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October 8, 2003

DELIVERY BY HAND

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

PUBLIC DOCUMENT

Re: **Treatment of Section 201 Duties In Antidumping Duty Calculations**

Dear Assistant Secretary Jochum:

On behalf of certain U.S. producers of carbon quality pipe and tube and the Committee on Pipe and Tube Imports ("CPTI") we hereby respond to the Department's request for comments on the appropriateness of deducting section 201 duties from the export price or constructed export price in antidumping duty calculations. *See Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties*, 68 Fed. Reg. 53104 (September 9, 2003).

A signed original and six copies of these comments are filed. In addition, as requested the comments are submitted in electronic form on a disk which accompanies the paper copies.

SUMMARY OF ARGUMENT

The statute requires the deduction from the EP/CEP of U.S. import duties, including the section 201 duty, incident to transporting the subject merchandise from the foreign producer or exporter to the unaffiliated U.S. purchaser, when the duties are included in the price to the first unaffiliated U.S. purchaser. 19 U.S.C. § 1677a(c)(2)(A). {Section 772(c)(2)(A) of the Tariff Act of 1930, as amended.}. The section 201 duty, like the regular customs duty, is a U.S. import duty that is calculated as a percentage of the entered value of the subject merchandise. The section 201 duty must be deducted from the EP/CEP in all instances in which the regular customs duty is deducted. The statutory language is clear. U.S. import duties are to be deducted from the U.S. price when paid by the foreign producer or affiliates. Section 201 duties are U.S. customs duties as published in the HTSUS. They are unequivocally U.S. import duties.

The reasons for not deducting antidumping and countervailing duties from the EP/CEP, which the Department provided in an unimplemented Recommendation Memorandum in *Carbon and Certain Alloy Steel Wire Rod From Trinidad and Tobago,*[1] do not apply to section 201 duties. Unlike antidumping and countervailing duties, section 201 duties do not indicate that merchandise has been subsidized or dumped. The rationale for excluding antidumping duties from the antidumping margin calculation is unique to antidumping duties, because only antidumping duties are the result of the antidumping margin calculation. This rationale does not apply to section 201 duties. Countervailing duties that offset an export subsidy are not deducted in

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[1] Memorandum from Gary Taverman to Bernard T. Carreau re Recommendation Memorandum – Section 201 Duties and Dumping Margin Calculation in Antidumping Duty Investigation: *Carbon and Certain Alloy Steel Wire Rod From Trinidad and Tobago* (August 13, 2002), ("Recommendation Memorandum") appended hereto as Attachment 1.

calculating the antidumping margin because of a particular statutory prohibition, which does not apply to section 201 duties.

I. THE SECTION 201 DUTY MUST BE DEDUCTED FROM EXPORT PRICE AND CONSTRUCTED EXPORT PRICE WHEN INCLUDED IN PRICE

A. The Statute Requires Deduction of the Section 201 Duty from Export Price and Constructed Export Price as an U.S. Import Duty When Included in Price

The section 201 duty is an U.S. import duty incident to transporting the subject merchandise from the foreign producer or exporter to the first unaffiliated purchaser in the United States. The statute specifies that:

> The price used to establish the export price and constructed export price 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.

(emphasis added) 19 U.S.C. § 1677a(c)(2)(A). The language "shall be reduced" is mandatory, requiring deductions from the export price ("EP") and constructed export price ("CEP") when the import duties are included in price. The EP and CEP refer to the price at which the subject merchandise is first sold to a purchaser in the United States that is not affiliated with the foreign producer or exporter. 19 U.S.C. §§ 1677a(a) and (b). The Department must follow the plain language of the statute and reduce the EP/CEP by the amount of the section 201 duty when the section 201 duty is included in the price to the first unaffiliated U.S. purchaser.

Section 201 duties are temporary, lasting three years at the most, and are periodically revised downward. *See, Proclamation 7529 - To Facilitate Positive Adjustment to Competition From Imports of Certain Steel Products*, 67 Fed. Reg. 10553 March 7, 2002. They are different

than antidumping duties in these respects.

