Before the Department of Commerce
International Trade Administration

# Comments of Corus Group plc
# On the Treatment of Section 201 Duties
# in Antidumping Calculations


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In a notice dated September 9, 2003 (68 Fed. Reg. 53104), the Department asked for comments on the appropriateness of deducting Section 201 and countervailing duties from gross unit price in order to determine the applicable export price or constructed export price (hereafter referred to as "export price") used in antidumping calculations. On behalf of Corus Group plc ("Corus"), we submit the following comments on why the deduction of Section 201 duties would be contrary to U.S. law, inconsistent with the Department's longstanding practice, and in derogation of United States' WTO obligations.[1] These comments expand upon comments submitted by Corus Staal BV in the context of the first administrative review of *Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands*.[2]

**Introduction**

For purposes of calculating the export price in antidumping proceedings, 19 U.S.C. §1677a(c)(2)(A) requires the Department to reduce the price used to calculate export and constructed export prices 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." The Department is also directed to make further deductions for certain U.S. selling expenses under 19 U.S.C. § 1677a(d). For reasons described below, Corus submits that the Department should determine not to deduct Section 201 tariffs

[1] Corus Group plc believes that deduction of countervailing duties likewise would be contrary to U.S. law and WTO obligations. However, as Corus Group plc receives no subsidies, comments here are limited to the issue of the deduction of Section 201 duties.

[2] *See* Letter to Secretary Donald L. Evans from Richard O. Cunningham dated August 20, 2003 in Investigation No. A-421-807, which contains a detailed numerical example of how deduction of Section 201 duties would distort the dumping margin.

from the U.S. price calculated under U.S. antidumping law. Such a deduction is not only bad trade policy; it would violate the requirements of the WTO and U.S. law.

Department practice, court precedent, and legislative history all dictate that Section 201 duties should *not* be deducted under 19 U.S.C. § 1677a(c)(2)(A) or § 1677a(d).[3] Doing so would create highly distorted dumping margins that would run counter to the purpose of making a "fair comparison" between U.S. price and normal value. The increased margin would arise, not from any pricing decision or cost change on the part of the foreign exporter, but from an import-restrictive action taken by the United States Government. The deduction would also escalate the restrictive impact of Section 201 tariffs in a way that violates U.S. and WTO requirements that a safeguard measure be applied only to the extent necessary to prevent or remedy serious injury. In the current steel cases it would also be an indirect violation of the specific statutory prohibition against imposing Section 201 duties at a rate higher than 50 per cent *ad valorem* above the rate existing at the time of the remedy.[4]

**<u>Legal Analysis</u>**

The deduction of Section 201 tariffs from export price would result in a major increase in the protectionist impact of the Section 201 duties and a massive distortion of the antidumping duty calculation. Recognizing this distortion in the context of other trade remedies, the

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[3] The Department has previously acknowledged in a staff memorandum that the deduction of Section 201 duties from U.S. price would artificially increase antidumping duties and, thereby, double the impact of Section 201 tariff remedies. The staff memorandum preliminarily recommended that such a deduction was not consistent with Department policy. *See* Memorandum from Gary Taverman to Bernard T. Carreau Regarding Section 201 duties and dumping margin calculations in *Antidumping Investigation: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago* (Aug. 13, 2002).

[4] Trade Act of 1974, as amended, Sec. 203(e)(3), 19 U.S.C. § 2253(e)(3).

Department has consistently maintained that deduction of remedial remedies under 19 U.S.C. § 1677a(c)(2)(A) or § 1677a(d) is an impermissible interpretation of the statute. The Court of International Trade has upheld the Department's longstanding position that antidumping and countervailing duties should not be treated as "United States import duties" or as "costs" for purposes of calculating the U.S. price.[5] In affirming the Department's interpretation of the statute, the Court has agreed that deduction from the U.S. price of other duties that are imposed for import relief purposes would result in "double-counting."[6]

The Department has noted that the term "United States import duties" first appeared in the Antidumping Act of 1921 (42 Stat. 12), which defined the term in neither the statute nor the legislative history.[7] The Senate report, though, "uniformly refers to antidumping duties as 'special dumping dut[ies]' and uniformly refers to ordinary customs duties as 'United States import duties.'"[8] In this distinction, the Department has found support for considering AD and CVD duties to fall outside the meaning of "United States import duties" as used in 19 U.S.C. § 1677a(c)(2)(A).

