I. INTRODUCTION

The Department has received a number of submissions from interested parties in response to its request for comments on the deductibility of countervailing duties and safeguard duties from U.S. price in the antidumping duty calculation. Proponents of the deductibility of countervailing duties and Section 201 duties consist of a number of domestic industry parties, including the domestic steel industry. These comments are offered in rebuttal to their collective arguments. While these comments focus on Section 201 duties, the arguments and underlying policy considerations apply equally to countervailing duties.

The proponents of deductibility seek to overturn the Department's long-standing policy against imposing double remedies in the context of antidumping investigations through the deduction of WTO-sanctioned remedial duties from U.S. price, notwithstanding Congressional and judicial endorsement of that policy and its consistency with both U.S. antidumping law and WTO obligations.

The domestic industries' arguments in favor of imposing a double-remedy by deducting WTO-sanctioned remedial duties from U.S. price are unsound. Seizing on certain extrinsic features of Section 201 duties – that in their view demonstrate Section 201 duties' similarity to normal duties as well as their differences from admittedly non-deductible antidumping duties — the domestic industries argue that Section 201 duties should be deducted just as normal duties are. These arguments, however ignore the intrinsic remedial nature of Section 201 duties, recognized both in U.S. law and the WTO Safeguards Agreement.

In apparent recognition that double counting is illegal or at a minimum bad trade policy, the domestic industries also seek to reassure the Department that the deduction of Section 201

duties will not result in double counting, a view that is factually wrong. The domestic industries are effectively arguing that the Department should forge a broad new anti-duty absorption policy, a step never contemplated by Congress or the WTO. Moreover, deducting Section 201 duties is for many reasons bad trade policy and should be rejected. Finally, the domestic industries cite two previous decisions by the Department as precedent for the deduction of Section 201 duties from U.S. price. These two isolated decisions are inapposite, and do not justify any change in the Department's policy of not deducting WTO-sanctioned duties from U.S. price.

II. SECTION 201 DUTIES ARE REMEDIAL DUTIES LIKE ANTIDUMPING DUTIES AND WHOLLY DISSIMILAR FROM NORMAL DUTIES

The domestic industries argue for the deductibility of Section 201 duties by pointing to apparent similarities between Section 201 duties and the normal duties that are deductible from U.S. price, as well as by attempting to differentiate Section 201 duties from clearly non-deductible antidumping duties. By ignoring the fundamental nature of Section 201 duties as remedial measures, the domestic industries avoid confronting the difficult question of how to convince the Department that it may *legitimately* treat duties imposed to address foreign producer dumping more favorably than remedial duties, either imposed to offset subsidization or to facilitate positive adjustment to competition. Nor do the domestic industries effectively respond to the issues of the WTO-illegality of such deductions, or the inconsistency of such deductions with U.S. and judicial decisions. Instead, the domestic industries' strategy has been to obscure the debate by seizing on superficial attributes of Section 201 duties that are extrinsic to the fundamental nature of Section 201 duties and irrelevant to the current debate. The arguments presented by the domestic industries in this regard do nothing to further the Department's analysis, and the notion that this complex issue should be resolved through the

reliance on oblique language in the Presidential Proclamation, baseless assumptions regarding the significance of terms used in the 1921 Act, the inclusion of Section 201 duties in the HTS, and a reference to "withdrawal of concessions" in Article 19 of GATT 1994 is absurd.

A. Arguments that 201 Duties are Like Normal Duties are Without Merit

As demonstrated in our affirmative comments, both the WTO Agreement on Safeguards and numerous provisions of U.S. law demonstrate that Section 201 duties, like antidumping duties and countervailing duties and in contrast to normal import duties, are remedial in purpose and effect. Such duties constitute an exception to the principle of trade liberalization for the purpose of providing emergency relief for the effects of a specific problem of international trade (namely, rapidly increasing but fairly-traded imports that cause serious injury).

The domestic industries have suggested that Section 201 duties should be deducted from U.S. price as a matter of law. The intent in imposing the Section 201 duties, they argue, dictates that safeguard duties are indistinguishable from normal import duties and, therefore, must be deducted from U.S. price under section 772 of the Tariff Act of 1930. Yet the features of Section 201 duties that they portray as being like the features of a "normal duty" do not belie Section 201 duties' fundamental nature as remedial duties. Rather, if taken to their logical conclusion, the domestic industries' arguments serve only to confirm that: (1) Section 201 duties are remedial duties and (2) there is no legal foundation for the domestic industries' assertion that Section 201 duties must be deducted from U.S. price.