1. The Section 201 Duty is Included in the Price When the First Unaffiliated Purchaser is Not the U.S. Importer

The section 201 duty is a regular, albeit higher, customs duty which is paid by the U.S. importer. The section 201 duty is not included in the price from the foreign producer or exporter when the first unaffiliated U.S. purchaser is the U.S. importer because the foreign producer or exporter do not pay the duties, but instead the importer pays them to the U.S. government. The section 201 duty thus should not be deducted from the EP/CEP when the first unaffiliated U.S. purchaser is the U.S. importer.

However, when the first unaffiliated U.S. purchaser is not the U.S. importer, the section 201 duty is included in the price to the unaffiliated U.S. purchaser and must therefore be deducted from the EP/CEP pursuant to 19 U.S.C. § 1677a(c)(2)(A).

2. Treating the Section 201 Duty as a Deductible Expense or Import Duty Only Double Counts the Duty in the Calculation of the Dumping Margin When the First Unaffiliated Purchaser is the U.S. Importer

Although the Department has not addressed the merits of deducting safeguard duties under section 201 of the U.S. Tariff Act of 1974 from the EP/CEP in the final determination of an antidumping investigation or review, this issue was raised in *Carbon and Certain Alloy Steel Wire Rod From Trinidad and Tobago.* There the Department deducted these duties at the preliminary determination, but then issued a Recommendation Memorandum indicating that it did not intend to deduct the duties for the final determination. For the final determination of that case the Department disregarded section 201 duties, finding that they were insignificant,[2] and that it had

[2] Section 351.413 of the Department's Regulations specifies that the Department may disregard insignificant adjustments in calculating antidumping margins. The regulations define "insignificant

not given parties a full opportunity to addresses the merits of the deduction of these duties from the EP/CEP. Final Determination of Sales at Less Than Fair Value, 67 Fed. Reg. 55788, 55790 (August 30, 2002). In the unimplemented Recommendation Memorandum the Department concluded:

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

Recommendation Memorandum at 4. The Department explained the basis for its finding of an "artificial increase of antidumping duties" and the "double-count of the impact of 201 tariffs" as follows:

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

Recommendation Memorandum at 3. Treating the section 201 duty as a deduction from the gross price when the first unaffiliated U.S. purchaser is the U.S. importer, does, as the Department indicates, double the impact of the section 201. First, the importer must pay the section 201 duty itself to the U.S. government. Second, the importer must pay additional antidumping duties

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adjustments" as a "any individual adjustment having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having an *ad valorem* effect of less than 1.0 percent, of the export price, constructed export price or normal value as the case may be."

which would not have been imposed if section 201 duties did not apply to the subject merchandise. Domestic producers recognize that the deduction of the section 201 duty from the EP/CEP is not appropriate, and not required by statute, when the first unaffiliated U.S. purchaser is the U.S. importer, because the section 201 duty is not included in the price to the unaffiliated U.S. purchaser.

In contrast, the deduction of section 201 duties from the EP/CEP is appropriate, and is required by the statute, when the first unaffiliated U.S. purchaser is not the U.S. importer because the section 201 duty is included in the price to the unaffiliated U.S. purchaser. The deduction of the section 201 duty a single time from U.S. price does not "double count" the section 201 duty in calculating the dumping margin when the first unaffiliated U.S. purchaser is not the importer. The impact of section 201 duties is no different than the impact of the regular customs duty.

B. Reasons for Not Deducting Antidumping and Countervailing Duties from the EP/CEP Identified in the Recommendation Memorandum Do Not Apply to Section 201 "Safeguard" Duties, Because Section 201 Duties Do Not Indicate That Merchandise Has Been Subsidized or Dumped.

The Recommendation Memorandum in *Carbon and Certain Alloy Steel Wire Rod From Trinidad and Tobago* further states that:

> the issue of whether to deduct section 201 duties from EP and/or CEP should be resolved in accordance with the rationale for the Department's longstanding policy to make no deduction to EP/CEP for antidumping (AD) and countervailing duties (CVD).

