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PUBLIC DOCUMENT

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Public Comment

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VIA MESSENGER

James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th Street & Pennsylvania Avenue, N.W.
Washington, DC 20230
Attention: Section 201 Duties

Re: Antidumping Proceedings: Rebuttal Comments on the Treatment of Section 201 Duties and Countervailing Duties

Dear Mr. Secretary:

On behalf of Hyundai HYSCO ("HYSCO"), we hereby submit rebuttal comments on whether the Department should deduct Section 201 duties from U.S. gross unit price for antidumping duty calculations.[1] HYSCO is a Korean producer and exporter of certain steel products.

[1] See Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, 68 Fed. Reg. 53104 (Sept. 9, 2003).

In our October 9, 2003 public comments, we provided numerous reasons why the Department must not deduct Section 201 duties from export price ("EP") or constructed export price ("CEP") in its dumping calculations.[2] Specifically, we explained that: (1) the phrase "United States import duties" in the statute excludes special Customs duties; (2) Section 201 duties, like antidumping and countervailing duties, are special Customs duties; (3) the Department's decisions in Softwood Lumber from Canada and Fuel Ethanol from Brazil do not apply to Section 201 duties; (4) the deduction of Section 201 duties from U.S. price would illegally provide a double remedy to domestic industries in the form of artificially inflated dumping duties; and (5) the impact of the Byrd Amendment would be indirectly increased through the effective distribution of Section 201 duties to domestic producers.

For the reasons explained below, we again urge the Department to continue its longstanding policy of not deducting special Customs duties, including Section 201 duties, from its calculation of the U.S. gross unit price in antidumping proceedings.[3]

I. Deducting Section 201 Duties is Not Necessary to Achieve Fair Comparisons with Normal Value

Commenters argued that the deduction of Section 201 duties in the U.S. price calculation is necessary to achieve a fair comparison with normal value because Section 201 duties are a cost

[2] See Letter from Akin Gump Strauss Hauer & Feld LLP, "Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties" (Oct. 9, 2003).

[3] While our comments focus on Section 201 duties, a similar analysis applies to countervailing duties.

or expense that is reflected in the form of a higher U.S. selling price.[4] Further, they contend that not deducting Section 201 duties will overstate U.S. price in the antidumping duty analysis.[5] These arguments are problematic and should be rejected.

The argument that the imposition of Section 201 duties must result in a higher U.S. selling price is inherently flawed. Such arguments presume that all elements are fixed, and that an increase in one cost element necessarily translates into a dollar-for-dollar change in the selling price. While companies' prices to their customers theoretically reflect all costs and expenses, plus a mark-up for profit, the methodology for establishing prices in the normal course of business is not so scientific, and any of the elements is subject to change. Rather, the final prices charged to customers normally result from the consideration of many factors such as supply and demand, market conditions, and the bargaining power of buyers and sellers. Contrary to the commenters' presumptions, it is difficult for sellers to pass along 100 percent of the costs and expenses to their customers when the market determines prices and other sources of supply are available. Thus, another equally legitimate response to an additional cost, such as a Section 201 duty, is to lower the profit level experienced on the sale.

The Department has recognized this repeatedly in its calculations. All business expenses are not automatically deducted from the gross unit price. Antidumping and countervailing

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[4] See, e.g., Letter from United States Steel Corporation to the U.S. Department of Commerce, "Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties" (Oct. 9, 2003), at 7, 9-11.

[5] Id. at 7.

duties, for example, are expenses incurred by the importer. However, the Department will only deduct these particular expenses in the U.S. price calculation if the foreign producer or exporter pays them directly on behalf of an unaffiliated importer or reimburses that importer, which courts have upheld.[6] If, however, a foreign producer or exporter imports the subject merchandise on its own behalf, the Department has consistently confirmed that it will not deduct these real business expenses from EP or CEP.[7] Therefore, the Department has determined in other contexts that the magnitude of dumping is fully addressed even when, for example, special import duties incurred by a foreign producer or exporter are not deducted from U.S. gross unit price.