The language of the Presidential Proclamation is silent with respect to the issue of deductibility of Section 201 duties: One domestic industry member claims that the President characterized Section 201 relief as normal duties because in the Steel Safeguards Proclamation,

the President imposed the safeguard measure in the form of "an increase in duties on imports."[1] The term "increase in duties on imports," however, says nothing about whether this increase constitutes a normal duty or a remedial duty, and is thus hardly dispositive with respect to the question of whether Section 201 duties should be deducted from U.S. price in a dumping analysis. Moreover, the context in which that increase was ordered clearly suggests that the President was providing an extraordinary remedial measure. The Steel Safeguards Proclamation not only expressly states that the duties are being imposed in order to "facilitate positive adjustment" in response to "serious injury" being experienced by the domestic industries, but these measures are announced in conjunction with a tariff rate quota on imports of steel slab, an extraordinary action normally prohibited under the WTO regime.[2]

Arguments based on the legislative history of the Antidumping Act of 1921 are critically flawed: Another domestic industry member argues that, according to the Antidumping Act of 1921, on which the current antidumping statute is based in part, the term "'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."[3] Therefore, the industry member argues, Section 201 duties must be included within the definition of "United States import duties" and deducted from U.S. price under Section 772(c)(2)(A) of the current antidumping statute. This argument is critically flawed. The domestic industry member's argument leads to the unavoidable conclusion that because "special dumping duties" (which includes antidumping duties) are included within the definition of U.S. import duties, they too

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1 *See Steel Products; Adjustments to Competition from Imports*, Proclamation No. 7529, 67 Fed. Reg. 10,551, 10,555 (March 7, 2002) (hereinafter Presidential Proclamation).

2 *Id.* at 10,553.

3 Stewart and Stewart Brief, Antidumping Proceedings: Treatment of Section 201 Duties: Comments of International Steel Group Inc. and the United Steel Workers of America at 9 (Oct. 9, 2003) (hereinafter Stewart and Stewart Brief).

must be deducted from U.S. price as a matter of law, a conclusion which is in direct conflict with the rulings of the Court of International Trade, Commerce Department practice, and the domestic industries' own statements acknowledging that antidumping duties are not deductible from U.S. price. Finally, the Domestic industries' strained interpretation of the 1921 Antidumping Duty Law is inconclusive because safeguard duties did not exist at the time the 1921 statute was enacted.

The inclusion of Section 201 duties in the HTS is inapposite: The domestic industries also argue that because Section 201 duties are included in the U.S. Harmonized Tariff Schedule, unlike antidumping and countervailing duties, they are normal import duties that must necessarily be deducted from U.S. price under section 772 (c)(2)(A) of the Tariff Act of 1930. Petitioners again seize on an irrelevant distinction between antidumping duties and Section 201 duties. As discussed in our affirmative comments at page 15, the inclusion of Section 201 duties in Subchapter III of Chapter 99, and the reference to Section 201 duties as "relief" distinguishes them from normal U.S. import duties and from additional normal import duties such as those listed in Subchapter I.[4] As such, the posture under which Section 201 duties are included in the HTS does not contradict, but confirms the fact that these are remedial duties.

Of more relevance than any tautological references to Section 201 duties as "duties," is how those duties are implemented. In that regard, under Customs rules, importers entering merchandise subject to a safeguard measure must distinguish between normal duties and Section 201 duties, because the Section 201 duties are calculated separately on the entry form, rather

[4] *See* U.S. Harmonized Tariff Schedule (hereinafter USHTS), Section XXII, Chapter 99, Subchapter III, n. 11(a) (2003).

than aggregated with the normal import duties.[5] Moreover, importers whose merchandise is subject to Section 201 duties must record on each entry two separate classifications for each entered item: the 201 duty HTS number in Chapter 99 as well as the HTS classification for the product itself from the appropriate Chapter (*e.g.*, in the case of steel, Chapter 72) that in turn identifies the separately-owed normal duty associated with that entered merchandise.

Another aspect of the implementation of Section 201 duties demonstrates their difference from normal duties. Specifically, the requirements associated with imports subject to safeguard measures admitted to foreign trade zones (FTZ) are further support for the fact that safeguard duties are treated like antidumping and countervailing duties and are remedial in nature. FTZs are designated sites at which special Customs admission procedures may be used. One principal purpose of these sites is to permit importers to defer duties on imports of foreign merchandise that are being further processed and another is to permit importers to, in essence, elect whether to pay duties on the merchandise imported into the FTZ or on the merchandise as withdrawn from the FTZ.

