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BY HAND DELIVERY

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

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

Dear Assistant Secretary Jochum:

The European Confederation of Iron and Steel Industries (EUROFER) hereby submits rebuttal comments in response to the Commerce Department's October 21, 2003 Federal Register notice (68 Fed.Reg.60079). A signed original, six copies, and comments in electronic form are submitted with this letter. EUROFER greatly appreciates the opportunity to participate in the Commerce Department's deliberation on the appropriate treatment of Section 201 duties and countervailing duties in the course of antidumping duty calculations.

A. Commerce is Not Required to Deduct Section 201 Duties from Export or Constructed Export Price in its Antidumping Margin Calculation

The antidumping statute does not permit the deduction of Section 201 duties from the export or constructed-export price in an antidumping margin calculation. Nevertheless, the

domestic industry contends that the statute clearly requires the deduction of such duties. Indeed, counsel for International Steel Group Inc. and the United Steelworkers of America claims that "a simple syllogism applies" to this issue:

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

Although syllogisms are useful tools for illustrating basic logical progressions, the validity of their conclusion is entirely dependent upon the soundness of their underlying premises. Here, counsel's second premise is fatally flawed. Section 201 duties by their very nature are distinct from normal U.S. import duties. Accordingly, there is simply no basis to conclude that the statute permits, let alone requires, the deduction of Section 201 duties from the calculation of an antidumping duty margin.

Normal U.S. import duties are applied to all imports in accordance with the international tariff bindings entered into by the United States. These bindings are intended to liberalize trade by progressively reducing protective tariffs. As such, countries may not impose import duties above the levels established by these bindings. Thus, for example, in *Chile – Price Band System and Safeguard Measures Relating to Certain Agriculture Products*, the WTO Appellate Body held that a "price band system" administered by Argentina on imported footwear and textiles

[1] Letter from Terence P. Stewart to the Honorable James J. Jocham, October 9, 2003, at 4.

violated Article II of the GATT because it resulted in the imposition of import duties in excess of Argentina's tariff bindings.[2]

By contrast, Section 201 duties (*i.e.*, safeguard remedies) represent a significant and extremely limited departure from the United States' internationally agreed tariff obligations. Section 201 duties are a unique and temporary remedy designed to reduce import volumes of a particular product, and thus limit trade, in an effort to alleviate the impact of import competition on a specific domestic industry. However, given the severely distortive nature of Section 201 duties,[3] they may be applied only if a detailed and voluminous investigation by the International Trade Commission demonstrates that a domestic industry has suffered "serious injury."[4]

The domestic industry attempts to marginalize this investigative process, claiming that the decision to implement Section 201 remedies ultimately turns on political considerations. History demonstrates, however, that the failure to adhere to the legal requirements established by the Safeguards Agreement, and by U.S. law, renders the application of Section 201 duties unlawful. To date, six cases challenging the imposition of safeguards remedies have been adjudicated by the WTO dispute resolution body. In each case, the dispute resolution panel and/or appellate body ruled that the countries imposing the safeguards remedies violated the

[2] WTO Doc. WT/DS207/R (March 5, 2002) (panel report).

[3] Because Section 201 duties are not intended to remedy unfair trading practices but are merely intended to alleviate the impact of import competition on a domestic industry, one legal scholar has commented that they "are the most protectionist of any remedies permitted in the GATT-WTO system." Raj Bhala, *Escape Clause Actions*, Chapter 9, *printed in* Raj Bhala & Kevin Kennedy, WORLD TRADE LAW (1998) at 897.

[4] *See, e.g.,* Safeguards Agreement, Article 2 (" A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."); Article 3.1 ("A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994.).

requirements of the Safeguards Agreement.[5] This precedent establishes that the imposition of safeguard remedies cannot simply be a political decision. Moreover, it establishes that Section 201 duties are not simply normal import duties that can be freely applied within the bounds of a country's tariff obligations. Rather, they are specialized remedial duties that are the product of a complex and rigorous legal framework.