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[5] *See*, *e.g., PQ Corp. v. United States*, 652 F. Supp. 724, 737 (Ct. Int'l Trade, 1987); *Federal Mogul Corporation v. United States*, 813 F. Supp. 856, 872 (Ct. Int'l Trade, 1993); *Hoogovens Staal BV v. United States*, 4 F. Supp. 1213 (Ct. Int'l Trade, 1998); *U.S. Steel v. United States*, 15 F. Supp. 2d 892, 898-900 (Ct. Int'l Trade, 1998); *Bethlehem Steel et al v. United States*, 27 F. Supp. 2d 201, 208-209 (Ct. Int'l Trade, 1998); *AK Steel Corp. v. United States*, 988 F. Supp. 594, 607-608 (Ct. Int'l Trade, 1997).

[6] *See, e.g.*, *AK Steel* at 607.

[7] *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 18404, 18421 (April 15, 1997).

[8] *Id.*

The Department's reasoning that the deduction of AD and CVD duties from U.S. price is inappropriate equally supports the conclusion that deduction of Section 201 tariffs would be unreasonable. Section 201 duties, like antidumping and countervailing duties, are imposed to counteract the effects of imports found to be injurious to U.S. producers. Thus, increasing one of the other forms of remedial duty would constitute precisely the "double-counting" that both the Department and the Courts have found unacceptable. Deduction of the Section 201 tariffs in and of itself would create large dumping margins where there otherwise are small duties or none. Surely the President did not intend that every steel import become subject to an antidumping case merely by payment of the Section 201 tariffs.

Moreover, if antidumping duties are "special" duties, so are Section 201 tariffs, which are applied only following a finding by the International Trade Commission that the domestic industry is seriously injured or threatened with serious injury. They are applied only against imports of the merchandise subject to such ITC determinations. The Section 201 tariffs are, therefore, easily distinguishable from ordinary U.S. duties and related entry fees such as harbor maintenance fees or merchandise processing fees, which the Department routinely deducts from the U.S. price.[9] A decision by the Department not to deduct the Section 201 duties from export price would be upheld as a reasonable interpretation of the statute by the courts.

Treatment of Section 201 duties as a "cost" or "expense" would be as ill-advised as treatment of Section 201 duties as normal import duties. As noted above, the Department has

[9] *See*, *e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Ferrovanadium from the Republic of South Africa*, 67 Fed. Reg. 45083, 45085 (July 8, 2002) and *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Korea*, 67 Fed. Reg. 31225, 31227 (May 9, 2002) (harbor maintenance and merchandise processing fees deducted from U.S. price under 19 U.S.C. § 1677a(c)(2)(A)).

consistently maintained, and the CIT has upheld, the rejection of the notion that remedial duties are "costs" or "expenses" for purposes determining export price. Legislative history of the changes to the U.S. statute and regulations to implement the results of the Uruguay Round also supports the clear rejection of the idea of "duty as a cost."[10] As the CIT has said, treating remedial duties as costs "would create the same double-counting issue Commerce is seeking to avoid in its refusal to consider countervailing and antidumping duties to be U.S. import duties."[11]

Whether Section 201 duties are "import duties" or "costs" is an initial question in assessing the appropriateness of deduction. Also essential to this issue are international obligations and other provisions of U.S. law. In fact, deduction of Section 201 duties from U.S. price would not only run counter to U.S. policies but also would violate the WTO Agreement on Antidumping, the WTO Agreement on Safeguards, and other U.S. statutory provisions.

. There is no explicit authorization in the Antidumping Agreement for the deduction of other remedial duties, such as Section 201 duties or countervailing duties. Rather, Article 2.4, note 7, of the Agreement admonishes national authorities not to double count adjustments in calculating dumping margins. More fundamentally, the extraordinary inflation of dumping margins that would result from the deduction of Section 201 duties – and the creation of margins where otherwise there would be none – would flout the letter and spirit of both 19 U.S.C. § 1677b(a) and Article 2.4 of the Antidumping Agreement, both of which require a "fair comparison" between export price and normal value. The fiat of increasing the dumping margin

[10] *See, e.g.*, discussion of duty absorption in the Statement of Administrative Action at 823: "This new provision of law is not intended to provide for the treatment of antidumping duties as a cost."

[11] *AK Steel* at 608, n 12.

through circular logic – that payment of one remedial duty (Section 201) in and of itself increases another remedial duty (antidumping duties) – is also a bald violation of Article 9.3, which mandates that the antidumping duty shall not exceed the margin of dumping.

