October 9, 2003

PUBLIC DOCUMENT

BY HAND DELIVERY
The Honorable James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Attn: Section 201 Duties

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

Dear Assistant Secretary Jochum:

United States Steel Corporation ("U.S. Steel") submits the following letter to the U.S. Department of Commerce (the "Department") in response to the Department's request for 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, as amended (19 U.S.C. § 1677a(c)(2)(A) (2000)).[1] This brief specifically addresses the question of the treatment of section 201 duties. U.S. Steel is also submitting additional comments addressing the treatment of countervailing duties in a separate letter.

U.S. Steel 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 and any countervailing duty deposits imposed to offset non-export subsidies in accordance with 19 U.S.C. § 1677a(c)(2)(A).

I. Section 201 Duties Must Be Deducted from EP and CEP

The issue facing the Department is whether section 201 tariffs – which appear at the "temporary legislation" chapter of the tariff schedule (i.e., chapter 99) and increase the "normal" import duty rates at chapters 72 and 73 of the tariff schedule –

[1] Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, 68 Fed. Reg. 53104 (Dep't Commerce Sept. 9, 2003).

should be deducted from EP and CEP. This issue, we submit, has already been resolved in Fuel Ethanol from Brazil.[2]

In Fuel Ethanol, the subject merchandise had been subject to normal import duties under item 427.88 of the Tariff Schedules of the United States ("TSUS"), the predecessor of the current Harmonized Tariff Schedule ("HTS").[3] Pursuant to an act of Congress, the imports were also "subject to additional duties under TSUS item 901.50."[4] Accordingly, the Department "made deductions from the selling price for special customs duties {and} regular customs duties . . ."[5] In particular, the Department concluded that it:

> is required to subtract from the exporter's sales price any United States import duties incident to bringing the merchandise from the place of shipment to the place of delivery in the United States. 19 U.S.C.

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[2]Fuel Ethanol from Brazil, 51 Fed. Reg. 5572 (Dep't Commerce Feb. 14, 1986) (final determ.) ("Fuel Ethanol").

[3]Ethyl Alcohol from Brazil, 51 Fed. Reg. 9538 at n. 4 (Int'l Trade Comm'n Mar. 19, 1986) (final determ.).

[4]Id.

[5]Fuel Ethanol from Brazil, 51 Fed. Reg. 5572 (Dep't Commerce Feb. 14, 1986) (final determ.) (emphasis added).

> 1677a(d)(2). As this duty is a cost incurred by P.I.I. in selling the merchandise which has not been reduced by revenues received by P.I.I. from any other source, the Department has deducted the full amount in accordance with the statute.[6]

Although Fuel Ethanol did not concern section 201 duties, the "special" additional duties involved in that case are indistinguishable in their operation from section 201 duties. Specifically, the ethanol duties fell within TSUS item 901.50, which was described as follows:[7]

PART I. – TEMPORARY LEGISLATION

Subpart A – Temporary Provisions for Additional Duties . . .

901.50 Ethyl alcohol (provided for in item 427.88, part 2D, schedule 4) when imported to be used in producing a mixture of gasoline and alcohol or a mixture of a special fuel and alcohol for use as fuel, or when imported to be used otherwise as fuel.

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[6] Id.

[7] Tariff Schedules of the United States (1985), attached hereto at Exhibit 1.

The duties in item 901.50 were collected in addition to the "normal" duties imposed for item 427.88.[8] In the current HTS, these ethanol duties now appear in Chapter 99, at subheading 9901.00.50.[9]

Section 201 duties on steel, like the ethanol duties, are imposed in addition to the "normal" duties found in chapters 72 and 73 of the HTS.[10] Also like the ethanol duties, the section 201 duties appear in the "Temporary Legislation" chapter (i.e., now Chapter 99) of the HTS.[11] In terms of their operation and relationship to "normal" customs duties, therefore, the ethanol duties and the section 201 duties are identical.

In Wire Rod from Trinidad and Tobago, the Department stated in an internal "Recommendation Memorandum" that "section 201 duties are not treated as normal customs duties" in the HTS because "they appear in a separate schedule for

[8] Id.

[9] Harmonized Tariff Schedule, 2003 Rev. 2.

[10] See, e.g., HTS subheading 9903.72.60 (establishing the duty rate as "the rate provided in ch. 72 + 30%") (Harmonized Tariff Schedule, 2003 Rev. 2).

[11] See Harmonized Tariff Schedule, 2003 Rev. 2.

temporary duties at subchapter III of chapter 99."[12] Accordingly, the memorandum recommended that such duties not be deducted from either EP or CEP.[13] Significantly, this memorandum was not adopted for the Department's final determination, which declined to address the merits of the issue.[14] Nor should the Department adopt such reasoning today. As an initial matter, that memorandum (i) fails to distinguish (or even to cite) Fuel Alcohol, and (ii) fails to offer any rationale for why import duties provided under chapter 99 do not qualify as "United States import duties" under the statute.[15]

Moreover, even if the Department considers section 201 duties not to be "normal" customs duties (as the "Recommendation Memorandum" suggests), this is

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[12]Recommendation Memorandum in Wire Rod from Trinidad and Tobago re: Section 201 Duties and Dumping Margin Calculations (Dep't Commerce Aug. 13, 2002) at 3 (Public Document).

[13]Id.

[14]Wire Rod from Trinidad and Tobago, 67 Fed. Reg. 55788 (Dep't Commerce Aug. 30, 2002) (final determ.).