The term "United States import duties" has existed in U.S. law for over eighty years without formal definition. Nevertheless, the comments filed by the domestic industry uniformly assert that Section 201 duties are the functional equivalent of normal customs duties — *i.e.*, U.S. import duties — and, as such, should be deducted from the antidumping duty margin calculation. The legislative history, however, makes clear that U.S. import duties and special duties, such as those designed to remedy injury sustained by U.S. industries, are separate and distinct. Indeed, the Senate report accompanying the Antidumping Act of 1921 (42 Stat. 12), the first act in which the terms appeared, clearly delineates between "special antidumping duties" and ordinary customs duties, which are uniformly referred to as "United States import duties."[6] The distinction between normal import duties and Section 201 duties is even more apparent in the Uruguay Round Agreements Act of 1994. To ensure that U.S. law complied with the requirements of the Safeguards Agreement, Congress created separate categories for "tariff

[5] Five cases were concluded by July 2002: *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*, WTO Doc. WT/DS98/R (June 21, 1999) (panel report); *Argentina – Safeguard Measures on Imports of Footwear*, WTO Doc. WT/DS121/R (June 25, 2999) (panel report); *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WTO Doc. WT/DS166/AB/R (December 22, 2000) (Appellate Body report); *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WTO Doc. WT/DS177/AB/R (May 1, 2001) (Appellate Body report); *United States – Definitive Safeguard Measures on Import of Circular Welded Carbon Quality Line Pipe from Korea*, WTO Doc. WT/DS202/R (Nov. 29, 2001) (panel report). Since that time, the U.S. Section 201 duties on certain steel imports have been held to violate the Safeguards Agreement.

[6] *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).

modifications"[7] (which contains internationally negotiated customs duties) and "import restrictions" (which contains remedial duties such as antidumping, countervailing, and safeguard duties).[8] If Congress had wanted to include safeguard remedies within the spectrum of normal import duties, it could have easily included such remedies in the category of tariff modifications. However, the fact that Congress distinguished between normal import duties and safeguard duties demonstrates that Congress never intended for safeguard duties to be regarded as ordinary U.S. import duties.

The domestic industry attempts to blur this distinction by citing to two cases in which Commerce deducted a purportedly "special" tariff from the export price during its margin calculation. Their reliance on these cases, however, is misguided. In the antidumping duty investigation of softwood lumber from Canada, Commerce deducted certain fees imposed pursuant to the Softwood Lumber Agreement from the export price of Canadian lumber. The domestic industry argues that that these fees "operated much as the 201 duties operate in this case.…"[9] What the domestic industry fails to note, however, is that these fees were imposed by the exporting country — Canada — and, as such, were treated by Commerce as "export taxes."[10] The deduction of these fees is, therefore, neither remarkable nor unexpected since Commerce is statutorily obligated to deduct "any export tax… imposed by the exporting country on the

[7] Uruguay Round Agreements Act, Title I, Subtitle B, Section III.

[8] Uruguay Round Agreements Act, Title, III, Subtitle A.

[9] *See* Comments on Behalf of Carpenter Technology Corporation; Crucible Specialty Metals Division, Crucible Materials Corp; Electralloy Corp.; Slater Steels Corp., Fort Wayne Specialty Alloys Division, filed by Collier Shannon Scott (October 9, 2003) at 4 ("Comments of Carpenter Technology et al").

[10] *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 56,062, 56,067 (November 6, 2001) ("We allocated the SLA fees of each respondent across all transactions in its U.S. sales file and treated them as an export tax in making adjustments to U.S. prices.").

exportation of subject merchandise to the United States."[11] Thus, contrary to the domestic industry's arguments, the *Softwood Lumber* case does not stand for the proposition that "duties similar to those resulting from section 201 should be deducted from U.S. price."[12] Rather, at most, *Softwood Lumber* stands for the unremarkable proposition that Commerce must deduct export taxes charged by the exporting country from the export or constructed-export price.

