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HAND DELIVERY **PUBLIC DOCUMENT**

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

Attn: Becky Erkul, Office of Policy
Import Administration

Re: Antidumping Proceedings: Treatment of Section 201 Duties: Comments of International Steel Group Inc. and the United Steelworkers of America

Dear Mr. Secretary:

On September 9, 2003, the Department published a request for public comments "on the appropriateness of deducting section 201 duties and countervailing duties from gross unit price in order to determine the applicable export price or constructed export price used in antidumping duty calculations."[1] On behalf of International Steel Group Inc. (ISG) and the United Steelworkers of America (USWA), we hereby submit initial comments in response to the Department's request.

For the reasons discussed below, ISG and the USWA believe that it is both appropriate and required by the statute that, in investigations and administrative reviews, the Department deduct the amount of any Section 201 duties from the gross unit price (or starting price) in

determining the export price, or constructed export price, in antidumping calculations in accordance with 19 U.S.C. § 1677a(c)(2)(A), when the duties are included in the starting price.

I. THE DEDUCTION OF ALL UNITED STATES IMPORT DUTIES FROM EXPORT PRICE AND CONSTRUCTED EXPORT PRICE IS REQUIRED BY THE ANTIDUMPING STATUTE.

A. In Antidumping Comparisons, the Gross Unit Price is Adjusted to Derive an Ex-Factory Price.

In antidumping determinations, the Department assesses whether there are sales of subject merchandise in the United States at "less than fair value" and, if so, calculates a margin of dumping for those sales. In order to make these determinations, the Department compares the "normal value" (basically, the price of the merchandise in the home market) with the "export price" of each sale of the subject merchandise in the United States during the period under review. 19 U.S.C. § 1673.

In this comparison, the export price, as defined by the statute, is either the “export price” or the “constructed export price” of the merchandise. The “export price” is the price at which subject merchandise is sold or agreed to be sold prior to the date of importation into the United States, as adjusted in accordance with the statute. 19 U.S.C. § 1677a(a). Typically, the "export price" is used for sales between a foreign seller and an unrelated U.S. purchaser. “Constructed export price” is the price at which subject merchandise is sold or agreed to be sold in the United States before or after the date of importation, by or for the account of the producer or exporter (or by a seller affiliated with the producer or exporter) to the first unrelated purchaser, as adjusted in accordance with the statute. 19 U.S.C. § 1677a(b). The export price, whether an

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

"export price" or a "constructed export price," is an ex-factory price. That is, it is the price that is arrived at after the starting price is adjusted by adding and subtracting certain costs or charges in accordance with the statute. Section 772(c) of the Tariff Act of 1930 (the Act), as amended (19 U.S.C. § 1677a(c)), sets out the costs or charges that must be added to and/or subtracted from the starting price in order to arrive at the ex-factory export price.

B. All U.S. Import Duties Must Be Deducted From the Export Price.

Section 772(c)(2)(A) of the Act clearly requires the deduction of all United States import duties from the gross unit price. Specifically, the statute instructs that the price used to derive export price (EP) and constructed export price (CEP), *i.e.*, the gross unit price, shall be reduced by, *inter alia*, the amount of U.S. import duties. In relevant part, the statute provides:

> (c) Adjustments for export price and constructed export price
>
> The price used to establish export price and constructed export price shall be --
>
> * * *
>
> (2) reduced by --
>
> (A) ... the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States, ...

19 U.S.C. § 1677a(c)(2)(A) (emphasis added). It is self-evident that the language of the statute is mandatory and provides for no exceptions. Hence, all U.S. import duties must be deducted from EP and CEP.[2]

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[2] To the extent that the Department makes an exception for antidumping duties, it does so only under the theory that antidumping duties are unique and deducting them would

II. "SECTION 201 DUTIES" ARE "UNITED STATES IMPORT DUTIES."

A simple syllogism applies here.

Premise 1: The statute requires that all U.S. import duties must be deducted from the starting price used to establish EP and CEP.

Premise 2: Section 201 duties are U.S. import duties.

Conclusion: The statute requires that Section 201 duties must be deducted from the starting price used to establish EP and CEP.

In their nature and practical effect, so-called "Section 201duties" are no different than normal customs duties. U.S. import duties are imposed, or not imposed, for a variety of policy reasons. The term "Section 201 duties" is merely a shorthand description for U.S. import duties that are imposed following a safeguard investigation conducted by the International Trade Commission pursuant to Sections 201 and 202 of the Trade Act of 1974, and a Presidential determination made pursuant to Section 203. Indeed, the safeguard statute, presidential proclamations, and relevant international agreements all confirm that Section 201 safeguard duties are considered normal customs duties.