Recommendation Memorandum at 1. The reasons for not deducting antidumping and countervailing duties from the EP/CEP do not however apply to section 201 "safeguard" duties. Section 201 duties differ from antidumping and countervailing duties, because section 201 duties do not indicate that merchandise has been subsidized or dumped, as the Department recently

stated:

> The Department notes that there is a clear distinction between antidumping and anti-subsidy trade actions and safeguard trade actions. As discussed in Lock Washers, while the PRC may have taken provisional safeguard measures against imports of steel from country X, including hot-rolled steel, this does not mean that the PRC has made a finding of dumping. At most, it would mean that PRC producers of hot-rolled steel are suffering serious injury.

Lawn and Garden Steel Fence Posts From the People's Republic of China, Notice of Final Determination of Sales at Less Than Fair Value, 68 Fed. Reg. 20373, (April 25, 2003). The reasons for not deducting antidumping or countervailing duties imposed because merchandise has been dumped or subsidized do not apply to the section 201 duty imposed to provide temporary relief from serious injury caused by a high level of imports.

1. The rationale for excluding antidumping duties from the calculation of the antidumping margin cannot be applied to section 201 duties.

The antidumping margin is the amount by which respondents must increase the EP/CEP, or decrease the normal value, to eliminate antidumping duties. Antidumping duties are excluded from the calculation of the antidumping margin because they are the result of the antidumping margin calculation, and not a component of it, as the Department indicated in the Recommendation Memorandum citing *UK Lead and Bismuth*:

> antidumping duties are intended to offset the effect of discriminatory pricing between two markets. In this context, making an additional deduction from {U.S. price} for the same antidumping duties that corrects this price discrimination would result in double-counting.

Recommendation Memorandum at 2. The rationale for excluding antidumping duties from the antidumping margin calculation is unique to antidumping duties, because only antidumping duties are the result of the antidumping margin calculation. The rationale for excluding antidumping

duties from the calculation of antidumping margins does not apply to section 201 duties.

The Recommendation Memorandum further states that antidumping duties should be excluded from the calculation of antidumping margins because "antidumping duties derive from a calculated margin of dumping, not from an assessment of value, as is the case for normal customs duties." *Recommendation Memorandum* at 3, quoting *Hoogoverns Staal v. United States*, 4 F. Supp. 2d 1213 (CIT 1998). Section 201 duties, like normal customs duties, derive from an assessment against value and do not derive from the calculation of a dumping margin.[3] Since normal customs duties are deducted from the EP/CEP this reasoning from the Recommendation Memorandum supports, rather than militates against, the deduction of section 201 duties from the EP/CEP.

2. The rationale for not deducting countervailing duties from the EP/CEP does not apply to section 201 duties.

The rationale for not deducting countervailing duties from the EP/CEP likewise cannot be applied to section 201 duties. Countervailing duties that offset an export subsidy are not deducted in calculating the antidumping margin because of a particular statutory prohibition[4] as the Department has stated:

Article VI.5 of the General Agreement on Tariffs and Trade (GATT 1994)

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[3] *See also, Comments Regarding Treatment of Section 201 Duties in the Final Determination of Certain Alloy Steel Wire Rod From Trinidad and Tobago*, Schagrin Associates, August 16, 2002, appended hereto as Attachment 2.

[4] The statute does not explicitly address countervailing duties other the those that offset an export subsidy. 19 U.S.C. § 1677a(c)(1)(C). Countervailing duties other the those that offset an export subsidy are an expense and a U.S. import duty incident to transporting the subject merchandise from the foreign producer or exporter to the unaffiliated U.S. purchaser, which must be deducted from the EP/CEP pursuant to 19 U.S.C. § 1677a(c)(2)(A) when the first unaffiliated U.S. purchaser is not the U.S. importer.

> provides that "{n}o product . . . shall be subject to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization." This provision is implemented in section 772(c)(1)(C) of the Tariff Act.

Certain Hot-Rolled Carbon Steel Flat Products From Thailand, Notice of Final Determination of Sales at Less Than Fair Value, 66 Fed. Reg. 49622, 49624 (Sept. 28, 2001). Section 772(c)(1)(C) of the Tariff Act, *i.e.* 19 U.S.C. § 1677a(c)(1)(C), specifies that:

> The price used to establish export price and constructed export price shall be – (1) increased by . . . (C) the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy.[5]

There is no similar statutory provision, or GATT / WTO provision, related to section 201 duties.