Similarly, the U.S. Court of International Trade has held that "{t}he key issue . . . {for antidumping calculations} is to compare the price paid in the U.S. to the price paid in the home market or third country market, not the return realized by the {exporter} on sales made in the

[6] See 19 C.F.R. § 351.402(f)(1); see also AK Steel Corp. v. United States, 988 F. Supp. 594, 607-08 (Ct. Int'l Trade 1997) (citing PQ Corp. v. United States, 652 F. Supp. 724, 737 (Ct. Int'l Trade 1987)) (recognizing that the deduction of special Customs duties would double-count the effect of the import relief and "would work to open up a margin where none otherwise exists"); U.S. Steel v. United States, 15 F. Supp. 2d 892, 898-900 (Ct. Int'l Trade 1998) (noting that the deduction of countervailing duties from U.S. price would result in a double remedy by inflating the dumping margin); Hoogovens Staal v. United States, 4 F. Supp. 2d 1213, 1220 (Ct. Int'l Trade 1998) (holding that the Department's decision not to deduct antidumping duties was a permissible interpretation of the statute because such deductions "would reduce the U.S. price – and increase the margin – artificially").

[7] See, e.g., Structural Steel Beams From the Republic of Korea, 68 Fed. Reg. 2499, at Comment 2 (Jan. 17, 2003) (final admin. rev.) (stating that the reimbursement rule does not apply when the importer and exporter are the same entity). Similarly, the Department does not always deduct indirect selling expenses from U.S. price or normal value. See, e.g., 19 C.F.R. § 351.410(e) (providing that where commissions are incurred in one market, but not in the other, the Department will make an allowance for indirect selling expenses in the other market up to the amount of the commissions).

two markets."[8] In other words, the courts recognize that not all business expenses must be deducted from the U.S. or home market (or third-country) gross unit prices. The courts' unwillingness to support the deduction of an expense in an antidumping calculation that would either double count the effect of an import relief measure or artificially inflate the calculated dumping margins explains, in part, why they have upheld the Department's exclusion of antidumping duties from the statutory phrase "United States import duties."[9] The same is true for Section 201 duties. It is not necessary to deduct Section 201 duties in the U.S. price calculation to achieve a fair comparison with normal value. Moreover, such a deduction will unfairly distort the antidumping duty calculations by making the U.S. price appear far less than the true sales price.

II. The Department Should Disregard Submitted Comments Regarding U.S. Customs Regulations

One commenter erroneously argued that Section 201 duties are normal import duties for purposes of Customs law.[10] This contention is not persuasive and not applicable. U.S. Customs and Border Protection's ("Customs'") regulations, at 19 C.F.R. §§ 159.41-159.47, refer to

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[8] See Thyssen Stahl AG et al. v. United States, 886 F. Supp. 23, 31-32 (Ct. Int'l Trade 1995) (quoting Torrington Co. v. United States, 832 F. Supp. 379, 392 (Ct. Int'l Trade 1993)) (emphasis added) (finding that the U.S. antidumping statute does not permit the adjustment of gains or losses resulting from the hedging of currencies in dumping calculations).

[9] 19 U.S.C. § 1677a(c)(2)(A).

[10] See Letter from Collier Shannon Scott, PLLC, to the U.S. Department of Commerce, "Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties: Initial Comments in Response to Request for Public Documents" (Oct. 9, 2003), at 7.

"Special Duties" only with respect to the rules governing liquidation, which are not applicable to Section 201 duties. Therefore, it is not relevant to the present analysis that these rules governing "special duties" apply to antidumping and countervailing duties and not Section 201 duties.

Furthermore, Customs does not consider Section 201 duties to be normal import duties. As part of the implementation procedures for the Section 201 duties on steel, Customs issued answers to frequently asked questions.[11] In response to one question, Customs referred to the Section 201 duties as a "special duty for targeted steel products."[12] In response to another question, Customs referred to Section 201 duties as "new additional duties" that are "cumulative on top of normal duties, antidumping/countervailing duties, fees, taxes, or any other duties or charges."[13] Thus, Customs considers Section 201 duties to be special duties collected in addition to normal import duties. The Department should similarly recognize that Section 201 duties are special import duties and not deduct them from the U.S. price calculation.