A. The Safeguard Statute Demonstrates that Section 201 Duties are U.S. Import Duties.

The language of the statute providing for safeguard relief demonstrates that Section 201 duties relate to and are part of normal U.S. import duties. 19 U.S.C. § 2252(e) identifies the types of relief that the Commission can recommend, which include "(A) an increase in, or the imposition of, any duty on the imported article; (B) a tariff-rate quota on the article...."

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result in "double-counting." Regardless of whether this analysis is correct, it does not apply in the case of Section 201 duties.

{emphasis added}. Likewise, 19 U.S.C. § 2253(a)(3) provides that the President may "(A) proclaim an increase in, or the imposition of, any duty on the imported article; (B) proclaim a tariff-rate quota on the article...." {emphasis added}. Thus, the statutory language clearly contemplates Section 201 duties as increases in already-existing "United States import duties" applicable to certain merchandise.

B. Presidential Proclamations Demonstrate that Section 201 Duties are U.S. Import Duties.

It is also clear from the language employed by the President in proclamations announcing import relief that "Section 201 duties" are U.S. import duties. For example, in the case of the *Steel 201* action, the President simply made "modifications to the HTS" to effect a tariff-rate quota and "an increase in duties."[3] Likewise, in the *Steel Wire Rod* case, the President made "modifications to the HTS" to put in place a tariff-rate quota and to temporarily suspend duty-free treatment.[4] These proclamations merely amended the Harmonized Tariff Schedule in the same way that various other presidential proclamations amend the HTSUS, such as proclamations under the Generalized System of Preferences or the African Growth and Opportunity Act.

Furthermore, as noted above, pursuant to Presidential proclamation, "Section 201 duties" are memorialized in the Harmonized Tariff Schedule of the United States, as are other U.S. import duties. That these particular duties are set out in Chapter 99 of the HTSUS is of no particular relevance to whether they are U.S. import duties. As the title and the contents of

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[3] *Proclamation 7529 of March 5, 2002, To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products*, 67 Fed Reg. 10553 (March 7, 2002).

[4] *Proclamation 7273 of February 16, 2000, To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Wire Rod*, 65 Fed. Reg. 8621 (February 18, 2000).

Chapter 99 suggest, there are a variety of "special" or "temporary" duties that are imposed for any number of public policy reasons. Such duties are implemented through various legislative and administrative means and are set out in Chapter 99. New duty rates agreed to by the United States in international trade negotiations, for example, may require "temporary modifications proclaimed pursuant to trade agreements legislation" as the rates are lowered in phases.[5] Such temporary, transitional rates would also be set out in Chapter 99 of the HTSUS, but there is no suggestion that they would not constitute U.S. import duties by virtue of where they are set out in the HTSUS.

C. International Agreements Confirm that Section 201 Duties are U.S. Import Duties.

The language of the GATT and the WTO Agreement on Safeguards confirms as well that "Section 201 duties" are ordinary customs duties. Article XIX:1(a) of GATT 1994 provides that, where the "effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions" is such as to cause serious injury, Members are authorized to "suspend the obligation in whole or in part or to withdraw or modify the concession." The tariff concessions referenced are, of course, those recorded in the tariff schedules of each Member, as agreed to in the rounds of tariff negotiations and the subject of Article II:1(b) of GATT 1994.

Similarly, the Agreement on Safeguards provides, in Article 6, that provisional safeguard measures "should take the form of tariff increases." Thus, the structure of Articles XIX and II of GATT 1994 and the Agreement on Safeguards confirm the characterization of safeguard duties as ordinary customs duties.

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[5] The full title of HTSUS Chapter 99 is "Temporary legislation; temporary modifications proclaimed pursuant to trade agreements legislation; additional import restrictions proclaimed pursuant to section 22 of the Agricultural Adjustment Act, as amended."

Moreover, nothing in Article XIX of GATT 1994, the Agreement on Safeguards, or the Antidumping Agreement supports the conclusion that deducting duties paid pursuant to a safeguard action in the context of antidumping duty calculations would violate the obligations of Article VI of GATT 1994 or the Antidumping Agreement.

III. THERE ARE NO VALID REASONS FOR LIMITING THE TERM "UNITED STATES IMPORT DUTIES" IN SECTION 772(C)(2)(A) TO SO-CALLED "NORMAL" CUSTOMS DUTIES.

