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VIA HAND DELIVERY

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

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

Attn: Section 201 Duties
Becky Erkul, Office of Policy (Room 3708)

Dear Mr. Assistant Secretary:

The Korea Iron & Steel Association ("KOSA") hereby submits rebuttal comments pursuant to the Department of Commerce's ("Department") September 9, 2003 notice regarding the treatment of Section 201 duties and countervailing duties in the context of antidumping duty calculations. *Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties*, 68 Fed. Reg. 53,104 (Sept. 9, 2003); *see also* 68 Fed. Reg. 60,079 (Oct. 21, 2003) (extending the time limit for rebuttal comments). As detailed in KOSA's October 9, 2003 comments, KOSA strongly opposes the deduction of either Section 201 duties or countervailing duties from the calculation of export or constructed export price. Any methodology that would deduct Section 201 duties and/or

countervailing duties from the calculation of export price or constructed export price would not only contravene the Department's longstanding practice, which has been repeatedly endorsed by the courts, but also would violate U.S. law and the United States' obligations under the World Trade Organization ("WTO") Agreements.

I. Introduction

On October 9, 2003 Dewey Ballantine LLP and Skadden, Arps, Slate, Meagher & Flom LLP ("Dewey/Skadden") submitted comments on behalf of the United States Steel Corporation, Collier Shannon Scott ("CSS") submitted comments on behalf of a number of stainless steel producers, Stewart and Stewart ("Stewart") submitted comments on behalf of International Steel Group and the United Steelworkers of America, and Schagrin Associates ("Schagrin") submitted comments on behalf of certain U.S. producers of carbon quality pipe and tube and the Committee on Pipe and Tube Imports. These rebuttal comments address the arguments raised specifically in those submissions and refer collectively to those parties as the "domestic steel producers."

II. Section 201 Duties are Not "Normal" U.S. Import Duties

The domestic steel producers argue that Section 201 duties should be deducted from U.S. price pursuant to Section 772(c), which directs the Department to reduce EP and CEP by "United States import duties," and contend that the statute and legislative history do not contemplate any exception to this rule. CSS Comments at 3; Dewey/Skadden Comments at 6; Stewart Comments at 3, 8; Schagrin Comments at 3. The crux of the domestic steel producers' argument is that Section 201 duties are not special duties like antidumping duties but are, instead, "normal" or "regular" duties that should be deducted from U.S. price as allegedly contemplated by the statute. CSS

Comments at 4; Stewart Comments at 4; Schagrin Comments at 4. These assertions are without merit.

In support of its claim that Section 201 duties are normal duties, CSS cites a section of the antidumping statute that provides that antidumping and countervailing duties shall not be treated as "regular" customs duties "for purposes of any law relating to the drawback of customs duties." CSS Comments at 6. CSS argues that because that provision does not reference Section 201 duties for purposes of duty drawback, Section 201 duties must be "regular" duties. This argument is unavailing. The limited purpose of this statutory provision is to clarify that antidumping and countervailing duties are not eligible for duty drawback when goods are re-exported from the United States. It simply does not follow that Section 201 duties are therefore "regular" customs duties for purposes section 772(c).

Stewart contends that both the safeguards statute and the WTO Agreement on Safeguards characterize safeguard duties as ordinary customs duties. Stewart Comments at 4-6. A careful reading of Stewart's argument, however, reveals it to be entirely unsupported by anything in the language of either the statute or the Agreement. The statutory argument rests entirely on the fact that the statute describes the remedy available under Section 201 duties as a "duty" on the imported article (Stewart at 5), while the Agreement refers to a suspension or modification of "tariff concessions" or to "tariff increases." *Id*. at 6. Nothing in these verbal formulations sheds any light on whether or not Section 201 duties are intended to be "regular" customs duties under section 772(c) of the antidumping statute. Nor do these verbal gymnastics override the fundamental fact that Section 201 duties have long been recognized as an exceptional, short-term remedy (*i.e.*, "escape clause") intended to provide relief to an industry only in severe and extraordinary circumstances. *See Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, para. 66 (14 Dec. 1999) ("safeguard measures

were intended by the drafters of the GATT to be matters out of the ordinary"). By their very nature, safeguards duties are not "regular" import duties--they require an extraordinary finding.