However, not all imports benefit equally from the advantages offered by FTZs. Specifically, merchandise subject to antidumping duty orders, countervailing duty orders, and safeguard measures are severely restricted in terms of the Customs advantages they may obtain through the use of an FTZ. By contrast, an importer of merchandise subject only to normal Customs duties may, upon entry into the U.S. Customs territory of that merchandise, elect to pay either one of two applicable rates of duty — the rate of the merchandise as it was classified upon admission into the FTZ, or the rate at which the finished merchandise was withdrawn from the FTZ for entry into U.S. Customs territory. Merchandise subject to Section 201 duties is treated

[5] Steel 201 Questions and Answers *available at* http://www.customs.ustreas.gov/ImageCache/cgov/content/import/duty_5frates_5fhts/steel_5f201/steelqna_2epdf/v1/steelqna.pdf.

differently in this regard from goods subject only to normal import duties. The Presidential Proclamation requires that: "Any merchandise subject to a safeguard measure that is admitted into U.S. foreign trade zones . . . must be admitted as 'privileged foreign status' as defined in 19 C.F.R. § 146.41, and will be subject upon entry to any quantitative restrictions or tariffs related to the classification under the applicable HTS subheading."[6] In so doing, the President has determined that imports subject to Section 201 duties be treated identically to imports subject to antidumping and countervailing duties, which must be placed in "privileged foreign status" upon admission to a zone of subzone.[7]

Section 201 duties are not merely "withdrawal of concessions" as they may exceed the bounds of tariff concessions granted: Proponents of Section 201 deductibility also claim that because Section 201 duties have been characterized as a withdrawal of concessions, they must be identical in nature to the tariff concessions granted during multilateral tariff negotiations, *i.e.*, normal duties. They argue that the structure of Articles XIX and II of GATT 1994 supports the conclusion that safeguard duties are ordinary customs duties. The domestic industry claims that, according to Article 19.1.a (of GATT 1994), such duties are merely reversals of the tariff concessions granted to trading partners in the rounds of tariff negotiations, rather than remedial measures geared to provide a certain level of relief.

The domestic industries fails to note, however, that while 19.1.a of GATT 1994 describes the 201 duties as a "withdrawal" of concessions, the Agreement on Safeguards does not. "Suspension" of concessions is discussed only in the context of compensation. The Safeguards Agreement's use of the term "concessions" in that context, and not in reference to the Section 201 duties themselves, cannot be read as supporting the domestic industries' arguments.

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6 Presidential Proclamation at 10,556.
7 *Id. citing* 19 C.F.R. § 146.41.

Moreover, the relief imposed as a result of the Section 201 safeguard investigation is typically not a mirror image of the types of concessions that have been granted by the President as part of multilateral agreements. As noted by the International Trade Commission's (ITC) Chairman Okun, the remedy for Section 201 cases is quite broad and "may include tariffs, tariff-rate quotas, quantitative restrictions, trade adjustment assistance, international negotiations and any other action authorized by law that would be likely to facilitate positive adjustment to import competition."[8] Because the remedial measures available under a safeguard action are qualitatively much broader than any tariff concessions granted during multilateral tariff negotiations, safeguard measures may not be properly characterized as a mere reversal of concessions granted.

Finally, even if the U.S. industries' argument were limited to a comparison between a duty-based safeguard measure and tariff concessions recorded in the rounds of tariff negotiations, the Section 201 remedy still could not be characterized as a mere "revocation" or "withdrawal" of those tariff concessions. This is because a safeguard measure imposed by a Member State may quantitatively far exceeds the level of tariff concessions granted to its trading partners. Assume, for example, that normal trade relations ("NTR") rates on steel are 5 percent and the "regular" or Column 2 rate is 12 percent. The imposition of a 30 percent tariff in addition to the NTR rate clearly constitutes far more than a mere "withdrawal" of the 7 percent concession. In this example, the Member State has not only "withdrawn" concessions, but has imposed duties well in excess of the NTR import level.

Because the breadth of a safeguard measure can qualitatively and quantitatively far exceed any concessions granted, safeguard measures must be viewed as remedial in nature.