C. The Statute Does Not Exempt Remedial Duties from Calculation of Antidumping Margins

The Recommendation Memorandum also asserts that deducting section 201 duties from U.S. price would be inappropriate because section 201 duties like "AD and CVD are not normal import duties (i.e. they are remedial duties)." *Recommendation Memorandum* at 1. 19 U.S.C. § 1677a(c)(2)(A) does not however exempt remedial duties from deduction from the EP/CEP, or limit the deduction to only "normal" import duties. Just the opposite is the case. The language of the statute is expansive, relating to "**any**" "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." *See* 19 U.S.C. § 1677a(c)(2)(A).

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[5] In practice, rather than increase the EP/CEP by the amount of the countervailing duty that offsets an export subsidy, the Department counts the countervailing duty only once, in the countervailing duty proceeding, and then if there is an antidumping proceeding on the same merchandise, reduces the antidumping duty by the amount of the countervailing duty.

Moreover in other cases the Department has deducted remedial duties similar to the section 201 duty from the U.S. market price. For example, the Department deducts from the EP/CEP the fees which the U.S. Customs Service charges when Canadian lumber exporters exceed the quotas established by the U.S. - Canadian Softwood Lumber Agreement. Final Determination of Sales at Less Than Fair Value, *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,539 (April 2, 2002) Issues and Decision Memorandum, Comment 9. The Department also deducted an additional tariff on ethyl alcohol which Congress imposed in addition to the general column 1 customs duty. *See Fuel Ethanol from Brazil*, 51 Fed. Reg. 5,572 (Feb. 14, 1986). This tariff, like the section 201 duty, was intended to provide relief to the U.S. domestic industry, and also like the section 201 duty was listed in Chapter 99 of the HTS. In *Fuel Ethanol from Brazil* the Department cited its statutory mandate to deduct duties incident to bringing the merchandise from the place of shipment to the place of delivery in the United States as the basis for deducting the special tariff on ethanol, stating:

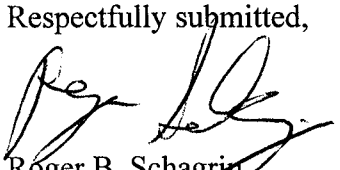
> *Comment 6*: P.I.I. argues that the deduction of the special tariff on ethanol in determining whether prices obtained on U.S. sales covered acquisition costs and selling expenses, and in the calculation of the exporter's sale price is inappropriate since the tariff was imposed in contravention of the General Agreement on Tariffs and Trade (GATT) and is the subject of compensation in the form of a reduced U.S. tariff on canned corn beef from Brazil.
>
> *DOC Response*: The Department is required to subtract from the exporter's sale 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. 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. With respect to the respondent's concerns regarding the legality of the United States tariff, the Department does not have the authority, nor is an antidumping duty investigation under the Act an appropriate forum, to make such a legal determination.

The section 201 duty must similarly be deducted from the EP/CEP as an import duty incident to bringing the subject merchandise from its place of shipment to the place of delivery in the United States, notwithstanding the fact that the section 201 duty was implemented to provide temporary relief to industries suffering from serious injury caused by a high level of imports.

CONCLUSION

For the foregoing reasons domestic producers request that the Department deduct the section 201 duty from the EP/CEP in calculating antidumping margins when the first unaffiliated U.S. purchaser is not the U.S. importer.

Respectfully submitted,



Roger B. Schagrin
Michael J. Brown
SCHAGRIN ASSOCIATES
Counsel for U.S. Pipe and Tube Producers

Exhibit 1

Department's Section 201 Recommendation Memorandum
In *Carbon and Certain Alloy Steel Wire Rod From Trinidad and Tobago*

UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-274-804
Investigation
Public Document
GII/O5: CR

AUG 13 2002

FOR PUBLIC FILE

MEMORANDUM TO: Bernard T. Carreau
Deputy Assistant Secretary
for AD/CVD Enforcement II

FROM: Gary Taverman
Director, Office 5
AD/CVD Enforcement

SUBJECT: Recommendation Memorandum – Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago

Issue

After an investigation under section 201 of the Trade Act of 1974 (section 201), should duties imposed under section 203 of that Act be deducted from U.S. price in calculating export price (EP) and/or constructed export price (CEP) in the Department of Commerce's (the Department's) dumping calculation?