The domestic steel producers further contend that, in the antidumping investigation of softwood lumber from Canada, Commerce deducted Softwood Lumber Agreement ("SLA") quota penalty fees, which were "similar" to Section 201 duties. CSS Comments at 4; Schagrin Comments at 10. This argument fundamentally mischaracterizes the decision in the softwood lumber case. Not only were the SLA quota penalty fees at issue in the softwood lumber case not "similar" to Section 201 duties, they were not U.S. duties at all. Rather, they were *Canadian* export fees imposed pursuant to a bilateral agreement with the United States. The SLA quota penalty fees were deducted from U.S. price, but this was done pursuant to Section 772(c)(2)(B), which provides expressly for the deduction of export taxes, *not* pursuant to Section 772(c)(2)(A), as U.S. import duties. *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,539, Issues and Decision Memorandum at Comment 9 (April 2, 2002) (final determ.).

Likewise, the domestic steel producers note that in *Fuel Ethanol from Brazil*[1], the Department deducted a "special tariff" from U.S. price that "resembled a safeguard measure" (CSS Comments at 4, Stewart Comments at 11, Schagrin Comments at 10) or was otherwise "identical" to Section 201 duties (Dewey/Skadden Comments at 5). The domestic steel producers argue that the tariffs on fuel ethanol are the same as Section 201 duties, but somehow different than antidumping duties, because they are "indistinguishable in their *operation* from section 201 duties" (*id.* at 4 (emphasis added)) in that they are both "imposed in addition to the 'normal' duties." *Id.* at 5. It is not clear how being "imposed in addition to the 'normal' duties" operationally distinguishes the fuel ethanol and Section

[1] 51 Fed. Reg. 5572, Comment 6 (Feb. 14, 1986) (final determ.).

201 duties from antidumping duties. Antidumping duties are, of course, also imposed in addition to normal duties. Moreover, the fuel ethanol duties were not subject to the "extent necessary" restriction as Section 201 duties. As discussed below, Section 201 duties can only be imposed to the "extent necessary" to facilitate adjustment. Accordingly, deducting Section 201 duties in the dumping calculation pushes the Section 201 remedy beyond the extent necessary, as determined by the President. In that sense, the fuel ethanol and Section 201 duties are in no way comparable, and the Section 201 duties cannot be deducted in the dumping calculation.

Finally, the domestic steel producers' "critical point" is that Section 201 duties are *regular* Customs duties because "section 201 duties are stated with certainty in the tariff schedules; antidumping duties, by contrast, are not." CSS Comments at 6; Dewey/Skadden Comments at 5; Stewart Comments at 5. Even if one were to accept the argument that the administration and operation, rather than the purpose, of a duty distinguishes its type, it is clear that Section 201 duties are a special duty. Products subject to Section 201 duties have a special chapter, Chapter 99 of the U.S. Harmonized Tariff Schedules ("USHTS"), clearly distinguishing these duties from regular Customs duties. Indeed, if Section 201 duties were regular duties, the new tariff rates incorporating the Section 201 duty would simply be listed in the relevant chapters under the appropriate tariff heading. Moreover, antidumping duties (and countervailing duties) might also be listed in a special chapter of the USHTS, but for the impracticality of administering antidumping duty rates in such a manner. Antidumping duties are not listed in the USHTS not because they are "special," but rather because they vary by company, by country, and change constantly, making it inefficient and virtually impossible to include them in the USHTS. The USHTS would have to be updated as frequently as Customs issues antidumping instructions to the ports regarding effective antidumping duty rates. Accordingly, the fact that

antidumping duties are not included in a special section of the USHTS does not make Section 201 duties regular duties to be deducted from U.S. price.