III. The Department Should Not Consider Other Countries' Antidumping Practices in Its Analysis

Commenters urged the Department to change its longstanding policy of not deducting special duties in the calculation of U.S. price for an antidumping analysis to conform its

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[11] See U.S. Bureau of Customs and Border Protection, "Steel 201 Questions and Answers" (Mar. 29, 2002), available at http://www.customs.ustreas.gov.

[12] Id.

[13] Id. (emphasis supplied).

methodology with those of the European Union, Canada, and Mexico.[14] These commenters' arguments are inherently flawed.

First, the United States must conform its antidumping regime to the provisions and principles inherent in Article VI of GATT 1994 and the corresponding Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Antidumping Agreement"). The United States is not obligated to conform its laws to the implementing provisions of other signatory countries.

The Antidumping Agreement as well as the Agreement on Safeguards suggest that Section 201 duties should not be deducted in the U.S. price calculation. Specifically, Article 2.4 of the Antidumping Agreement requires that "{a} fair comparison shall be made between the export price and the normal value." A deduction of Section 201 duties from U.S. gross unit price would be inconsistent with this provision because a price net of Section 201 duties would grossly misrepresent the actual level of dumping, if any. Moreover, Article 5.1 of the Agreement on Safeguards requires countries to "apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." The President's Proclamation that imposed the Section 201 duties for steel, for example, indicated the measures he believed were

[14] See, e.g., Letter from Dewey Ballantine LLP to the U.S. Department of Commerce, "Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties: Initial Comments in Response to Request for Public Comments" (Oct. 9, 2003), at 35-36.

necessary to prevent or remedy the alleged injury to the domestic industry.[15] Thus, the deduction of Section 201 duties in U.S. price calculations, which effectively doubles the level of safeguard measures imposed by increasing the amount of dumping duties owed by the exact amount of Section 201 duties collected, violates the Agreement on Safeguards and illegally expands the President's safeguards decision.

Such commenters also are incorrect particularly with respect to EU practice. In March 2003, the EU published a new regulation regarding the provision of double remedies to domestic industries.[16] Specifically, the EU Council recognized that "the importation of certain goods may be subject to both anti-dumping or anti-subsidy measures on the one hand and safeguard tariff measures on the other," but that "a combination of measures could place an undesirably onerous burden on certain exporting producers seeking to export to the Community."[17] Accordingly, the EU Council recently adopted a regulation such that, if the same imports are subject to antidumping or countervailing duties and safeguard tariff measures, the Council may adopt measures that either: (1) amend, suspend, or repeal existing antidumping or countervailing duties or (2) exempt imports, wholly or partially, from otherwise payable antidumping or countervailing duties. The Council may also adopt any other measures it deems appropriate.

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[15] See Proclamation 7529 — To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products, 67 Fed. Reg. 10553, 10556 (Mar. 5, 2002).

[16] See Council Reg. No. 452/2003, "on measures that the Community may take in relation to the combined effect of anti-dumping or anti-subsidy measures with safeguard measures," Official Journal of the EU (Mar. 6, 2003), available at http://europa.eu.int/. See **Attachment**.

[17] Id.

Thus, contrary to certain commenters' claims, if the Department adopts the policy of deducting Section 201 duties in the U.S. price calculation, it will in fact be acting inconsistently with one of its major trading partners.

IV. Treatment of Section 201 Duties as a Cost or Expense Effectively Violates the Byrd Amendment

In an attempt to rationalize why Section 201 duties should be deducted from EP or CEP in antidumping duty calculations, one commenter noted that unlike the unfair trade remedies of antidumping and countervailing duties, Section 201 duties do not qualify for payments under 19 U.S.C. § 1675c, the "Byrd Amendment."[18] This commenter implies that if a remedy against injury from imports does not derive from an unfair trade practice, it should be treated differently in antidumping duty calculations. We disagree in two respects.