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[8] *Steel Volume I: Resolutions and Views of Commissioners*, USITC Pub. 3479 at 437 n. 44, Inv. No. TA-201-73 (Dec. 2001)(hereinafter ITC 201 Steel Decision).

B. The Department's Policy Against Deducting WTO-sanctioned Remedial Duties Applies Whether such Duties are Assessed or Estimated at the Time of Importation

The domestic industries argue that Section 201 duties constitute normal customs duties rather than remedial duties because, like normal customs duties, they are paid at the time of importation. The Department, however, has consistently rejected the relevance of this distinction in the deductibility context, and the CIT has upheld this position. In *Certain Cold-Rolled Carbon Steel Flat Products from Korea*, for example, the Department made clear that it had always treated duty deposits identically to duties actually imposed in the context of the antidumping calculation.[9] More importantly, the Department held that its reasoning for not deducting estimated antidumping duties from U.S. price (because making an additional deduction from U.S. price for the same antidumping duties that correct for this price discrimination would result in double-counting) was equally applicable where "actual" duties were known.[10] The Court of International Trade has also held that the logic behind the Department's policy of excluding duties from the calculation of U.S. price was reasonable, whether the duties at issue were estimated or actual duties. In *AK Steel,* the court held that the Department's policy of excluding both estimated and actual antidumping duties from its calculation of U.S. price in order to avoid double-counting was reasonable.[11] The timing of final duty assessment thus has no bearing on whether duties are remedial in nature. Antidumping duty deposits, which are also paid at the time of importation, are clearly considered to be remedial duties.

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[9] *See Certain Cold-Rolled Carbon Steel Flat Products from* Korea, 63 Fed. Reg. 781 (Dep't Comm. Jan. 7, 1998) (final determ.).

[10] *See id.*; *see also Certain Cut-to-Length Carbon Steel Plate From Belgium,* 63 Fed. Reg. 2,959 (Dep't Comm. June 26, 1998) (final determ.).

[11] *AK Steel v. U.S.*, 988 F. Supp 594, 607 (Ct. Int'l Trade 1997).

C. The reasons espoused by the Domestic Industries' for not deducting antidumping duties from U.S. price apply equally to Section 201 and countervailing duties.

One domestic industry participant explains that antidumping duties are not deducted from U.S. price because antidumping duties "are the result of the antidumping margin calculation" and that Section 201 duties, in contrast, "derive from an assessment against value" like normal customs duties.[12] First, antidumping duties, when assessed, are also assessed *ad valorem,* just as Section 201 duties are. More importantly, Section 201 duties do not "derive" from an assessment of value. As with antidumping duties (measures to offset price discrimination) and countervailing duties (measures to offset subsidization), safeguard duties are a measure of what is considered necessary to offset serious injury. As such, just as the countervailing and antidumping duties derive from U.S. Government investigations, Section 201 duties "derive" from the ITC's investigation and the Presidential Proclamation. The three types of duties all function as remedial duties assessed against the value of imported merchandise and should thus be treated consistently within the Department's antidumping calculation methodology. The Department should thus continue to act consistently with past practice and refuse to deduct WTO-sanctioned remedial duties, including safeguard duties, from U.S. price in antidumping cases.

D. Even if Section 201 duties were considered to be normal duties, the Department has the discretion not to deduct them.

The domestic industries argue that Section 201 duties must be deducted from U.S. price as a matter of law under section 772 of the Act, regardless of whether they are "normal" duties or

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12 Schagrin Associates Brief, Treatment of Section 201 Duties In Antidumping Duty Calculations at 7 (Oct. 8, 2003) (hereinafter Schagrin Brief).

remedial duties, because the statute does not expressly exempt remedial duties.[13] This position is directly contrary to the Department's practice of refusing to deduct both antidumping and countervailing duties, a practice upheld by the courts and endorsed by Congress, neither of which are expressly exempted by statute.

Moreover, the Department has exercised its discretion in the context of the deduction of expenses as well. Most notably, expenses considered "direct, inevitable consequences of an antidumping duty order" are typically not deducted from U.S. price. The expense perhaps most frequently viewed as a consequence of an antidumping duty order are the legal fees incurred in participating in trade remedy proceedings before U.S. agencies. Discussing its policy to not deduct legal fees for an antidumping case from U.S. price, the Department echoed the logic behind its policy of not deducting antidumping duties or countervailing duties from U.S. price, namely, that "{t}o do so would involve a circular logic that could result in an unending spiral of deductions for an amount that is intended to represent the actual offset for the dumping."[14]

The Department's refusal to deduct legal expenses associated with trade remedy proceedings has been supported by the Court of International Trade, which stated in *Daewoo Electronics Company v. U.S.* that "legal fees do not qualify as selling expenses."[15] In affirming the Department's practice, the court stated that it would be "against public policy to make an adjustment for legal fees in calculations of dumping margins" because the practice "would create

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[13] *See id.* at 9.