Background

Although the issue of whether or not it is appropriate to deduct 201 duties from U.S. price in calculating EP and/or CEP has not been directly raised in the wire rod from Trinidad and Tobago investigation, parties did raise proper treatment of 201 duties in this case. Our consideration of their comments has triggered the broader question of whether 201 duties should be deducted at all. Therefore, we find that it is appropriate to address this issue here.

Discussion

As explained below, the issue of whether to deduct section 201 duties from EP and or CEP should be resolved in accordance with the rationale for the Department's longstanding policy to make no deduction to EP/CEP for antidumping (AD) and countervailing duties (CVD). The Department has explained this policy by pointing out that (1) AD and CVD are not normal import duties (i.e., they are remedial duties) and (2) it would be inappropriate for the Department to double the impact of a remedial duty by deducting it from EP or CEP.

Statute: Section 772(c) of the Tariff Act of 1930, as amended (the Act), requires that the Department deduct "United States import duties" from EP and CEP. This statutory deduction existed prior to the passage of the Uruguay Round Agreements Act (URAA), and the URAA did not modify it in any respect. In addition, section 772(d) of the Act requires the Department to deduct U.S. selling expenses from CEP. There was a similar statutory deduction for U.S. selling expenses under the old law.

Department Practice: The Department has never addressed whether duties collected pursuant to a section 201 decision are considered, for purposes of determining the amounts to be deducted from EP and CEP, to be U.S. import duties or U.S. selling expenses. Nevertheless, the Department has a longstanding practice of not deducting AD or CVD duties from EP or CEP,[1] and the rationale for that practice applies to section 201 duties.

In Certain Cold-Rolled Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review, 63 Fed. Reg. 781 (1998), the Department explained why its does not deduct antidumping duties from EP or CEP:

> In UK Lead and Bismuth, we responded that "{a}ntidumping duties are intended to offset the effect of discriminatory pricing between the two markets. In this context, making an additional deduction from {U.S. price} for the same antidumping duties that correct this price discrimination would result in double-counting. Therefore, we have not treated cash deposits of estimated antidumping duties as direct selling expenses." {Citations omitted.} This same reasoning would also hold where "actual" antidumping duties are known. The fallacy of petitioners' argument for treating antidumping duties as a cost is that antidumping duties, although paid by an importer, are not selling expenses, nor are they normal customs duties. Antidumping duties are unique in that they represent antidumping duty margins - a measure of price discrimination between {foreign market value and U.S. price}. The statutory remedy for such unfair price discrimination is to assess antidumping duties against the merchandise in an amount equal to the amount by which the {foreign market value} exceeds the {U.S. price} for the merchandise.

Id. at 786.

The decision in Cold-Rolled Carbon Steel Flat Products from Korea is consistent with other articulations of the Department's practice. See Antidumping Duties; Countervailing Duties;

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[1] However, in cases where there are concurrent AD and CVD orders, section 772(c)(1)(C) of the Act states that the price used to establish EP and CEP shall be increased by the amount of any countervailing duty imposed on the subject merchandise to offset an export subsidy, in order to avoid double-counting.

Proposed Rule, 61 Fed. Reg. 7308, 7332 (1996) ("As with antidumping duties, the statute authorizes no adjustment to export price (or constructed export price) for countervailing duties imposed to offset other types of subsidies."); see also Statement of Administrative Action to the URAA at 215/885 ("The duty absorption inquiry would not affect the calculation of margins in administrative reviews. This new provision of law is not intended to provide for the treatment of antidumping duties as a cost.").

