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For Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
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Washington, D.C. 20230

Re: Rebuttal Comments Regarding Treatment of Section 201 Duties in Antidumping Duty Calculations

On September 3, 2003, the Department of Commerce ("Department") requested comments regarding the propriety of deducting Section 201 duties from gross unit price in determining export price ("EP") and constructed export price ("CEP") (collectively hereafter "U.S. Price") in antidumping calculations (68 Fed. Reg. 53104). On October 9, on behalf of Gerdau AmeriSteel Corporation and Commercial Metals Company, we submitted comments asserting that there are strong legal and policy justifications for deducting Section 201 duties in antidumping calculations. Pursuant to the Department's notice extending the time for submission of rebuttal comments in this proceeding (68 Fed. Reg. 60079), we hereby submit the following rebuttal comments.

A. Deducting Section 201 Duties from U.S. Price Would Not Result in a "Double Remedy."

Probably the most common argument made by parties opposing deduction of Section 201 duties from U.S. Price in antidumping proceedings is that deducting Section 201 duties would result in "double counting" or a "double remedy" for the domestic

industry.[1] Many of these parties rely on the Memorandum Regarding Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, Inv. A-274-804 (Aug. 13, 2002) ("Recommendation Memorandum"), in which the Department recommended that Section 201 duties be treated in the same way as antidumping and countervailing duties for purposes of calculating U.S. Price.[2]

The Recommendation Memorandum states that the same rationale for not deducting antidumping duties from U.S. Price supports the conclusion that Section 201 duties also should not be deducted. Recommendation Memorandum at 3. The memorandum continues:

> 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 . . . 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.'"

Id. The Recommendation Memorandum also concludes that "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." *Id*.

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[1] *See, e.g.,* Comments of Changwon Specialty Steel, Co., Ltd. and Dongbang Special Steel Co., Ltd., ("Changwon and Dongbang") at 8-12; Comments of the Consuming Industries Trade Action Coalition ("CITAC") at 5-7; Comments of the Korea Iron & Steel Association ("KOSA") at 6-7; Comments of O'Melveny & Myers L.L.P. at 5-6.

[2] *See*, *e.g.,* Comments of CITAC at 3; Comments of KOSA at 7-8; Comments of the European Confederation of Iron and Steel Industries ("EUROFER") at 2.

The "same rationale" for not deducting antidumping and countervailing duties from U.S. Price, in fact, does not apply in the case of Section 201 duties. While antidumping and countervailing duties are derived from the margin of dumping or the level of subsidization found, Section 201 duties are an assessment against value. While deducting antidumping duties in determining U.S. Price arguably would result in double counting, there is no such concern with Section 201 duties.

Subtracting Section 201 duties from U.S. Price simply recognizes that, in cases where both Section 201 duties and antidumping duties apply, there are two distinct injuries that must be remedied. Subtracting Section 201 duties from U.S. Price is necessary to keep both remedies intact. Not deducting Section 201 duties would simply ignore the fact that Section 201 duties *are* incurred by those subject to them.

Several parties attempt to buttress the "double remedy" argument with specific examples of how subtracting Section 201 duties from U.S. Price would result in "distortion." KOSA, for instance, presents an example showing an increase in total duty of over 50% if Section 201 duties are deducted from U.S. Price as compared to the calculation if Section 201 duties are not deducted from U.S. Price. *See,* Comments of KOSA at 8. KOSA's example is misleading because it assumes no change in behavior by the producer in response to the Section 201 duty being imposed. The producer should increase its U.S. Price to account for the Section 201 duty. In other words, the producer should pass the increased cost on to the consumer, rather than absorbing that cost itself. KOSA's example does not recognize that dumping is in fact aggravated to the extent that

the producer absorbs the Section 201 duty instead of raising its U.S. Price to account for the duty.