In a past antidumping investigation, the Department addressed the issue of whether to deduct Section 201 duties from the calculation of export price or constructed export price in antidumping margin calculations.[6] In that case, while the Department did not ultimately decide the issue on the merits,[7] the Recommendation Memorandum reasoned that "Section 201 duties are not normal customs duties" because they "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'" and because "they appear in a separate schedule for temporary duties at subchapter III of chapter 99 {of the HTS}."[8] As noted above, however, the derivation of the duty rate increase, its temporary status,

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6 *Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago* (A-274-804) (2002); Final Determination of Sales at Less Than Fair Value, 67 F.R. 55,788 (August 30, 2002).

7 The Department determined that the adjustment, in that case, "would have an insignificant effect" and it exercised its "discretionary authority set forth in section 777(A)(a)(2) of the Act to 'decline to take into account adjustments which are insignificant in relation to the price of value of the merchandise.'" The Department did not address the merits and determined instead "to do so in a future proceeding, as appropriate, with full opportunity for comment by all parties." Decision Memorandum for the Final Determination of the Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago (not dated).

8 *Recommendation Memorandum - Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from*

and its publication in Chapter 99 of the HTSUS are irrelevant to whether Section 201 duties are U.S. import duties. Furthermore, the Department's distinction between "normal" duties and Section 201 duties is contrary to the legislative history of the statute.

A. The Legislative History of the 1921 Act Demonstrates that Section 201 Duties are Encompassed by the Phrase "United States Import Duties."

The legislative history of the Antidumping Act of 1921 ("1921 Act") demonstrates that Section 772(c)(2)(A) cannot be limited to just "normal" duties but includes all duties not expressly excluded. The "additional costs, charges, or expenses, and United States import duties" language of subsection (c)(2)(A) was first enacted into U.S. law in sections 203 and 204 of the 1921 Act.[9] The 1921 Act used three different terms when discussing distinct types of duties: "special dumping dut{ies},"[10] "customs duties,"[11] and "United States import duties."[12]

Trinidad and Tobago, p. 3 (attached to letter from Charles Riggle to Paul C. Rosenthal) (August 13, 2002).

[9] *See* Antidumping Act of 1921, §§ 203, 204 ("1921 Act"). The Trade Agreements Act of 1979, by which 19 U.S.C. § 1677a was added to the Tariff Act of 1930, was intended by Congress to reenact the Antidumping Act of 1921, which it repealed, with modifications to bring it into accord with the Tokyo Round GATT Antidumping Code. *See* S. Rep. No. 96-249, at 15-16 (1979), *reprinted in* 1979 U.S.C.C.A.N. 401-02. No change in the substantive antidumping rules was intended except as specifically noted in the Senate Report; administrative and judicial precedents were to continue under the new law; and the provisions regarding U.S. price merely reenacted provisions of the 1921 Act with one substantive change (regarding adjustments for countervailing duties imposed to offset export subsidies). *Id.* at 93, 107, *reprinted in* 1979 U.S.C.C.A.N. 479, 493; *see also Timken Co. v. United States*, 11 CIT 786, 812-13, 673 F. Supp. 495, 519 (1987).

[10] *See, e.g.*, 1921 Act § 202(a).

[11] *See, e.g.*, 1921 Act § 211.

[12] *See, e.g.*, 1921 Act § 204.

Thus, Congress expressly distinguished between the "special dumping duty"[13] and "customs duties," the latter meaning regular or ordinary duties.

It therefore follows that the term "United States import duties," as it appears in the 1921 Act, must refer to something other than "special dumping duties" or "custom duties." The only logical conclusion is that the phrase "United States import duties" includes all duties imposed by the United States on imports, including "special dumping duties" and "custom duties" identified elsewhere in the statute. This reading of the statute is consistent with the basic tenet of statutory construction that "effect must be given, if possible, to every word, clause, and sentence of a statute."[14] Thus, where "the legislature uses certain language in one part of the statute and different language in another," an agency implementing the statute should "assume different meanings were intended."[15]

The legislative history of the 1921 Act is silent as to the definition of "any . . . United States import duties."[16] The drafters' failure to provide, in either the 1921 Act or its history, a special definition for the term "United States import duties" -- in contrast to the definitions

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[13] The 1921 Act did not separately discuss countervailing duties. The Senate Report, however, notes that the special antidumping duties referred to in the Act are imposed "in addition to the duties imposed by existing law . . ." *See* S. Rep. No. 67-16, at 10 (1921). The first general countervailing duty law was enacted in the Tariff Act of 1897. *See* 30 Stat. 151, 205 (July 24, 1897). *See also Zenith Radio Corp. v. United States*, 430 F. Supp. 242, 250 (Cust. Ct. 1977) (J. Newman, concurring) (noting that general countervailing duty law was first enacted in Section 5 of the Tariff Act of 1897). Thus, countervailing duties were "duties imposed by existing law . . . " at the time of the enactment of the 1921 Act.