[14] Memo. to Robert S. LaRussa from Joseph A. Spetrini, Issues and Decision Memo., *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan,* (*see also Certain Cut-to-Length Carbon Steel Plate from Germany,* 62 Fed. Reg. at 18,395 (Dep't Comm. Apr. 15, 1997) (final determ.); and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, et al.*, 57 Fed. Reg. 28,360, 28,413-4 (Dep't Comm. June 24, 1992) (final determ.).

[15] *Daewoo Electronics Co. v. U.S.*, 712 F. Supp. 931, 947 (Ct. Int'l Trade 1989).

artificial dumping margins…"[16] The domestic industries' position that the statute requires the Department to deduct Section 201 duties is thus baseless and contrary to the rulings of the Court of International Trade and Department practice. Moreover, as with the arguments based on the legislative history of the Antidumping Act of 1921 above, this position is inconsistent with other domestic industry statements acknowledging that antidumping duties are not deductible from U.S. price.

III. THE DEDUCTION OF SECTION 201 DUTIES FROM U.S. PRICE WILL RESULT IN DOUBLE-COUNTING

In apparent recognition that the double counting of Section 201 duties through their deduction from U.S. price would be WTO-illegal (or at a minimum bad trade policy), the domestic industries seek to reassure the Department that this simply would not occur. This argument rests, however on two false premises. The first is that Section 201 duties are normal duties, "the deduction of which has never raised double-counting concerns."[17] As discussed above, this premise is wrong and should therefore be disregarded. The second premise is that prices will have been raised dollar-for-dollar in the amount of any Section 201 duty, and that as a result, their deduction would merely "have a neutral effect on the dumping margin."[18] As discussed below, this premise is also false. The domestic industry also concludes that, if the deduction of 201 duties does not have a neutral effect because of a failure by an importer to raise prices dollar-for-dollar, such a result is justified because the failure to raise prices would constitute an impermissible "absorption" of the Section 201 duty. The deduction of the Section

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[16] *Id.*; *see also Federal-Mogul Co. v. U.S.,* 813 F. Supp. 856, 871-72 (Ct. Int'l Trade 1993); *Zenith Electronics Corp. v. U.S.*, 15 F. Supp. 648, 651 (Ct. Int'l Trade 1991).

[17] *See* Skadden, Arps, Slate, Meagher & Flom Brief, Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties. United States Steel Corporation at 8 (Oct. 9, 2003) (hereinafter Skadden Brief).

[18] *See* Collier Shannon Scott Brief: Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties: Initial Comments in Response to Request for Public Documents: Carpenter Technology Corporation et al. at 13 (Oct. 19, 2003).

201 duties would discourage this practice. The Department should not be persuaded to adopt such an anti-duty absorption agenda.

Deduction of Section 201 Duties will not have a neutral effect. The premise that the deduction of Section 201 duties will not be double-counted is contradicted by widely-acknowledged principles of the economics of pricing in commodity markets — principles that the domestic industry participants themselves have espoused. In support of the alleged "neutral effect" of the deduction of Section 201 duties, one domestic industry participant cites to the ITC opinion in the remedy phase of the steel 201 investigation, which stated that Section 201 duties would result in price increases.[19] The domestic industry participant concludes, erroneously, that the deduction of Section 201 duties would result in "a wash" because — as expected by the ITC — those duties will have been passed on to the consumer in the form of a dollar-for-dollar rise in prices. No one disputes that levying substantial remedial duties will result in significant price increases, and not surprisingly steel prices, for example, reportedly rose following the imposition of the steel safeguard remedy. Nowhere, however, did the ITC, the domestic industry or any other party assume that prices would rise commensurate with the amount of the ad valorem duty. In the context of the remedy phase of the Steel 201 investigation the domestic steel industry, in fact, concluded the opposite in the pricing analysis that it conducted using the ITC's COMPAS model. One domestic industry position, for example, was that a 40 percent duty would result in a 10 percent increase in price.[20] Another posited a price increase of 3.37 percent in the case of a 50 percent tariff on steel pipe and tube products.[21]

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[19] *See* Skadden Brief at 8 *citing* ITC 201 Steel Decision at 354.

