailing duties from U.S. price.

III. THE DEPARTMENT SHOULD APPLY TO SECTION 201 DUTIES ITS LONG-STANDING POLICY OF REFUSING TO DEDUCT WTO-SANCTIONED REMEDIAL DUTIES FROM U.S. PRICE

A. Section 201 Duties, Like Antidumping and Countervailing Duties, are WTO-Sanctioned Remedial Duties

1. The WTO Agreement on Safeguards and U.S. Implementing Legislation Confirms that Safeguard Measures in the Form of Duties are Remedial in Nature

There is no question that the WTO authorizes duties imposed as a safeguard measure in accordance with the Agreement on Safeguards. Nor, as discussed below, is there any question that such duties are remedial in purpose and an exception to the principle of trade liberalization

for the purpose of providing emergency relief for the effects of a specific problem of international trade (namely, rapidly increasing but fairly-traded imports that cause serious injury). Like antidumping and countervailing duties, Section 201 duties are considered to be WTO-sanctioned remedial duties under both the WTO Agreements and the U.S. laws that implement those Agreements.

The WTO Agreement on Safeguards indicates that duties imposed as a safeguard measure are qualitatively different than normal import duties. First, safeguard measures are emergency measures. The WTO Introduction to the Agreement on Safeguards, on the World Trade Organization website states that "Safeguard measures are defined as 'emergency' actions with respect to increased imports of particular products … "[26] Indeed, GATT Article XIX, on which safeguards are based, is entitled "Emergency Action on Imports of Particular Products." Normal import duties, by contrast, are applied across the board by all WTO Member States as a standard practice. Second, a safeguard measure may be imposed in the form of a duty, tariff-rate quota, or quantitative restriction. The fact that the Agreement on Safeguards authorizes Member States to impose new quotas, an action otherwise not permitted under the GATT system, illustrates the distinct nature of safeguard measures.[27] Third, the fact that a compensation procedure is part of the safeguard process further illustrates that a safeguard measure constitutes an exception to the GATT tariff system.[28]

An analysis of U.S. laws implementing the WTO Safeguards Agreement also reveals that safeguard duties indisputably constitute remedial measures, rather than an extension of normal

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[26] World Trade Organization: Agreement on Safeguards Introduction, *at* http://www.wto.org/english/tratop_e/safeg_e/safeint.htm.

[27] *See* Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, art. 2.

[28] *Id.* at art. 8.

import duties. As with antidumping and countervailing duties, the nature of a safeguard measure is vastly different from a normal import duty. First, U.S. law defines Section 201 duties as remedial. Specifically, a safeguard is defined as a measure imposed in order to "facilitate positive adjustment to import competition" in response to a finding by the International Trade Commission that imports are "a substantial cause of serious injury, or the threat thereof, to the domestic industry."[29] As countervailing and antidumping duties are calculated to remedy the impact of unfair trade practices, safeguard measures are calibrated to remedy injury to the domestic industry from rapidly increasing but fairly-traded imports. Second, like other remedial measures, such as antidumping duties and countervailing duties, safeguard measures may only be imposed following a public investigation in which interested parties are given an opportunity to participate and to challenge views put forward by other parties.[30] Third, Section 201 duties are subject to temporal limitations and *must* be digressive because they are imposed as an emergency measure on fairly-traded merchandise.[31] While normal import duties may be temporary and digressive, there is no requirement that they must be progressively liberalized. Finally, a safeguard measure may be imposed in the form of a duty, tariff-rate quota, or quantitative restriction.[32] The imposition of new quotas is otherwise not permitted under the GATT system.

2. An Analysis of Other U.S. Laws and Statements by Relevant Agencies Indicate that Section 201 Duties are Considered Remedial Under U.S. Law

Language in the Statement of Administrative Action for the Agreement on Safeguards also indicates that U.S. law considers safeguard duties to be remedial. When addressing the interaction between section 201 and other trade remedy measures, the SAA notes that the

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[29] 19 U.S.C. § 2251(a).
[30] *See Id.* at 19 U.S.C. § 2252.
[31] *Id.* § 2253(e)(5).
[32] *Id.* § 2253(a)(3).