Conversely, Section 201, or safeguard, duties were not contemplated in the 1921 Act.

[14] 2A Sutherland § 46.06, at 119.

[15] *Id.* at § 46.06, Supp. 1997 at 80.

[16] *See* S. Rep. No. 67-16, at 10-14.

provided for other terms[17] -- indicates that Congress intended no meaning other than the ordinary one for this term -- all import duties imposed by the United States, whether they be "special" import duties or regular import duties. Given the statute's specific definition for "special duties," Commerce has no basis for interpreting the "United States import duties" language narrowly.

This conclusion is further supported by a court decision issued contemporaneously to the statute. In *C.J. Tower & Sons v. United States*, the Court of Customs and Patent Appeals ("CCPA") addressed the intentions of the drafters of the 1921 Act. In its opinion, the CCPA expressly noted that the special "additional duties" were "desired and intended" by Congress to "be considered as duties for all purposes."[18] The CCPA's interpretation of the statute is particularly meaningful as contemporaneous exposition "is best explained by following the construction put upon it by judges who lived at the time it was made, or soon after."[19]

In sum, the phrase "United States import duties" was meant to encompass more than just "normal" customs duties; it covers "duties for all purposes." *C.J. Tower & Sons*. Thus, consistent with the statute, Section 201 duties are encompassed within the phrase "United States import duties" of Section 772(c)(2)(A).

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[17] *See, e.g.*, 1921 Act §§ 202 (defining "special dumping duty"), 206 (defining "cost of production"), and 207 (defining "exporter").

[18] *C.J. Tower & Sons v. United States*, 71 F. 2d 438, 445 (CCPA 1934) (emphasis added); *see also PQ Corp. v. United States*, 11 CIT 53, 66 n. 15, 652 F. Supp. 724, 736 n.15 (1987) (*quoting C.J. Tower & Sons*, 71 F. 2d at 445); *Imbert Imports, Inc. v. United States*, 331 F. Supp. 1400, 1406 n.10 (Cust. Ct. 1971), *aff'd* 475 F. 2d 1189 (1973).

[19] *Black's Law Dictionary* 318 (6th ed. 1990) ("contemporanea expositio est optima fortissimo in lege").

B. Distinguishing Section 201 Duties From Normal Customs Import Duties is Counter to Prior Department Practice.

Before the *Steel Wire Rod from Trinidad and Tobago* proceeding, the Department had never proposed to distinguish between "normal" duties and Section 201 duties for antidumping margin purposes. Indeed, the Department has previously interpreted the "additional costs, charges, or expenses, and United States import duties" language of Section 772(c)(2)(A) as encompassing more than just "normal" U.S. customs duties. In *Fuel Ethanol from Brazil*, for instance, the Department made "deductions from the selling price for special custom duties" as well as "regular customs duties."[20] Much like Section 201 duties, in the Brazilian case, Congress had passed legislation imposing additional duties on the existing *ad valorem* tariff for a particular type of ethyl alcohol. While the additional duties were not imposed following a Section 201 investigation, the tariff resembled a safeguard measure in that it resulted in a duty that exceeded the U.S. tariff binding. Thus, it is clear that the Department, itself, has recognized that the statute does not limit the reach of subsection (c)(2)(A) to so-called "normal" duties only.

IV. DEDUCTING SECTION 201 DUTIES FROM EP AND CEP WOULD NOT RESULT IN "DOUBLE COUNTING" OR A "DOUBLE REMEDY."

In the *Steel Wire Rod* case, the Department proposed to treat Section 201 duties like antidumping duties and expressed concern that "[d]eduction 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."[21] The Department further noted that the Court

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20 *See Antidumping; Fuel Ethanol from Brazil; Final Determination of Sales at Less than Fair Value,* 51 Fed. Reg. 5,572 (Feb. 1986) (emphasis added).

21 *Recommendation Memorandum - Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, p. 4 (attached to letter from Charles Riggle to Paul C. Rosenthal) (August 13, 2002).

of International Trade has upheld its policy of treating antidumping duties differently from "normal" customs duties, citing to *Hoogovens Staal v. United States*.[22] The Department's proposed treatment of 201 duties, however, is supported neither by logic nor by court precedent.

A. <u>Section 201 Duties Are, in Their Nature and Purpose, Different From Antidumping Duties.</u>

The comparison of Section 201 duties to antidumping duties overlooks several important differences, which militate against similar treatment. In the *Hoogovens* case, the Court upheld 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."[23] The same reasoning, however, does not apply with respect to Section 201 duties.