In a similar hypothetical, CITAC states that for a 30% Section 201 duty, "an exporter of steel would have to sell to the U.S. market at a price more than 30% *higher* than its domestic price in order to avoid dumping charges. Thus, imposing duties under a safeguard action would transfer otherwise perfectly legitimate pricing behavior into an unfair trade practice, i.e., dumping." Comments of CITAC at 7 (emphasis in the original). CITAC expresses surprise at a proposition that should be self-evident: when a 30% Section 201 duty is imposed, the expectation is that the foreign producer will raise its price in the U.S. market to account for the duty. If CITAC's hypothetical producer does not raise its price to account for the Section 201 duty it is not engaging in "otherwise perfectly legitimate behavior" – it is, in fact, dumping.

B. The Classification of Section 201 Duties Under Section 99 of the Harmonized Tariff Schedule Does Not Prove That They are Not U.S. Import Duties Under the Statute.

Some parties point to the fact that Section 201 duties are classified under Chapter 99 of the Harmonized Tariff Schedule ("HTS") to demonstrate that such duties are not "normal" import duties under the statute, and therefore should not be deducted from U.S. Price.[3] Changwon and Dongbang, for example, explain that Congress has the power to lay and collect taxes and duties through the establishment of normal customs duties which the ITC publishes in chapters 1 through 98 of the HTS. Comments of Changwon

[3] *See, e.g.,* Comments of Changwon and Dongbang at 6-7; Comments of British Columbia Lumber Trade Council, et al. at 7.

and Dongbang at 6. Changwon and Dongbang then note that Section 201 duties, which are imposed by the President pursuant to authority delegated by the Congress, are placed in Chapter 99 of the HTS, the "catchall for extraordinary and temporarily imposed duties." *Id*. at 7. The status of Section 201 duties as "special" duties and their classification under Chapter 99 means that they are not properly deducted from U.S. Price according to Changwon and Dongbang. But this reasoning is flawed.

There is nothing in the statute to support the view that all taxes and duties classified under Chapters 1-98 of the HTS are U.S. import duties, while duties classified under Chapter 99 of the HTS are not U.S. import duties. Moreover, the Department has determined that certain duties classified under Chapter 99 are U.S. import duties that are properly deducted from U.S. Price. In *Fuel Ethanol from Brazil,* 51 Fed. Reg. 5572 (Feb. 14, 1986), the Department determined that ethanol duties covered by 901.50 of the Tariff Schedules of the United States ("TSUS," the predecessor to the HTS) were properly deducted from U.S. Price. *Id*. at 5577. The ethanol duties were contained in the "Temporary Legislation" section of the TSUS, and today are contained in Chapter 99 of the HTS. The duties were imposed on top of the "normal" duties for the product contained elsewhere in the TSUS.

The Department's determination in *Fuel Ethanol from Brazil* was based on a straightforward and logical examination of the statutory requirements under 19 U.S.C. 1677a(d)(2):

> [The Department] is required to subtract from the exporter's sales price any United States import duties incident to bringing the merchandise from

> the place of shipment to the place of delivery in the United States. . . . 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.

Fuel Ethanol from Brazil at 5577.

The same reasoning dictates that the Department deduct Section 201 duties from U.S. Price. Like the ethanol duties, Section 201 duties are contained in the Temporary Legislation chapter of the HTS, and they are imposed on top of the customs duties contained elsewhere in the HTS. Further, Section 201 duties are unquestionably "duties incident to bringing the merchandise from the place of shipment to the place of delivery in the United States."

Attempts by parties in this proceeding to dismiss *Fuel Ethanol from Brazil* are unpersuasive. Changwon and Dongbang argue that the same reasoning does not apply to Section 201 duties because (1) the ethanol duties in that case were added to the HTS by Congress, while Section 201 duties are imposed by the President, and (2) Congress imposed the additional tariff to offset a federal excise tax subsidy that domestic producers received for fuel-grade ethanol. Comments of Changwon and Dongbang at 8. These considerations, however, played no role in the Department's determination that the duties should be deducted from U.S. Price. Rather, the overriding consideration driving the Department's decision was that the duties "were import duties incident to bringing the merchandise from the place of shipment to the place of delivery in the United States." *See, Fuel Ethanol from Brazil* at 5577.

C. Deducting Section 201 Duties from U.S. Price is Consistent with U.S. Law and the United States' Free Trade Obligations.