[20] Dewey Ballantine and Skadden, Arps, Slate, Meagher & Flom Brief: Certain Steel Products Inv. No TA-201-73 (Remedy): Bethlehem Steel Corp. et al. at 5 (Nov. 14, 2001).

[21] Schagrin Brief at 9.

The domestic industries' conclusions in the remedy phase of Steel 201 are widely held by others. Positing that the cost will be entirely borne by the consumer assumes that demand is completely inelastic, a circumstance that simply does not exist in the commodity markets that are typically the subject of Section 201 investigations. The domestic industries ignore these established principles here, and their argument that the deduction of Section 201 duties will not result in double counting is thus without merit.

The premise that deducting Section 201 duties will have a neutral effect on the antidumping margin is also wrong. It assumes that the importer must raise prices twice, once to eliminate a dumping margin, and once again to cover the Section 201 duty liability. For example, assume an antidumping investigation prior to the imposition of safeguard measures involving above cost sales in both the home market and the United States. The Department investigation reveals that U.S. price is $115 and Home Market Price is also $115 (Scenario 1). Because U.S. price is equal to home market price in Scenario 1, no dumping is found. Assume then that the U.S. price declines to $100, and a safeguard duty of 15 percent is also imposed. At that point, the merchandise becomes subject to both safeguard duties and antidumping duties (Scenario 2). In order to cover the cost of the safeguard duties, U.S. price rises to $115 (Scenario 3) which is, as in Scenario 1, the price at which no dumping exists. However, if the Section 201 duties are deducted from U.S. price in Scenario 3, then a liability for dumping duties will be created. This example illustrates that by deducting the safeguard duty from U.S. price, dumping has been "manufactured." The effect of deducting Section 201 duties is that the price increase from Scenario 2 to Scenario 3 was not permitted to elevate the subject merchandise from dumped import to a fairly-traded import, even though the price to the U.S. customer was identical to the home market price.

Requiring that there be two separate price increases does not reflect the realities of the marketplace. Rather, a single price increase should be credited to the foreign producer in the context of the antidumping proceeding. The same way a single antibiotic may be used to treat two infections of the body, a single price increase resulting from the imposition of safeguard duties should be credited to the foreign producer in the context of the U.S. price calculation.

Deducting Section 201 duties is Inconsistent with Established Trade Policy Regarding Duty Absorption. At the same time that the domestic industries argue that deducting Section 201 duties would have a neutral affect on the dumping margin, they also charge that failing to deduct Section 201 would "encourage importers to absorb the duties rather than raise prices," thereby undermining the remedial purpose of the safeguard law.[22]

If the Department adopts a policy of deducting Section 201 duties on the theory that it is necessary to prevent importers from absorbing any of the duties, it would be tantamount to the adoption of an anti-duty absorption measure, a step that would represent a unilateral and significant trade policy shift in a direction that neither Congress nor the WTO — both of which have considered and endorsed limited anti-duty absorption measures — have chosen to go. Measures to counter duty absorption considered in the WTO and Congress have been adopted in only a few narrow circumstances: in countervailing and antidumping duty sunset reviews, and through duty reimbursement regulations in the antidumping context. The WTO and Congress have thus chosen to adopt anti-absorption measures in only these narrowly-tailored circumstances. We also note that the anti-absorption measures that exist, of course, affect unfairly traded imports. In the face of the WTO's and Congress' posture on duty absorption, it would be singular for the Department to adopt an anti-absorption policy targeted at Section 201 duties, duties that apply to fairly-traded imports.

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[22] *See*, *e.g.*, Skadden Brief at 9.

IV. THE CONSEQUENCES OF DEDUCTING SECTION 201 DUTIES DEMONSTRATE THAT SUCH A PRACTICE WOULD BE UNSOUND TRADE POLICY

The consequences of adopting a policy of deducting Section 201 duties illustrate why such anti-duty absorption measures would be bad trade policy. Deducting Section 201 duties will achieve results which would be both arbitrary and discriminatory. The policy is arbitrary because — as the example set forth in Section III above illustrates — deducting Section 201 duties can manufacture antidumping margins, even where an importer has raised its prices in response to the safeguard measure. Such a policy would also be arbitrary because it results in imports subject to other Section 201 remedies such as quotas to be treated more favorably. This will undoubtedly encourage parties in Section 201 duties to argue strenuously for duties over quotas, even where the particular circumstances in the market might warrant quotas.