The Department has observed that "[a]ntidumping duties are unique in that they represent antidumping margins - a measure of price discrimination between FMV and USP."[24] Antidumping duties, however, are not determined at the time of entry but rather only after an administrative review (if one is requested). What is posted at the time of entry is a cash deposit, which may increase or decrease depending on whether the conduct of the foreign producer or importer changes. Dumping duty cash deposits are not what is actually owed unless there is no review. Indeed, if foreign producers stop dumping, all cash deposits are returned (with interest).

Section 201 duties, however, are entirely different from antidumping duties. While it is true that safeguard duties have a remedial purpose, *i.e.*, to facilitate the domestic industry's

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22 4 F. Supp. 2d 1213, 1220 (CIT 1998). This decision was cited in the Department's August 13, 2002 recommendation memo.

23 *Id*.

adjustment to import competition, this remedial purpose is completely separate from the purpose of antidumping duties, which is to address injurious dumping. The rate of additional tariffs imposed by the President under Section 203 is not determined on the basis of price discrimination or any other “unfair” trade practice. Rather, the additional Section 201 duties are, like normal *ad valorem* customs duties, an assessment against the value of the imports. Thus, the definitive duty owed due to Section 201 measures is known at the time of entry.[25]

As outlined above, the rationale behind the establishment of various tariff duties is not relevant to the question of which U.S. import duties are required to be deducted under subsection (c)(2)(A) of the statute. All U.S. import duties must be deducted. Also, unlike with antidumping duties, a U.S. importer faces no question or confusion as to the amount of Section 201 duties owed upon importation. Just like other U.S. import duties, Section 201 duties derive “from an assessment against value,” not from a “calculated margin of dumping,” and, just like other customs duties, Section 201 duties must be deducted from EP and CEP as required by Section 772(c)(2)(A).

B. Deducting Section 201 Duties From EP and CEP Will Not Result in "Double Counting," But Failure to Deduct 201 Duties From EP and CEP Will Result in Inequitable Treatment of U.S. Importers, Depending on Their Terms of Sale.

In the Department's recommendation memo in the *Steel Wire Rod from Trinidad and Tobago* investigation, the Department’s expressed concern was that deducting Section 201 duties

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24 *Certain Cold-Rolled Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 781, 786 (Jan. 7, 1998).

25 The amount of duties owed due to Section 201 tariffs is known at the time of entry at least to the same extent that the amount of other so-called “normal” duties owed is known, subject to the possibility of audit, appeal, reliquidation, etc.

from EP and CEP would result in "double counting" of Section 201 duties. Contrary to this groundless concern, the failure to deduct Section 201 duties from EP and CEP would actually undermine the effectiveness of safeguard relief, and would result in discriminatory treatment of U.S. importers in antidumping investigations or reviews depending on whether the importers purchased the subject merchandise on the basis of "f.o.b. foreign port" or "delivered duty paid." When correctly analyzed, this inequitable result is illustrated by the Department's own hypothetical as presented in the August 13, 2002 recommendation memorandum. In the memo, the Department sets out the following example:

> 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.[26]

The Department's assertion that the "impact of the Section 201 remedy would be $4.00" is simply incorrect.

- Where the terms of sale are f.o.b. port of export, there is no deduction of any customs duties because the price does not include any duties. In that case, the antidumping margin would not be affected at all by the proper deduction of Section 201 duties. The duties are paid by the importer and the return to the exporter is not affected.

- Where the terms of sale are delivered, duty paid (ddp), however, failing to deduct Section 201 duties would allow exporters to absorb the cost of the additional duties and would mask dumping.

These conclusions are demonstrated in the table attached as **Annex A**. The table demonstrates the discriminatory treatment that would result from the failure to properly deduct

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[26] *Recommendation Memorandum - Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from*

Section 201 duties from EP. The following breakouts from that table explain the problem in detail.

In each scenario presented below, the first exporter, "f.o.b. exporter," sells the product f.o.b. port of exportation, while the second, "ddp exporter," sells delivered duty paid (ddp). (The importers are similarly distinguished.) Logically, the terms of delivery should have no effect on an antidumping calculation because the costs of any delivery terms included in the price beyond f.o.b. are deducted from the starting price.[27] However, as can be clearly seen, by failing to fully deduct Section 201 duties, the ddp sales are treated more favorably.