International Trade Commission is charged with taking into account "relief" provided under "other" provisions (e.g. antidumping and countervailing duty law) because such "relief" could alter the amount of "relief" necessary under Section 201.[33] Congress thus evidently views the "relief" provided under 201 to be a remedy similar to that provided under the antidumping and countervailing duty laws.[34] Moreover, by codifying its position in the SAA, Congress ensured that its view would guide "the interpretation and application of the Uruguay Round Agreements and the URAA in any judicial proceeding in which a question arises concerning such interpretation or application."[35]

The U.S. Harmonized Tariff Schedule treats Section 201 duties as special remedial duties. Safeguard duties are found in Section XXII, Chapter 99, subchapter III of the Harmonized Tariff Schedule, which is entitled "Temporary Modifications Established Pursuant to Trade Legislation." The fact that Section 201 duties are not with regular import duties, but are separated in Subchapter III of Chapter 99, distinguishes them from normal U.S. import duties and from additional normal import duties such as those listed in Subchapter I. Indeed, Note 11 to Subchapter III, which covers "goods excluded from the application of relief" underscores the fact that such duties are remedial.[36]

Finally, U.S. Government agencies responsible for administering and implementing Section 201 consider Section 201 duties to be remedial. The International Trade Commission has made clear that, while intended to remedy distinguishable types of injury, antidumping/countervailing duties and section 201 duties are all remedial duties:

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[33] *See The Uruguay Round Agreements Act, Statement of Administrative Action, Agreement on Safeguards*, at B(2)(a) (1994), *compiled in* Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements. vol. 1 at 964.

[34] *See also* 19 U.S.C. 2252(c)(5) which instructs the ITC to refer cases for investigation under "other remedial provisions of law" if warranted, such as antidumping countervailing duty and 337.

[35] *See* 19 U.S.C. § 3512(d).

[36] *See* U.S. Harmonized Tariff Schedule, Section XXII, Chapter 99, Subchapter III, n. 11(a).

> As a basic matter, Title VII and section 201 remedy different problems facing an industry. Title VII remedies the injury caused by unfairly-traded imports by applying a tariff to those imports from a specific country (or company) to either nullify a subsidy bestowed on those products or to raise the price of the imports if they are sold at less than fair value. Section 201 remedies the injury caused by increased imports that are presumed to be fairly-traded. It does so on a global scale to give the domestic industry time to adjust to import competition by either becoming more efficient or by shifting productive resources to other pursuits.[37]

The U.S. Bureau of Customs and Border Protection, the agency charged with administering all border measures, likewise considers duties imposed under Section 201 to be remedial. The information notice issued to steel importers notes, for example that the "remedy will go into effect on March 20, 2002." Under "Enforcement" the document reads: "The current steel remedy does not supercede or cancel any existing remedy such as quotas, anti-dumping or countervailing duties, nor does it supercede the existing duty rates listed in chapter 72 and 73 of the HTSUS." The Section 201 information sheet, distributed to U.S. importers and Customs brokers and published on the Bureau's web site, similarly distinguishes between Section 201 duties and normal import duties. Notably, the fact sheet states that "these new additional duties are cumulative on top of normal duties, antidumping/countervailing duties, fees, taxes, or any other duties or charges.[38] Filing directions governing entries of merchandise subject to the safeguard measure also distinguish between normal duties and Section 201 duties, requiring that the duties paid under Section 201 be listed separately from normal import duties on Customs Form 7501.[39, 40]

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[37] *Steel Volume I: Resolutions and Views of Commissioners*, USITC Pub. 3479 at 437 n. 44, Inv. No. TA-201-73 (December 2001).

[38] *See* Steel 201 Questions and Answers *available at* http://www.customs.ustreas.gov/ImageCache/cgov/content/import/duty_5frates_5fhts/steel_5f201/steelqna_2epdf/v1/steelqna.pdf.

[39] *Id.*

[40] Merchandise subject to antidumping duty orders, countervailing duty orders, and safeguard measures are severely restricted in terms of the Customs advantages they may obtain through the use of a foreign trade zone ("FTZ"). Under 19 C.F.R. § 400.33(b)(2) merchandise subject to antidumping or countervailing duty orders must be

B. The Department Should Apply to Section 201 Remedial Duties Its Long-Standing Policy Against Deducting WTO-Sanctioned Remedial Duties

1. The Department's August 13, 2002 Preliminary Determination Should be Affirmed

In keeping with the Department's sound policy of refusing to impose an unauthorized double remedy by deducting from U.S. price WTO-sanctioned remedial duties, on August 13, 2002, the Department preliminarily concluded in a Recommendation Memorandum (the "August 13 Memorandum") that it would also be inappropriate to deduct safeguard duties from U.S. price. This memorandum, which was issued in the context of an antidumping duty investigation on *Certain Alloy Steel Wire Rod from Trinidad and Tobago*, explained the Department's preliminary decision as follows:

> {the}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…not be deducted from U.S. price in calculating EP and/or CEP."[41]

The August 13 Memorandum concludes that the rationale for not deducting antidumping duties and countervailing duties from U.S. price is equally applicable to safeguard duties. This is the correct decision because deducting the safeguard remedy from U.S. price, either as a "United States import duty" or a selling expense would result in artificial magnification of the safeguard remedy, that is, the imposition of a double remedy. Safeguard duties have been calculated to

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placed in "privileged foreign status" upon admission to a zone of subzone. As a result, upon entry into the U.S. Customs territory, the product will be subject to the antidumping or countervailing duty that applied to the product as classified upon admission into the zone, even if the product has changed in form and is this classified under a tariff heading not subject to a remedial measure. Section 201 duties are treated identically in the Presidential Proclamation, which states: "Any merchandise subject to a safeguard measure that is admitted into U.S. foreign trade zones…must be admitted as 'privileged foreign status' as defined in 19 C.F.R. § 146.41, and will be subject upon entry to any quantitative restrictions or tariffs related to the classification under the applicable HTS subheading."

[41] August 13 Memorandum at 4.

"facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."[42] By imposing safeguard duties, the United States has already remedied the actual or potential injury posed by imports. Deducting Section 201 duties from U.S. price cannot be viewed as fulfilling the goals of Section 201, as those objectives have already been met. Nor does the deduction of Section 201 duties advance the objectives of the antidumping statute. As consistently applied by the Department and sanctioned by the Court of International Trade and Congress, U.S. antidumping law does not condone the creation or augmentation of the dumping margin beyond that specifically authorized by antidumping law.

2. The WTO Safeguards Agreement Prohibits the Deduction of Section 201 Duties from U.S. Price

Just as the WTO Antidumping Agreement prohibits the imposition of antidumping duties in excess of the margin of dumping, and just as the WTO Agreement on Subsidies and Countervailing Measures prohibits the imposition of a countervailing duty in excess of the subsidy found, Article 5.1 of the WTO Agreement on Safeguards prohibits the imposition of safeguard measures in excess of those required to prevent or remedy serious injury and to facilitate adjustment. Moreover, just as deducting antidumping and countervailing duties from U.S. price would impose an impermissible double remedy, deducting Section 201 duties from U.S. price would result in the imposition of a remedy in excess of that determined by the President to be required to prevent or remedy serious injury.

Consider, for example, an antidumping investigation undertaken to the imposition of safeguard measures involving above-cost sales in both the home market and the United States. The Commerce Department investigation reveals that U.S. price is $115 and Home Market Price

[42] *See* 19 U.S.C. § 2253(a)(1)(A).

is also $115 (Scenario 1). Because U.S. price is equal to home market price in Scenario 1, no dumping is found. Assume then that the U.S. price declines to $100, the U.S. industry seeks additional relief in the form of safeguard measures, and a safeguard duty of 15 percent is imposed. At that point, the merchandise becomes subject to both safeguard duties and antidumping duties (Scenario 2). In order to cover the cost of the safeguard duties, U.S. price rises to $115 (Scenario 3) which is, as in Scenario 1, the price at which no dumping exists. However, if the Section 201 duties are deducted from U.S. price in Scenario 3, then a liability for dumping duties will be created. In essence, the deduction of Section 201 duties from U.S. price has created an impermissible double remedy: the first, an authorized remedy through the WTO-sanctioned imposition of Section 201 duties and the second, a remedy that is contrary to Article 5.1 of the WTO Safeguards Agreement, that creates a liability for dumping duties.

Deducting Section 201 duties from U.S. price also violates other provisions of the WTO Agreement on Safeguards. For example, allowing Section 201 duties to impact the antidumping calculation must necessarily extend the impact of the safeguard measure beyond the three year limit. This would occur because antidumping administrative reviews are retrospective, but antidumping duties are applied prospectively, and thus the effects of a safeguard duty that is deducted from U.S. price could potentially survive for years following the termination of the safeguard measure. Such a result would clearly violate Article 7.1 of the Agreement on Safeguards, which directs Member States to "apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment." By deducting safeguard duties from U.S. price, the Commerce Department would be magnifying the impact of the Section 201 remedy without meeting all the procedural requirements (imposed by both U.S. law and the Agreement on Safeguards) that are as a condition precedent to extension or

modification of a safeguard measure.