First, it does not follow that Section 201 duties should be deducted from the U.S. price calculation because they do not qualify for distribution to domestic producers on the face of the Byrd Amendment. The stated intent of the Byrd Amendment, which has been found to violate WTO rules,[19] is to strengthen the remedial purpose of laws designed to counter the unfair trade

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[18] See Letter on behalf of the Long Products Producers Coalition, Nucor Corporation, and the Rebar Trade Action Coalition to the U.S. Department of Commerce, "Section 201 Duties: Comments of Long Products Producers Coalition, Nucor Corporation, and the Rebar Trade Action Coalition" (Oct. 9, 2003), at 7; see also 19 U.S.C. § 1675c(a) ("Duties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures.")

[19] See WTO Appellate Body, United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R, WT/DS234/AB/R, at paras. 256 and 318(a) (Jan. 16, 2003) ("CDSOA Report") (finding that Byrd Amendment "is a non-permissible specific action against dumping," contrary to Article 18.1 of the WTO's

practices of price discrimination and subsidization by distributing collected antidumping and countervailing duties to affected domestic industries.[20] While safeguard measures do not remedy an unfair trade practice, they are imposed to remedy a domestic industry experiencing "serious injury" from a surge in imports. Thus, like antidumping and countervailing duties, safeguard measures in fact are designed to assist a domestic industry experiencing injury from imports. Accordingly, the Department should treat Section 201 duties as it has historically treated other duties imposed to remedy injury to domestic industries allegedly caused by imports, and not deduct such duties in the U.S. price calculation.

Second, although the Byrd Amendment's language does not refer to Section 201 duties, the deduction of Section 201 duties in U.S. price calculations effectively will result in their distribution to qualifying domestic producers. As explained in our October 9, 2003 public comments, at pages 8-12, if the Department abandons its longstanding practice and deducts Section 201 duties from the calculation of U.S. price, the amount of dumping duties owed on a particular transaction will increase exactly by the Section 201 duties collected on that transaction, all other things being equal. Thus, Section 201 duties effectively will be distributed to domestic producers, which is inconsistent with the United States' WTO obligations.

Antidumping Agreement, because it results in the financing of the U.S. domestic industry through the transfer of collected dumping duties, thereby further encouraging foreign producers and exporters not to dump products in the United States).

[20] See Continued Dumping and Subsidy Offset, Pub. L. No. 106-387, 114 Stat. 1549, 1549A-72-73.

For the foregoing reasons, we again strongly encourage the Department not to deduct Section 201 duties from U.S. gross unit price in its calculation of antidumping duties. To do otherwise would violate U.S. and international law by unreasonably distorting the antidumping calculations while unjustly enriching domestic industries through the provision of double safeguard remedies.

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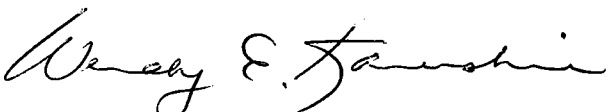
If you have any questions or desire any additional information, please do not hesitate to contact the undersigned.

Respectfully submitted,



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Attachment

COUNCIL REGULATION (EC) No 452/2003

of 6 March 2003

on measures that the Community may take in relation to the combined effect of anti-dumping or anti-subsidy measures with safeguard measures

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 133 thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) By Regulation (EC) No 384/96 [1], the Council adopted common rules for protection against dumped imports from countries which are not members of the Community.

(2) By Regulation (EC) No 2026/97 [2], the Council adopted common rules for protection against subsidised imports from countries which are not members of the Community.

(3) By Regulation (EC) No 519/94 [3] and (EC) No 3285/94 [4], the Council adopted common rules for the adoption of safeguard measures against imports from certain countries which are not members of the Community. Safeguard measures may take the form of tariff measures applicable either to all imports or to those imports in excess of a pre-determined quantity. Such safeguard measures imply that the goods are eligible to enter the Community market upon payment of the relevant duties.