The policy would also result in discriminatory effects because it would treat foreign producers that sell to related party importers differently than foreign producers that sell to unrelated importers. The deduction of Section 201 duties would penalize foreign producers that sell to a related importer but not those that sell to an unrelated importer because the deduction of Section 201 duties would not have an effect on the dumping margin if the importer is not related to the foreign producer. In other words, if the unrelated importer elects to absorb — at least in part — the duty, the policy will have no effect. Discriminating against foreign-owned importers through such a policy is contrary to the United States' national treatment obligations under the various Bilateral Investment Agreements to which it is a party.[23]

Finally, a policy of deducting Section 201 duties would be bad trade policy because the results of the Commerce's LTFV investigation would essentially be predetermined. Section 201

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[23] *See, e.g.*, Bilateral Investment Agreement, Nov. 14, 1991, art. II, U.S. - Arg., *available at* http://www.tcc.mac.doc.gov..

duties are typically of a very large magnitude. Deducting Section 201 duties would thus virtually assure the existence of an antidumping duty margin.

V. THE CASE LAW CITED BY THE U.S. STEEL INDUSTRY IN SUPPORT OF DEDUCTING WTO-SANCTIONED REMEDIAL DUTIES IS EITHER INAPPOSITE OR SUPERCEDED BY MORE RECENT CASES

The domestic industry cites *Softwood Lumber from Canada*[24] and *Fuel Ethanol from Brazil*[25] as supporting the deduction of safeguard duties from U.S. price. These cases, however, provide no support for the argument that WTO-sanctioned remedial duties should be deducted in the antidumping calculation.

In *Softwood Lumber*, the issue before the Department of Commerce was whether the tariff rate quota ("TRQ") fees paid by Canadian producers to the Canadian government should be characterized as "export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received" described in section 771(6)(C) of the Tariff Act of 1930 and excluded from the calculation of U.S. price.[26] The Department examined the text of the U.S.-Canada Softwood Lumber Agreement and concluded that there was no evidence of a specific intent that such fees offset a countervailable subsidy.[27] The Canadian lumber producers did not argue that the fees paid to the Canadian government constituted a WTO-sanctioned remedial measure which, as a legal and policy matter, should be not be deducted from U.S. price in order to avoid a double remedy and the Department never addressed this issue. The Department's findings in *Softwood Lumber,* therefore, provide no precedential support for the imposition of a double remedy through the deduction of WTO-

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24 *See Certain Softwood Lumber Products From Canada*, 66 Fed. Reg. 56,062, 56,067 (Dep't Comm. Nov. 6, 2001) (prelim. determ.) (hereinafter Lumber Prelim.)

25 *See Fuel Ethanol From Brazil*, 51 Fed. Reg. 5,572 (Dep't Comm. Feb. 14, 1986) (prelim. determ.) (hereinafter Ethanol Prelim.).

26 19 U.S.C. § 1677(6)(c).

27 *See* Memo to Fanyar Shirzad from Bernard Carreau, Issues and Decision Memo., Certain Softwood Lumber Products from Canada at cmt. 9 (March 21, 2002).

sanctioned remedial duties in the antidumping calculation. This case is also inapposite because the fees were an export tax — not a U.S. import duty — that Canadian exporters agreed to pay if their exports exceeded certain quantities. Moreover, these taxes resulted from the bilateral negotiations that produced the Softwood Lumber Agreement and were not imposed by the U.S. Government.

Even if the Department had determined that the TRQ fees were remedial and had determined that a double remedy was appropriate in *Softwood Lumber*, the fact that the fees were not imposed pursuant to a WTO-sanctioned trade remedy provision, like antidumping duties, countervailing duties and safeguard measures, would render *Softwood Lumber* irrelevant to the question of how WTO-sanctioned remedial duties should be treated. Specifically, the treatment of safeguard measures imposed under the Agreement on Safeguards must be consistent with the WTO principles: most importantly the requirement that a Member State limit the impact of the safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment."[28] Finally, to the extent that *Softwood Lumber* has any relevance to the question of whether WTO-sanctioned remedial duties should be deducted from U.S. price, the Department's decision cannot stand in the face of the Department's long-standing policy, approved by Congress and the courts, to avoid the imposition of a double remedy by deducting such duties from U.S. price.