The domestic industry also erroneously relies on *Fuel Ethanol from Brazil*. In that case, Commerce deducted a legislatively created tariff on imported fuel ethanol. Despite a belief that the U.S. fuel ethanol industry was being injured by imports, neither Congress nor the Administration at that time requested the initiation of a Section 201 investigation. Rather than condition the protection of the domestic industry on the industry's ability to demonstrate that it had actually been injured by imports, Congress simply modified the existing import duty through the normal legislative process for setting and modifying import duties.[13]

The absence of an injury investigation in the *Fuel Ethanol* case is significant. The history of the statute implies that "special duties" are the product of an injury investigation. By contrast, U.S. import duties are the product of legislation. Thus, the *Fuel Ethanol* duties were clearly not "special," but were merely normal U.S. import duties. Remedial duties, such as those imposed to remedy serious injury found by in an ITC investigation, however, are entirely separate duties imposed to offset specific injury findings by the International Trade Commission. Thus, as Commerce noted in its preliminary recommendation memorandum in the *Wire Rod from*

[11] 19 U.S.C. § 1677a(c)(2)(B).

[12] Comments of Carpenter Technology et al. at 4.

[13] It is interesting to note that Commerce failed to take a position on whether the lawfulness of the legislative duties in the *Fuel Ethanol Case*. Rather, Commerce noted that it would simply carry out its margin calculation regardless of whether such duties were lawful.

Trinidad and Tobago case, "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 to make a positive adjustment to import competition."[14] Commerce has consistently recognized that the deduction of such remedial duties from the export or constructed-export price is inappropriate.[15] This practice has been sustained by the Court of International Trade as a reasonable interpretation of the statute.[16]

Under these circumstances, Commerce should conclude that the statute does not permit the deduction of Section 201 duties.[17] This conclusion is bolstered by the fact that Congress has consistently distinguished between normal U.S. import duties and remedial duties, such as safeguard duties, in the trade and customs laws. Moreover, this conclusion is supported substantial policy reasons. As is discussed below, the deduction of Section 201 duties from export and constructed-export price would result in substantial double counting of the remedy. Moreover, deducting Section 201 duties would impermissibly prolong their impact past the time allotted by U.S. law and the Safeguards Agreement. Finally, deducting Section 201 duties would place the United States at odds with its trading partners and would violate the United States' international obligations.

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[14] *See* Recommendation Memorandum to Bernard T. Carreau, Deputy Assistant Secretary for AD/CVD Enforcement II, from Gary Taverman, Director Office 5 AD/CVD Enforcement, in Case No. A-274-804, *Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago* (August 13, 2002).

[15] *See, e.g., Certain Cold-Rolled Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 781 (1998)

[16] *See, e.g., Hoogovens Staal v. United States*, 4 F. Supp. 2d 1213 (Ct. Int'l Trade 1998); *Bethlehem Steel v. United States*, 27 F. Supp. 2d 201 (Ct. Int'l Trade 1998).

[17] Similarly, Commerce should conclude that Section 201 duties are not "costs" for purposes of calculating an antidumping margin. Commerce has consistently rejected the notion that remedial duties are "costs" for purposes of 19 U.S.C. 1677a(c)(2)(A). The courts have agreed.

B. The Deduction of Section 201 Duties Would Violate the United States' International Obligations

The Safeguards Agreement expressly limits the application of safeguard measures to levels that are "necessary to prevent or remedy serious injury and to facilitate adjustment."[18] Inherent in this limitation is the recognition that safeguard measures many not exist indefinitely. Thus, Article 7.1 of the Safeguards Agreement provides clear time limits for the application of such measures.[19]

By proposing to deduct Section 201 duties in the antidumping margin calculation, however, Commerce is effectively proposing to circumvent the quantitative and temporal requirements of the Safeguards Agreement. As was fully argued in the initial comments filed by counsel for the respondents, the deduction of Section 201 duties from export or constructed-export price would result in double counting of the remedies. Foreign producers and importers would be required to pay the Section 201 duties directly upon entry of their goods, as well as indirectly through an increase in any antidumping margin imposed by Commerce. Clearly, the extraordinary increase in the effective rate of the Section 201 duties that would result from both their direct and indirect application exceeds the level necessary to prevent or remedy serious injury and, therefore, violates Article 5.1 of the Safeguards Agreement. Moreover, once the Section 201 duties are incorporated into the antidumping duty calculation, their impact will be felt for at least two years after they have been terminated. This clearly violates the requirements of Article 7.1 of the Safeguards Agreement.