[15]Section 772(c) of the statute requires that the Department deduct from EP and CEP amounts "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).

irrelevant for purposes of the statute. Fuel Ethanol recognizes that whether the duties are characterized as "normal duties," as "special duties," or simply as selling costs "incident" to importation, they must be deducted from U.S. price.[16] Section 201 duties, like any other expense incurred by the seller, reduce the net return to the seller. Failure to deduct section 201 duties will result in a net U.S. price that is artificially high because it is greater than the ex-factory price for the merchandise. This precludes an "apples-to-apples" comparison with ex-factory home market prices. Consequently, if section 201 duties are not deducted, the Department cannot make a "fair comparison" between EP or CEP and normal value as required by section 773(a) of the statute.[17]

II. Deduction of Section 201 Duties from EP and CEP Does Not Result in Double-Counting

According to the "Recommendation Memorandum," "treating section 201 duties as deductible selling expenses or import duties would, in effect, generally double-count (i.e., double-count the impact of) the section 201 remedy."[18] This suggestion is

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[16] Fuel Ethanol from Brazil, 51 Fed. Reg. 5572 (Dep't Commerce Feb. 14, 1986) (final determ.).

[17] 19 U.S.C. § 1677b(a).

[18] Recommendation Memorandum in Wire Rod from Trinidad and Tobago re: Section 201 Duties and Dumping Margin Calculations (Dep't Commerce Aug. 13, 2002) at 3 (Public Document).

without any basis. The rationale that has been invoked by the Department in the case of antidumping duties is based on a purported concern that the same measure of price discrimination not be taken into account twice:

> Antidumping duties are unique in that they represent antidumping duty *margins* – a measure of price discrimination between FMV and USP. The statutory remedy for such unfair price discrimination is to assess antidumping duties against the importer merchandise in an amount equal to the amount by which the FMV exceeds the USP for the merchandise. To then subtract this amount from USP in order to recalculate a supra-antidumping duty margin would be creating additional price discrimination that did not exist. This is the same as saying that dumping margins must be adjusted to account for dumping margins.[19]

This concern does not even arguably apply to section 201 duties, which do not measure price discrimination. To the contrary, they reflect the President's judgment regarding the degree of relief required to permit the domestic industry to adjust. Moreover, as discussed above, the section 201 duties operate simply to increase normal import duties, deduction of which has never raised double-counting concerns.

The "Recommendation Memorandum" purports to illustrate double-counting with the following example:

> if the section 201 duty were 20 percent ad valorem, and the entered value of an entry subject to the duty were $10.00, one would expect the U.S.

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[19] Certain Cold-Rolled Carbon Steel Flat Products from Korea, 63 Fed. Reg. 781, 787 (Dep't Commerce Jan. 7, 1998) (final results).

> 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.[20]

The conclusion drawn from this example is flawed. The purpose of the section 201 tariff-based remedy was to cause foreign producers to raise their United States prices.[21] In the example above, if the foreign producer had raised its price to $12.00 (in effect, passing the increased cost to the consumer), deduction of the section 201 duties simply results in a "wash." Thus, if normal value were $10.00, there would be no dumping margin.

Failure to deduct the section 201 duties, however, would undermine the relief because foreign producers would be encouraged to "absorb" the duties rather than raise prices. Suppose, in the example above, that the foreign producer (and its affiliated U.S. reseller) decided to maintain the price at $10.00, absorb the additional duties, and accept a net return of $8.00. If section 201 duties were deducted, this producer – unlike the producer who increased its prices – would face a dumping margin of $2.00. Without

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[20] Id.

[21] See Steel, International Trade Commission Publication 3479 (Dec. 2001) at 354 ("the tariff-based remedies we are recommending are intended to increase domestic prices . . .") and at 363 ("we found that a tariff will not unduly restrict imports but will allow domestic prices to rise . . .").

such deduction, however, this producer faces no consequence for absorbing the increased duties and accepting a lower net price.

Moreover, even if foreign producers raise their prices to cover the increased duties, failure to deduct section 201 duties would provide an enormous competitive advantage to unfair traders the expense of fair traders. Unfair traders who raise their prices to account for section 201 duties, while still accepting the same net return below normal value, will see their dumping liability reduced or eliminated (up to the level of the section 201 duties). This will in turn place enormous pressure on those who would otherwise trade fairly to instead absorb the section 201 duties and accept below-normal-value returns simply to compete with those trading unfairly.

Consider two foreign producers selling in this market, both with a normal value for their products of $12.00: the unfair trader is selling in the U.S. at $10.00 while the fair trader is selling at $12.00. Under normal circumstances the unfair trader would be subject to dumping liability to level the playing field. If each producer raises its prices by 20 percent (to $12.00 and $14.40, respectively) to take into account the 201 duties, however, the policy proposed in the Wire Rod "Recommendation Memorandum" would relieve the unfair trader of any dumping liability and give it a huge advantage over the fair trader. Indeed, the failure to deduct section 201 duties masks dumping by the unfair

trader, whose dumping margin simply disappears. By doing so, it encourages the fair trader to instead absorb the 201 duties, accept a net return below normal value, and undermine the safeguards relief.

In sum, the deduction of section 201 duties does not raise any of the double-counting concerns implicated by the deduction of antidumping duties. In fact, failure to deduct section 201 duties would mask dumping, and encourage foreign producers to behave in ways that would undermine the safeguards relief. Accordingly, the Department should, as required by the statute, deduct the section 201 duties from EP and CEP.

Respectfully submitted,

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