The Following Assumptions are Made and Apply to all of the Scenarios Below:

- Normal value: $11.00
- Ocean freight and U.S. inland freight: $0.50 each
- Pre-201 duty rate: 20 percent *ad valorem*

SCENARIO 1: Initial Situation Before Safeguard is Imposed

Sale Terms	Home Market Price	Invoiced U.S. Price	Customs Duty	AD Export Price	AD Margin	Cost to Importer	Net return to Exporter
fob	$11.00	$10.00	$2.00	$10.00	$1.00	$14.00	$10.00
ddp	$11.00	$13.00	$2.00	$10.00	$1.00	$14.00	$10.00

As described, in the initial scenario, before safeguard action is taken, two exporters sell to the U.S. on different terms, one f.o.b., one ddp. These sales are treated equally in the antidumping calculation. The f.o.b. price is used as the export price with no need for adjustment. The ddp price is adjusted down to account for the cost of ocean freight ($0.50) and inland freight ($0.50), and the $2.00 charge for customs duties. Thus, a dumping margin of $1.00 is calculated

Trinidad and Tobago, p. 3 (attached to letter from Charles Riggle to Paul C. Rosenthal) (August 13, 2002).

[27] *See* 19 U.S.C. § 1677a(c)(2)(A).

for each exporter regardless of the terms of sale. The net return to each exporter is the same, \$10.00,[28] as is the actual cost to each importer, \$14.00.[29]

SCENARIO 2: Safeguard Imposed, Prices Unchanged, Only Pre-201 Duties Deducted From EP

Sale Terms	Home Market Price	Invoiced U.S. Price	Customs Duty	AD Export Price	AD Margin	Cost to Importer	Net return to Exporter
fob	\$11.00	\$10.00	\$4.00	\$10.00	\$1.00	\$16.00	\$10.00
ddp	\$11.00	\$13.00	\$3.43	\$10.29	\$0.71	\$13.71	\$8.57

In the next scenario, a 20 percent *ad valorem* additional duty has been imposed as a safeguard remedy, thus making the total customs duty rate 40%. The exporters do not adjust their invoice prices in response to the increased tariff rate. The f.o.b. sale is treated the same as before, with the f.o.b. price again used as the export price. Customs collects a total of \$4.00 in duties on the f.o.b. sale, plus \$1.00 in AD duties, so the f.o.b. importer pays a total of \$16.00 in this scenario (with \$1.00 for shipping). The net return to the f.o.b. exporter remains \$10.00.

In the ddp sale, however, the transaction apparently receives more favorable treatment, and the ddp importer is the beneficiary. The ddp exporter maintains its invoice price of \$13.00 despite the increase in tariffs. Consequently, the calculated duty basis goes down.[30] The exporter absorbs the additional duties as a cost, reducing its net return to \$8.57, effectively

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28 The f.o.b. exporter nets \$10.00 because that is what was paid at the foreign port. The ddp exporter nets \$10.00 because it was paid \$13.00 but covered the cost of shipping (\$1.00 total) and customs duties (\$2.00).

29 For the f.o.b. importer, \$10.00 invoice price + \$2.00 customs duty + \$1.00 AD duty + \$0.50 ocean freight + \$0.50 inland freight = \$14.00. For the ddp importer, \$13.00 invoice price + \$1.00 AD duty = \$14.00.

30 "Invoice price minus shipping costs divided by 1.2" for the 20% tariff rate ((13-1))/1.2 = 10) compared to "invoice price minus shipping costs divided by 1.4" for the 40% tariff rate ((13-1))/1.4 = 8.57).

lowering the ex-factory price. The ddp importer, however, benefits significantly in this scenario because all of the import duties are not deducted from the gross unit price. The adjusted export price of the ddp sale, therefore, appears to increase. Consequently the ddp importer pays a lower dumping margin.

As noted above and as can be clearly seen, however, the net return to the ddp exporter has gone **down** from $10 to $8.57 (meanwhile the total cost to the ddp importer has gone down and is over $2.00 less than the cost to the f.o.b. importer). In effect, the ddp exporter has lowered his price, absorbed the additional Section 201 duties, and the ddp importer will be rewarded for this with a **lower** dumping margin and will pay a lower total cost (thus enabling the ddp importer to lower its price in the U.S. market). This is neither a logical nor equitable outcome, and it is highly improbable that Congress intended it. It undercuts the effectiveness of both the safeguard remedy and the antidumping remedy, and it is unfair to the f.o.b. importer, who pays a higher cost in antidumping duties.

SCENARIO 3: Safeguard Imposed, Prices Unchanged, All Import Duties Deducted From EP

Sale Terms	Home Market Price	Invoiced U.S. Price	Customs Duty	AD Export Price	AD Margin	Cost to Importer	Net return to Exporter
fob	$11.00	$10.00	$4.00	$10.00	$1.00	$16.00	$10.00
ddp	$11.00	$13.00	$3.43	$8.57	$2.43	$15.43	$8.57

The solution to the problem presented by scenario 2 is to properly deduct all import duties, including Section 201 duties, from the gross unit price, when import duties are included in that price. This outcome is shown in the table above. Here, the fact that the ddp exporter has effectively lowered his price to $8.57 is accounted for by an appropriately increased dumping

margin. In this way, both remedies, the safeguard duties and the antidumping duties, are given their intended effect.