(4) The importation of certain goods may be subject to both anti-dumping or anti-subsidy measures on the one hand and safeguard tariff measures on the other. The objectives of the former are to remedy market distortions created by unfair trading practices, whilst the objectives of the latter are to grant relief against greatly increased imports.

(5) However, the combination of anti-dumping or anti-subsidy measures with safeguard tariff measures on one and the same product could have an effect greater than that intended or desirable in terms of the Community's trade defence policy and objectives. In particular, such a combination of measures could place an undesirably onerous burden on certain exporting producers seeking to export to the Community, which may have the effect of denying them access to the Community market.

(6) Consequently, exporting producers seeking to export to the Community should not be subject to undesirably onerous burdens and should continue to have access to the Community market.

(7) It is therefore desirable to ensure that the objectives of the safeguard tariff measures and anti-dumping and/or anti-subsidy measures can be met without denying those exporting producers access to the Community market.

(8) Therefore, specific provisions should be introduced to enable the Council and the Commission, where they consider it appropriate, to take action with a view to ensuring that a combination of anti-dumping or anti-subsidy measures with safeguard tariff measures on the same product does not have such an effect.

(9) While it may be foreseeable that both the safeguard duty and the anti-dumping or anti-subsidy measures may become simultaneously applicable to the same product, it is not always possible to determine in advance at which precise point in time this may occur. Therefore, the Council and the Commission should be in a position to provide for such a situation in a manner ensuring sufficient predictability and legal certainty for all operators concerned.

(10) The Council and the Commission may consider it appropriate to amend, suspend or repeal anti-dumping and/or anti-subsidy measures or to provide for exemptions in whole or in part from any anti-dumping or countervailing duties which would otherwise be payable, or to adopt any other special measures. Any suspension or amendment of, or exemption from, anti-dumping or anti-subsidy measures should be granted only for a limited period of time.

(11) Any measures taken under this Regulation should be applicable from the date of their entry into force, unless otherwise specified therein, and should therefore not provide a basis for the reimbursement of duties collected prior to that date,

[1] OJ L 56, 6.3.1996, p. 1. Regulation as last amended by Regulation (EC) No 1972/2002 (OJ L 305, 7.11.2002, p. 1).
[2] OJ L 288, 21.10.1997, p. 1. Regulation as amended by Regulation (EC) No 1973/2002 (OJ L 305, 7.11.2002, p. 4).
[3] OJ L 67, 10.3.1994, p. 89. Regulation as last amended by Regulation (EC) No 1138/98 (OJ L 159, 3.6.1998, p. 1).
[4] OJ L 349, 31.12.1994, p. 53. Regulation as last amended by Regulation (EC) No 2474/2000 (OJ L 286, 11.11.2000, p. 1).

HAS ADOPTED THIS REGULATION:

Article 1

1. Where the Commission considers that a combination of anti-dumping or anti-subsidy measures with safeguard tariff measures on the same imports could lead to effects greater than is desirable in terms of the Community's trade defence policy, it may, after consultation of the Advisory Committee established by Article 15 of Regulation (EC) No 384/96 or by Article 25 of Regulation (EC) No 2026/97, propose to the Council that, acting by simple majority, it adopt such of the following measures as it deems appropriate:

(a) measures to amend, suspend or repeal existing anti-dumping and/or anti-subsidy measures;

(b) measures to exempt imports in whole or in part from anti-dumping or countervailing duties which would otherwise be payable;

(c) any other special measures considered appropriate in the circumstances.

2. Any amendment, suspension or exemption pursuant to paragraph 1 shall be limited in time and shall apply only when the relevant safeguard measures are in force.

Article 2

Any measure adopted pursuant to this Regulation shall apply from its date of entry into force. It shall not serve as basis for the reimbursement of duties collected prior to that date unless otherwise provided in that measure.

Article 3

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 6 March 2003.

For the Council

The President

D. REPPAS