Similarly, the Department's decision in *Fuel Ethanol from Brazil* provides no support for the argument that WTO-sanctioned remedial duties should be deducted from U.S. price. In *Fuel Ethanol from Brazil*, the Department determined that the special tariff on ethanol should be

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[28] Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement on Establishing the World Trade Organization, Annex 1A at art. 5.1 (hereinafter Agreement on Safeguards).

deducted from U.S. price as an import duty.[29] This case is inapposite because there is no evidence that the special tariff was remedial in nature. For example, while the special tariff on *Fuel Ethanol from Brazil* was originally included in an Appendix to the TSUS[30]and is currently included in Chapter 99 of the USHTS, the special tariff is, unlike safeguard duties, included in subchapter I of Chapter 99 (Temporary Legislation Providing for Additional Duties) not in subchapter III (Temporary Modifications Established Pursuant to Trade Legislation).[31] This distinction is important because Note 11 to subchapter III and many headings in subchapter III refer to the duties imposed therein as the "application of relief" while there is no such reference to the remedial nature of the special tariff on fuel ethanol.[32] Moreover, the International Trade Commission preliminary determination in the Ethyl Alcohol investigation indicates that the special tariff was imposed not to remedy any injury suffered by the domestic industry, but to offset a tax subsidy that Congress did not wish imports to benefit from.[33] Indeed, the special tariff could not have been intended as remedial because both a contemporaneous Treasury Department study[34] and an investigation in 1985 by the International Trade Commission failed to find any injury.[35] The fact that this supposed "temporary" modification has been in place for close to twenty years also differentiates if from Section 201 remedial duties, which are a temporary measure targeted to specific industry conditions.

Even if the Department had determined that the special tariff was remedial and had determined that a double remedy was appropriate in *Fuel Ethanol from Brazil,* the fact that the

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29 *See* Ethanol Prelim. at 5,577.

30 *See* Tariff Schedules of the U.S. Annotated, Appendix to the Tariff Schedules, Part 1, Temporary Legislation (1987).

31 USHTS, Section XXII, Chapter 99, Subchapter I.

32 *See id.* at Subchapter III, n. 11(a) and Subchapter I.

33 *See Certain Ethyl Alcohol from Brazil*, Inv. No. 731-TA-248, USITC Pub. 1678 at 38 (Prelim.) (April 1985).

34 *See Congressman Cites Alcohol-Fuel Monopoly*, Associated Press, Nov. 28, 1980.

35 *See Certain Ethyl Alcohol from Brazil,* Inv. No. 731-TA-248, USITC Pub. 1818 (Final) (March 1986).

special tariff was not imposed pursuant to a WTO-sanctioned trade remedy provision, like antidumping duties, countervailing duties and safeguard measures, renders *Fuel Ethanol from Brazil* irrelevant to the question of how WTO-sanctioned remedial duties should be treated. Specifically, the treatment of safeguard measures imposed under the Agreement on Safeguards must be consistent with the WTO principles, most importantly the requirement that a Member State limit the impact of the safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment."[36] Further, to the extent that *Fuel Ethanol from Brazil* has any relevance to the question of whether WTO-sanctioned remedial duties should be deducted from U.S. price, the Department's decision in that case cannot stand in the face of the Department's long-standing policy, approved by Congress and the Courts, to avoid the imposition of a double remedy by the GATT system.

Finally, as in *Softwood Lumber*, the question of whether it was appropriate for the Department to create a double remedy by deducting the special tariff was never addressed by the Department. Rather, the only argument made by the Brazilian producers against the deduction of the special tariff, and the only argument addressed by the Department, was whether it was permissible to deduct from U.S. price a duty imposed in contravention of the General Agreement on Tariffs and Trade (GATT). And even with respect to this issue the Department did not decide in the affirmative; rather the Department simply held that it had no authority to address the question.[37]

VI. CONCLUSION

The domestic industries seek to overturn the Department's long-standing policy against imposing double remedies through the deduction of WTO-sanctioned remedial duties from U.S.

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36 Agreement on Safeguards at art. 5.1.

37 *See* Ethanol Prelim. at 5,577.

price in an antidumping duty calculation, despite Congressional and judicial endorsement of that policy and its consistency with both U.S. law and WTO obligations. We urge the Department to recognize the unsoundness of these positions, and to let its policy stand unchanged.

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