Additionally, by properly deducting Section 201 duties, the f.o.b. importer and the ddp importer are treated equitably. In this scenario, the total cost to each importer, as one would logically expect, is nearly the same. The total cost to the importers would be identical except that, because the ddp exporter maintained its price and absorbed the additional tariffs, the customs value basis was lowered, resulting in a lower assessed import duty. By applying the correct methodology and deducting all import duties, the f.o.b. importer is not disadvantaged based solely on the terms of the sale.

The goal of a safeguard, in essence, is to cause price to increase to a sustainable level. By absorbing the additional duties and maintaining its original delivered price, the ddp exporter frustrates the purpose of the safeguard **and** effectively intensifies its dumping, resulting in import prices potentially going down in the U.S. marketplace rather than up. Failure to deduct all import duties, including Section 201 duties, results in systematically less favorable treatment of importers who buy from independent exporters on an f.o.b. basis, compared to importers buying ddp, or importers buying from associated exporters, or on consignment. There is no credible policy basis for this discriminatory treatment.

SCENARIO 4: Prices Lowered to Avoid Market Impact of the Additional Duties: Comparison

Sale Terms	Home Market Price	Invoiced U.S. Price	Customs Duty	AD Export Price	AD Margin	Cost to Importer	Net return to Exporter
Only pre 201 duties deducted							
fob	$11.00	$10.00	$4.00	$10.00	$1.00	$16.00	$10.00
ddp	$11.00	$13.00	$3.43	$8.57	$2.43	$15.43	$8.57
All duties fully deducted							
fob	$11.00	$8.57	$3.43	$8.57	$2.43	$15.43	$8.57
ddp	$11.00	$10.71	$2.78	$6.94	$4.06	$14.78	$6.94

The chart above details the scenario where the f.o.b. exporter adjusts its price downward in response to the additional safeguard duties. The hypothetical assumes that the ddp exporter responds by lowering its price correspondingly.[31] The f.o.b. exporter's dumping margin increases from $1.00 to $2.43, but again the margin remains the same regardless of how the Department treats the Section 201 duties. The ddp exporter's dumping remains masked, however, if the Department fails to properly deduct all duties. The net return to the ddp exporter, *i.e.*, the true price at which it is selling the product, is over $4.00 less than fair value in this situation, yet the dumping margin paid by the ddp importer would be only $2.67, just slightly above that paid by the f.o.b. importer.

Indeed, failure to deduct 201 duties from the gross unit price would appear to provide a great incentive for the f.o.b. importer to renegotiate payment terms and switch to ddp. Doing so would allow the importer to significantly reduce his total cost, by over $2.00 per unit, which would enable the importer to further cut prices in the U.S. market. An additional unfairness arises here because importers buying from independent exporters on an f.o.b. basis may not be able to alter the payment terms of the sale, and would therefore not receive the benefit that is conferred upon ddp importers. The purpose of Section 201 and the antidumping law, however, is not to create an incentive for importers to alter the terms of their sales agreements, or to provide an advantage to some importers over others. The remedial purpose of both Section 201 and the antidumping law is frustrated when exporters absorb the remedial tariffs and are allowed to intensify their dumping. The Department needs to recognize the inequitable effect of failing to

[31] In many cases, especially in the steel industry, foreign producers have consistently demonstrated a willingness to price aggressively and unfairly in the U.S. market.

deduct 201 duties from gross unit price, and the Department's methodology must prevent it. Hence, Section 201 duties must be deducted from gross unit price.

SCENARIO 5: DDP Exporter Raises Its Price to Reflect the Duty Increase

Sale Terms	Home Market Price	Invoiced U.S. Price	Customs Duty	AD Export Price	AD Margin	Cost to Importer	Net return to Exporter
DDP Sales Price raised to reflect duty increase, only pre 201 duties deducted							
ddp	$11.00	$15.60	$4.17	$12.51	$(1.51)	$14.09	$10.43
DDP Sales Price raised to reflect duty increase, all duties fully deducted							
ddp	$11.00	$15.60	$4.17	$10.43	$0.57	$16.17	$10.43

In this last scenario, the ddp exporter raises its invoice price by 20 percent in response to the safeguard measure, which is certainly a positive development. As before, though, this table demonstrates that the net return to the exporter for sales to the U.S. remains less than normal value. By failing to fully deduct Section 201 duties, though, the Department would find <u>no dumping</u>, although it is clearly the case that dumping continues at a rate of over 5 percent. Only by deducting all U.S. import duties paid, including Section 201 duties, can the Department make the required "apples to apples" comparison of the home market price and the price that the exporter actually receives selling to the U.S. market. Only by deducting all U.S. import duties paid, including Section 201 duties, can the Department ensure that full effect is given to **both** safeguard and antidumping remedies.