[18] Safeguards Agreement, Article 5.1.

[19] Article 7.1 provides that safeguard remedies may be applied "only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment."

C. Importers are not Required to Increase Their Prices by the Full Amount of Section 201 Duties

The linchpin of domestic industry comments is that if the Department decides that Section 201 duties should not be fully deducted from EP/CEP, the Section 201 remedy would be undermined because the costs borne by an unaffiliated customer whose goods also are subject to an antidumping order would not necessarily be increased by the full amount of the 201 duty.

These arguments should be rejected.

Unlike antidumping relief, whose purpose is to eliminate price discrimination (regardless of import volume), Section 201 is designed to reduce import volume. If the imposition of a 30 percent Section 201 duty results in an exporter reducing its volume by 70 percent, while "eating" the duty on the remaining 30 percent of pre-201 shipments, Section 201 has accomplished its purpose. Thus, in a very real sense, and contrary to domestic industry comments, Section 201 is intended to reduce an exporter's net return on its sales to the U.S., since as a result of such reduction the exporter will reduce its sales volume.

A decision by the Department that 201 duty should be deducted from EP/CEP would result in the Department collecting antidumping duty solely because of the failure of an exporter to raise its price by the full amount of the Section 201 duty. However, since Section 201 already has accomplished its intended result by reducing the volume shipped (because the exporter's net return has been reduced), collection of additional antidumping duty as a result of this reduction constitutes an impermissible double remedy (i.e., volume reduction and double duty collection).

It is for these fundamental reasons that exporters/foreign producers are not **required** to respond to the imposition of 201 duties by raising their prices to the ultimate customer by the full

amount of Section 201 duties collected at time of entry. So long as the desired volume reductions are achieved (as has occurred in the steel proceeding) the remedy has been effective.

D. Countervailing Duties are Not U.S. Import Duties that may be Deducted from Export or Constructed-Export Price

Unlike Section 201 duties, Commerce has already determined that countervailing duties are not appropriately classified as "U.S. import duties" for purposes of calculating export or constructed-export price.[20] Commerce's determinations were consistently upheld by the courts. Nothing has changed since Commerce rendered these determinations. It is unclear, therefore, why Commerce is now seeking comments on the appropriate treatment of countervailing duties in the calculation of an antidumping duty margin.

The arguments raised by the domestic industry in support of deducting countervailing duties from export or constructed export price are neither novel nor persuasive. Rather, they simply rehash the arguments presented to Commerce and the courts regarding the disparity between antidumping and countervailing duties. As was fully argued in the principal comments filed on behalf of Instituto Brasileiro de Siderurgia ("IBS"), both Commerce and the courts, however, have already rejected these arguments.[21] Eurofer does not intend to reargue the points made by IBS (and others). However, it is worth noting that the consistency with which Commerce and the courts have held that countervailing duties cannot be deducted from export or constructed export price counsels against reversing positions now.

[20] *See, e.g.*, *Certain Cold-Rolled Carbon-Steel Flat Products from Korea,* 63 Fed. Reg. 781 (January 7, 1998); *Certain Cold-Rolled and Corrosion Resistant Carbon-Steel Flat Products from Korea*, 62 Fed. Reg. 18,404 (April 15, 1997); *Certain Cut-to-Length Carbon Steel Plate from Germany*, 62 Fed. Reg. 18,390 (April 15, 1997).

[21] *See* Comments of Instituto Brasileiro de Siderurgia on the Appropriateness of Deduction Section 201 duties from the Export Price in Antidumping Margin Calculations (October 9, 2003) at 2.

Respectfully submitted,

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