1. Deducting Section 201 Duties from U.S. Price is Consistent with U.S. Law.

Certain parties argue that deducting Section 201 duties from U.S. Price would be contrary to U.S. law.[4] These arguments, however, are not supported by a plain reading of 19 U.S.C. § 1677a(c)(2)(A) or the case law interpreting the statute.

The Tariff Act of 1930, 19 U.S.C. § 1677a, describes how U.S. Price is calculated. Section 1677a(c)(2)(A) provides that U.S. Price should 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." Under the plain meaning of the statute, Section 201 duties are U.S. import duties because they 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.

BCLTC cites decisions in which the Department concluded that antidumping and countervailing duties should not be considered United States import duties under Section 1677a(c)(2)(A) and then concludes that those decisions require that Section 201 duties be

[4] *See*, *e.g.,* Comments of the British Columbia Lumber Trade Council ("BCLTC") at 2-9; *see also*, Comments of the Government of Japan at 2; Comments of CITAC at 4.

treated in the same manner.[5] The cases BCLTC cites do not address whether Section 201 duties should be considered U.S. import duties, and BCLTC's attempt to make the reasoning in those cases apply to Section 201 duties fails. BCLTC states: "[l]ike CVD and AD duties, Section 201 duties 'are not normal customs duties.' The Department has recognized that 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.'" Comments of BCLTC at 7 (citing the Recommendation Memorandum).

As noted above, Section 201 duties are different from antidumping and countervailing duties in one critical respect: Section 201 duties are assessed against the value of the product, while antidumping and countervailing duties derive from the margin of dumping or rate of subsidization found. In the cases BCLTC cites, the Department's refusal to consider antidumping and countervailing duties to be U.S. import duties under Section 1677a(c)(2)(A) stemmed from concerns over double counting, not from a belief that all "remedial duties assessed to offset a particular trade distortion" should be treated in the same manner with regard to calculation of U.S. Price, as BCLTC contends. *See,* Comments of BCLTC at 7. Since, as explained above, there is no double counting issue with Section 201 duties, the rationale for not deducting antidumping and countervailing duties from U.S. Price does not apply in the case of Section 201 duties.

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[5] Comments of BCLTC at 4-8 (*citing Certain Cut-to-Length Carbon Steel Plate from Germany: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 18390, 18395 (April 15, 1997) and *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)).

2. Deducting Section 201 Duties is Consistent with the United States' Commitments Under the WTO Agreement and GATT.

Several parties insist that deducting Section 201 duties from U.S. Price would be inconsistent with the United States' WTO obligations.[6] Neither the WTO Agreement nor GATT prohibits the deduction of Section 201 duties in antidumping proceedings. In fact, deducting Section 201 duties from U.S. Price is fully consistent with the United States' WTO commitments.

GATT permits both the temporary imposition of safeguard measures to protect a domestic industry in extraordinary circumstances, and the imposition of antidumping duties. Like United States law, GATT recognizes that safeguard measures and antidumping duties are two separate mechanisms intended to address two distinct problems. The guidelines on safeguard measures are contained in the Agreement on Safeguards, and the guidelines on antidumping are contained in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Antidumping Agreement").[7] Article 2.4 of the Antidumping Agreement provides:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences with affect price comparability, including differences in conditions and terms of sale, taxation, level of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

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[6] *See*, *e.g.,* Comments of Energizer Battery Manufacturing, Inc. ("Energizer") at 13-15; Comments of EUROFER at 5-7.

[7] Both of these agreements are contained in Annex 1A to the WTO Agreement.

Deducting Section 201 duties from U.S. Price is fully consistent with this language, as such duties affect price comparability. Neither the Agreement on Safeguards nor the Antidumping Agreement contains provisions explicitly or implicitly prohibiting the deduction of Section 201 duties from U.S. Price.

D. Conclusion

Despite the arguments to the contrary, deducting Section 201 duties from U.S. Price would result in no double counting, and would be fully consistent with United States and international law. As deducting these duties would ensure the full measure (and no more) of the antidumping and Section 201 remedies, the Department should deduct Section 201 duties from U.S. Price.

Respectfully submitted,

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