V. CONCLUSION

For the reasons presented above, the deduction of Section 201 duties from the gross unit price in determining export price for purposes of antidumping duty calculations is both required by the statute and appropriate for policy reasons. The statute requires the deduction of all United

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Therefore, it is reasonable to assume that any price cuts by the f.o.b. exporter would be matched by other exporters.

States import duties from the gross unit price, and Section 201 duties are U.S. import duties. As detailed above, this conclusion is supported by examination of the safeguard statute, presidential proclamations, relevant international agreements, legislative history, court decisions, and prior Department practice.

Policy concerns also support the deduction of Section 201 duties. Failure to deduct Section 201 duties from EP and CEP undermines the remedial purpose of both the antidumping law and the safeguard law. Moreover, if Section 201 duties are not deducted from export price, U.S. importers are treated inequitably based on their terms of sale.

Accordingly, ISG and the USWA both urge the Department to determine that it is appropriate, on legal and policy grounds, to deduct Section 201 duties from gross unit price in antidumping duty calculations.

Respectfully submitted,

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Annex A

Sale Terms	Home Market Price	Invoiced U.S. Price	Ocean Freight	U.S. Inland Freight	Duty Basis	Customs Duty Rate	Customs Duty	AD Export Price	AD Margin	Cost to Importer	Net Return to Exporter
	a	b	c	d	e	f	g	h	i	j	k
					b-c-d for fob		(e x f)	(b for fob)	a-h	(b+c+d+g+i) for fob	(b for fob)
					(b-c-d)/(1+f) for ddp			(b-c-d-g for ddp)*		(b+i) for ddp	(b-c-d-g for ddp)
Initial situation before SG imposed, two exporters, one sells on fob basis, one sells on ddp basis											
fob	$11.00	$10.00	0.5	0.5	10.00	20%	$2.00	$10.00	$1.00	$14.00	$10.00
ddp	$11.00	$13.00	0.5	0.5	10.00	20%	$2.00	$10.00	$1.00	$14.00	$10.00
Prices unchanged, duty increased to 40% after SG imposed, only pre 201 duties deducted in AD calculation of EP											
fob	$11.00	$10.00	0.5	0.5	10.00	40%	$4.00	$10.00	$1.00	$16.00	$10.00
ddp	$11.00	$13.00	0.5	0.5	8.57	40%	$3.43	$10.29	$0.71	$13.71	$8.57
Prices unchanged, duty increased to 40% after SG imposed, all duties fully deducted in AD calculation of EP											
fob	$11.00	$10.00	0.5	0.5	10.00	40%	$4.00	$10.00	$1.00	$16.00	$10.00
ddp	$11.00	$13.00	0.5	0.5	8.57	40%	$3.43	$8.57	$2.43	$15.43	$8.57
Prices lowered to avoid market impact of duty, only pre 201 duties deducted											
fob	$11.00	$8.57	0.5	0.5	8.57	40%	$3.43	$8.57	$2.43	$15.43	$8.57
ddp	$11.00	$10.71	0.5	0.5	6.94	40%	$2.78	$8.33	$2.67	$13.39	$6.94
Prices lowered to avoid market impact of duty, all duties fully deducted											
fob	$11.00	$8.57	0.5	0.5	8.57	40%	$3.43	$8.57	$2.43	$15.43	$8.57
ddp	$11.00	$10.71	0.5	0.5	6.94	40%	$2.78	$6.94	$4.06	$14.78	$6.94
DDP Sales Price raised to reflect duty increase, only pre 201 duties deducted											
ddp	$11.00	$15.60	0.5	0.5	10.43	40%	$4.17	$12.51	$(1.51)	$14.09	$10.43
DDP Sales Price raised to reflect duty increase, all duties fully deducted											
ddp	$11.00	$15.60	0.5	0.5	10.43	40%	$4.17	$10.43	$0.57	$16.17	$10.43

* Applying the correct methodology, the full value of "g", i.e., the full value of the customs duty paid, is subtracted from the invoiced U.S. price (as are the shipping costs) to derive the AD export price. In the scenarios where the incorrect methodology is applied, only half "g", i.e., only the 20% pre-201 tariff amount, is subtracted.