Finally, the deduction of safeguard measures from U.S. price potentially deprives U.S. trading partners of the compensation to which they are entitled under Article 8 of the Agreement on Safeguards. Article 8 states that Member States are entitled to "substantially equivalent concessions…to the trade of the Member applying the safeguard measure." If safeguard measures are deducted from U.S. price, the United States trading partners will be forced either to increase the level of concessions to a level that includes the impact resulting from the interaction between the safeguard remedy and the U.S. antidumping laws, or relinquish their rights under the WTO.

3. The Department Should Not Deduct Section 201 Duties Where Such Duties Have Been Determined by WTO DSB to be Illegal

On March 7, 2002, in response to the U.S. imposition of definitive safeguard measures on imports of certain steel products, the European Community requested consultations with the United States under Article 4 of the Dispute Settlement Understanding, Article XXII:1 of the GATT 1994 and Article 14 of the Agreement on Safeguards.[43] Requests for consultations were subsequently lodged by a number of other countries as well, including some of the United States' largest trading partners.[44] A Dispute Settlement Panel was convened in July 2002 to determine

[43] *See Request for Consultations by the European Communities: United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/1 (March 13, 2002).

[44] Requests for consultations were made by Japan, Korea, China, Switzerland, Norway, New Zealand, Chinese Taipei, and Brazil. *See Request for Consultations by Korea: United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS251/1 (March 26, 2002); *Request for Consultations by Japan: United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS249/1 (March 26, 2002); *Request for Consultations by China: United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS252/1 (Apr. 2, 2002); *Request for Consultations by Switzerland: United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS253/1 (Apr. 8, 2002); *Request for Consultations by Norway: United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS254/1 (Apr. 10, 2002); *Request for Consultations by New Zealand: United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS258/1 (May 21, 2002); *Request for Consultations by the European Communities: United States – Definitive Safeguard Measures on Imports of Certain Steel Products*,

whether the imposition of safeguard duties on certain steel products satisfied "the WTO prerequisites for taking such action, including those mentioned in Articles 2, 3, 4, 5, 7, 8, 9 and 12 of the Agreement on Safeguards and Articles X and XIX of GATT 1994."[45]

In the case of *United States—Definitive Safeguard Measures on Certain Steel Products*, the Panel determined that *all* safeguard measures at issue in the dispute were inconsistent with the requirements of GATT Article XIX:1(a) and Safeguards Agreement Article 3.1 with respect to the demonstration of unforeseen developments. Having found all the safeguard measures imposed by the United States to be inconsistent with the WTO, the Panel found it unnecessary to examine the remaining claims against the United States.[46] The findings of the WTO Panel are currently under review by the Appellate Body.

As discussed above, the Department should apply to Section 201 duties its policy of avoiding a double remedy by refusing to deduct *any* Section 201 duties from U.S. price. However, if the Department nonetheless adopts a policy that WTO-sanctioned Section 201 duties may be deducted from U.S. price without violating U.S. WTO obligations, the Department should not extend that policy to safeguard duties that have been found to violate U.S. WTO obligations. A final ruling that safeguard duties are inconsistent with U.S. WTO obligations would render equally contrary to WTO principles the Department's giving effect to such duties by deducting them from U.S. price.

With respect to the safeguard duties imposed on certain steel products therefore, the Department should, at the very least, refrain from deducting such duties from U.S. price until the

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WT/DS259/1 (May 23, 2002); *Request for Consultations by Chinese Taipei: United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS274/1 (Nov. 11, 2002).

[45] *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, Reports of the Panel, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, para. 10.4 (July 11, 2003).

[46] *Id*. at para. 10.145-150.

Appellate Body has completed its review and, if the Panel's findings are upheld, then as a matter of compliance with that finding and with U.S. WTO obligations, no Section 201 duties should be deducted from U.S. price.

4. As a Matter of Public Policy, Duties on Fairly-Traded Imports Should Not be Subjected to a Greater Impact Than Duties on Unfairly-Traded Imports

As discussed at length in Section II of these Comments, the policy against deducting antidumping duties from U.S. price is firmly rooted in both U.S. law, (as demonstrated by Commerce Department practice, Court of International Trade precedent, and Congressional approval), and in the WTO Antidumping Agreement. Indeed, the September 9, 2003 request for comments issued by the Commerce Department does not solicit views on this policy.

Given that it is unquestionably sound policy to avoid the imposition of a double remedy through the deduction of antidumping duties -- duties imposed to provide relief against *unfairly-traded* imports -- it would be anomalous to refuse to extend that policy to Section 201 duties, thereby imposing a double remedy against *fairly-traded* imports.

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