The courts have upheld this practice. For example, in Hoogovens Staal v. United States, 4 F.Supp.2d 1213 (CIT 1998), the Court of International Trade affirmed the Department's refusal to deduct antidumping duties, noting the Department's rationale that "antidumping duties derive from a calculated margin of dumping, not from an assessment against value, as is the case for normal customs duties; further, deducting antidumping duties as costs or import duties from U.S. price would, in effect, double-count the margin." Id. at 1220. See also Bethlehem Steel v. United States, 27 F.Supp.2d 201, 208 (CIT 1998) ("Subsequent changes in the wording of section 1677a provide no basis for revisiting the issue.").

Analysis: The Department's rationale for not deducting antidumping duties from EP and CEP, as approved by the Court of International Trade in Hoogovens and Bethlehem Steel, supports the conclusion that section 201 duties also should not be deducted. Section 201 duties are not normal customs duties and are not selling expenses. Rather, just as antidumping duties derive from a special calculation of price discrimination (and countervailing duties derive from a special calculation of countervailable subsidization), section 201 duties derive from a special calculation of the amount necessary to "facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs." 19 U.S.C. § 2253(a)(1)(A). In addition, section 201 duties are not treated as normal customs duties in the Harmonized Tariff Schedule of the United States (HTSUS); they appear in a separate schedule for temporary duties at subchapter III of chapter 99.

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

Recommendation

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

Agree ✓ Disagree _____ Let's Discuss _____

Holly A Kuga for
Bernard T. Carreau
Deputy Assistant Secretary
for Import Administration

8/13/02
Date

Exhibit 2

Comments of Interested Party Schagrin Associates In Response to
The Department's Section 201 Recommendation Memorandum
In *Carbon and Certain Alloy Steel Wire Rod From Trinidad and Tobago*

FOR PUBLIC FILE

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August 16, 2002

The Honorable Donald L. Evans
Secretary of Commerce
U.S. Department of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street N.W.
Washington, D.C. 20230

A-274-804
Total pages: 5
Investigation
Group II/Office 5
PUBLIC DOCUMENT

Attn: Under Secretary Grant D. Aldonas (Room 3850)
Assistant Secretary Faryar Shirzad (Room 3099B)

Re: Treatment of section 201 duties in the final determination in *Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*

Dear Secretary Evans:

These public comments are filed in the referenced investigation to address a major policy decision being taken in this case which potentially affects many other administrative reviews and future investigations to be conducted by the Department. Specifically, undersigned counsel represents domestic interested parties as to numerous orders that involve circular welded pipe, light-walled rectangular tube, large diameter line pipe, cut-to-length plate, hot-rolled sheet, and tin mill products, all of which are subject to dumping orders and subject to 201 duties.

By a public release dated August 13, 2002, the Department announced that it was reversing previously announced policy to deduct 201 duties from U.S. price in calculating EP and CEP. Comments on this change of practice were required to be filed within two and

one-half days, with no opportunity for rebuttal comments. On its face, this is an inadequate framework for obtaining comment on a significant change in policy. Nevertheless, as detailed below, we believe the analysis in Department's Recommendation Memorandum is so clearly in error, that the Department should reject the conclusions expressed in that memorandum.

The Recommendation Memorandum from Mr. Taverman to Mr. Carreau (August 13, 2002) analogizes the section 201 duties to antidumping duties and recommends applying the same rationale which has led the Department not to deduct antidumping duties in admin[redacted] The Memorandum quotes Court of International Trade precedent upholding the Department's rationale that "antidumping duties derive from a calculated margin of dumping, **not from an assessment against value**, as is the case for normal customs duties" and would double count the antidumping margin. Memorandum at 3 quoting *Hoogoverns Staal v. United States*, 4 F.Supp.2d 1213 (CIT 1998) (emphasis added). The Memorandum completely ignores the fact that section 201 duties are an assessment against value and do not derive from the calculation of a dumping margin. Regardless of the change in the entered value of the merchandise, the section 201 assessment rate remains the same and is simply an assessment against value. Again -- unlike antidumping duty calculations, the *ad valorem* rate of section 201 duties does not change based on import pricing and there are no administrative reviews of section 201 relief. Thus the precedent relied upon in the Recommendation Memorandum does not support the memorandum's recommendation but rather strongly supports the opposite conclusion.