III. The Refusal To Double Count Trade Relief Would Not Undermine the Effectiveness of Safeguard Relief

The domestic steel producers also argue that the failure to deduct Section 201 duties in the dumping margin calculation undermines the effect of the Section 201 relief and the antidumping duty order and that there would be "no penalty on the importer/foreign producer and, most important, no beneficial effect to the domestic industry as intended by the section 201 relief." CSS Comments at 10-11; Stewart Comments at 14. What the domestic steel producers seem to be arguing is that Section 201 relief is only meaningful if its impact is multiplied in the context of any unfair trade relief which may or may not even be in place for the products in issue. This argument must fail.

Safeguard relief and antidumping measures are aimed at completely different types of trade. Safeguard relief applies to fair trade, while antidumping measures are intended to combat unfair trade. As KOSA noted in its October 9, 2003 Letter, Section 201 does not require a finding of an unfair trade practice. To the contrary, WTO Members must ensure that safeguards measures are "not applied against fair trade beyond what is necessary to provide extraordinary and temporary relief." Antidumping measures are applied to unfair trade with the caveat that "the duty collected must not exceed the margin of dumping. *See generally* KOSA's October 9, 2003 Letter at 6-7; *Certain Cold-Rolled Carbon Steel Flat Products From Korea*, 63 Fed. Red. 781, 787 (Comment 7) (Jan. 7, 1988) (final admin. rev.). To deduct Section 201 duties from the calculation of unfair trade would violate both the requirement that safeguards measures not be applied against fair trade beyond what is necessary and the requirement that dumping duties must not exceed the margin of dumping.

IV. Deducting Section 201 Duties in the Margin Calculation Has the Same Effect as Deducting Antidumping Duties and Is An Equally Impermissible Doubling of the Remedy

The domestic steel producers argue that Section 201 duties are materially different from antidumping duties and, therefore, the double counting concerns do not apply. CSS Comments at 7-10; Dewey/Skadden Comments at 7-10. The domestic steel producers acknowledge Commerce's longstanding practice of not deducting antidumping duties from U.S. price because of the "double counting of the dumping margin." CSS Comments at 10 (emphasis in original). The domestic steel producers go to great lengths to distinguish antidumping duties and Section 201 duties, *see, e.g.,* Schagrin Comments at 7-8, but these distinctions are irrelevant. Antidumping duties are not deducted in calculating the dumping margin not because they are estimates or because they are dependent on the antidumping calculation, but because deducting them would provide a double *remedy* to the U.S. industry. *See generally Hoogovens Staal BV v. United States*, 4 F. Supp.2nd 1213, 1220 (Ct. Int'l Trade 1998). It is the risk of providing a double "remedy" to the domestic industry that has also kept the Department and the U.S. courts from deducting countervailing duties from U.S. price in the calculation of dumping. *See* KOSA's October 9, 2003 Letter at 3; *U.S. Steel Group v. United States*, 15 F. Supp 2d 892, 899 (Ct. Int'l Trade 1988). Deducting Section 201 duties from U.S. price in the dumping calculation, like deducting antidumping duties or countervailing duties, would create a windfall for the domestic industry in the form of a double remedy, in violation of U.S. law and the WTO.

The domestic steel producers also attempt to demonstrate through mathematical examples how the failure to deduct the Section 201 duty does not double count the remedy. CSS Comments at 11-13; Dewey/Skadden Comments at 9-10. The domestic steel producers' mathematical examples, however, do not involve 'apples-to-apples' comparisons, because they compare dumping margins calculated

based on varying U.S. prices, rather than comparing dumping margins calculated by varying whether or not the Section 201 duties are deducted. The distortive effect of deducting Section 201 duties in the dumping margin calculation, causing the Section 201 remedy to far surpass the "extent necessary," is clear when the analysis is properly performed. *See* KOSA's October 9, 2003 Comments at 8.

V. Conclusion

For these reasons (and those set out in its October 9, 2003 comments), KOSA strongly opposes deduction of Section 201 duties or countervailing duties from U.S. price in the Department's analysis of dumping. Deducting either Section 201 duties or countervailing duties from the calculation of U.S. price would a result in a double remedy for the domestic industry, which is impermissible under U.S. law and contrary to the United States' obligations under the WTO.

Please contact the undersigned should you have any questions or need any additional information.

Respectfully submitted,

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