The deduction would also, in essence, serve as an indirect means of escalating the restrictive effects of the Section 201 tariffs. The result would be prohibitive duties which render the entire Section 201 action in violation of the Section 201 statute and the WTO Safeguards Agreement, both of which mandate that the safeguard remedy not exceed the amount necessary to prevent or remedy the serious injury.[12] The deduction would, in many instances, also be a back-door means of violating the Section 201 prohibition which states, "No action may be taken under this section which would increase a rate of duty to (or impose a rate) which is more than 50 percent ad valorem above the rate (if any) existing at the time the action is taken."[13]

Finally, the artificial increase in margin caused by the deduction would distort numerous aspects of an antidumping investigation. It may create an artificial margin where otherwise none would have existed. In almost all cases, it will prevent any meaningful application of the *de minimis* rule. And, to the extent that the International Trade Commission considers the magnitude of the margin of dumping in its injury inquiry (Antidumping Agreement, Article 3.4; U.S. law, 19 U.S.C. § 771(7)(C)(iii)), an artificially-enlarged dumping margin distorts that analysis.

**<u>Trade Policy Considerations</u>**

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[12] *See* Sec. 203(e)(2), 19 U.S.C. § 2253(e)(2), and Art. 5, sentence one of the WTO Agreement on Safeguards.

[13] Sec. 203(e)(3), 19 U.S.C. § 2253(e)(3).

The two statutes at issue here – the antidumping law and Section 201 – have separate and distinct functions and address separate trade policy issues. Neither leads to the imposition of "United States import duties" in the normal meaning of that term. And using the remedy under one statute to magnify the remedy provided by the other statute for an entirely different trade problem would be totally inconsistent with the policies underlying both statutes.

Before turning to the purposes of the two statutes, an important preliminary point must be emphasized. A decision not to deduct the 201 tariff in computing U.S. price for antidumping purposes would not in any way reduce the intended duty imposed by either remedy. Assuming a 5 percent antidumping duty (without deduction of the 201 duty) and a 30 percent 201 duty, the importer would bear the entire duty burden intended by each of the two statutory remedies – that is, the 30 percent tariff and the 5 percent tariff would both have to be paid in full.[14] The issue, therefore, is not diminution of the duty burden; rather, it is whether the antidumping duty should be artificially magnified.

The antidumping law addresses an internationally recognized discriminatory practice – namely, exporting at a price that is either below the home market price of comparable transactions or, in effect, below fully allocated cost plus a normal profit. Accordingly, the calculation of the amount of the antidumping duty must reflect accurately the amount of price discrimination (or below-cost pricing, as the case may be). Understanding this point is critical to analysis of the present issue on policy grounds. The antidumping law focuses on an exporter's pricing decisions. The statutory analysis of that exporter pricing decision is completely

[14] Even this exceeds the burden under other countries' antidumping methodologies. The European Union, for example, imposes only the larger of the antidumping duty or safeguard duty on each particular importation.

performed by the calculations that result. Introduction of the Section 201 tariff would not be relevant to the exporter's pricing decision, since the exporter's U.S. price and its home market price would be the same as in the original calculation. Nor would the exporter's cost of production, selling expenses, transportation cost or other costs relevant to an antidumping analysis be changed.

The only change would be the imposition by the U.S. Government of a Section 201 tariff (30 percent on most products in the first year of relief) – a tariff directed at imports without regard to whether they are discriminatorily priced. Section 201 has nothing to do with dumping or any other pricing practice. The calculation of the tariff (or other remedy), moreover, has nothing to do with a "dumping margin." To the contrary, the statute directs that the remedy imposed be that which "will facilitate efforts by the domestic industry to make a positive adjustment to import competition"[15] and that which is imposed "only to the extent the cumulative impact of such action does not exceed the amount necessary to prevent or remedy the serious injury."[16]

The Section 201 tariff, therefore, solely addresses the amount of injury and the industry's need for shelter to promote effective adjustment. Those concepts have nothing whatsoever to do with calculation of the amount of dumping. To deduct a tariff measured by those factors in a computation intended to determine the degree of dumping thus makes no sense. Even worse, it is wholly unjustifiable to increase a remedy for discriminatory exporter pricing by a factor that

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[15] Sec. 203(a)(1), 19 U.S.C. § 2253(a)(1).

[16] Sec. 203(e)(2), 19 U.S.C. § 2253(e)(2).

has nothing to do with discriminatory pricing, especially when that factor – the 30 percent 201 duty – is already fully reflected in another duty that will be borne by the same imports.

In short, deduction of the 201 tariff from U.S. price in an antidumping calculation would represent a preposterous exercise in both double-counting and mixing apples with oranges. It would be difficult to imagine any more serious violation of the principles of good trade policy.

**Conclusion**

Deduction of the Section 201 tariff in the calculation of export price would be a patently unfair policy that would turn past Department practice on its head, run counter to numerous provisions of the U.S. antidumping and Section 201 statutes, and place the United States in violation of WTO obligations. For the foregoing reasons, the Department should not deduct Section 201 duties from export price.

Respectfully submitted,

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