The Recommendation Memorandum's characterization of the section 201 duties as something other than customs duties is also fundamentally in error. The President's March 5, 2002 Proclamation of relief temporarily changed the normal duty rate for the covered products. That the change is temporary or was intended to facilitate adjustment of the U.S. industry in no way changes the fact that the section 201 duties reflect a change in the normal duties assessed against the value of merchandise at the time of entry. Indeed, in the President's Proclamation (67 Fed. Reg. 10553 (March 7, 2002)) and in the Presidential Memorandum for the Secretary of Treasury, the Secretary of Commerce, and the U.S. Trade Representative (67 Fed. Reg. 10593 (March 7, 2002)), the President states, *inter alia*, that he has determined that most appropriate action to take is a safeguard measure in the form of "an increase in duties on imports," a phrase which can only be interpreted by its plain terms to mean an increase in the normal customs duties assessed on entries.

Similarly, the specific tariff actions taken are all referred to as in increase in duties and not a separate extraordinary duty. Further confirming the proper characterization of the section 201 duties as simply a change in the normal tariff rate is that the Annex to the Presidential Proclamation changed the appropriate tariff schedules of the Harmonized Tariff Schedule of the United States. 67 Fed. Reg. 10558 (March 7, 2002). The Recommendation Memorandum's effort to liken the section 201 duties to a special calculation similar to an antidumping duty calculation is simply fatuous. U.S. customs duties are deducted in the context of EP and CEP calculations and the higher U.S. customs duties resulting from the section 201 proclamation should not be treated any differently.

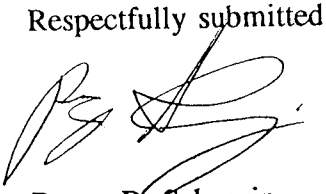
Similarly, the deduction of section 201 duties does not "double-count" the duty, as this conclusion rests entirely upon the Department's erroneous characterization of the section 201 duties. The Department has never claimed that the deduction of what it refers to as "normal" duties, results in double-counting of such duties. Moreover, since the section 201 duties are not antidumping duties, they cannot be said to be double-counted in the antidumping calculations.

We also note that, while acknowledging that the section 201 duties are designed to facilitate adjustment of the U.S. industry, the proposed policy dramatically undercuts the impact of the section 201 duties. Specifically, the new policy permits foreign producers or their U.S. affiliates simply to pay the section 201 duties on behalf of importers and nullify the intended price effect in the U.S. market necessary to support adjustment efforts.

Finally, a general statement regarding the Department's posture on this issue is in order. The Administration promised Congress in obtaining passage of fast track legislation that it would vigorously enforce U.S. trade laws and seek to strengthen those laws in the context of international negotiations. The Department's professed intention to change its position on the treatment of section 201 duties from that adopted in the preliminary determination here fundamentally weakens the U.S. law and betrays the Administration's promise to the Congress. Moreover, the Department's position in this matter sends a strong signal to U.S. trading partners that the United States will readily acquiesce to weakening U.S. laws and thereby severely undermines the U.S. negotiating position.

For all these reasons, it is imperative that the conclusion expressed in the Recommendation Memorandum be reversed and that section 201 customs duties paid by foreign producers or their U.S. affiliates be deducted from the U.S price (export price) in accordance with the plain meaning of the statute.

Respectfully submitted,



Roger B. Schagrin

Certificate of Service

I, Sherrie M. Waldrup, do hereby certify that I did, on this 16th day of August, 2002, cause a copy of the foregoing public submission, together with any attachments, to be served upon the following parties via hand delivery:

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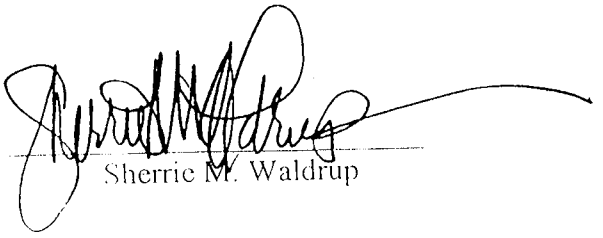

Sherrie M. Waldrup