November 7, 2003

PUBLIC DOCUMENT

BY HAND DELIVERY
The Honorable James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Attn: Section 201 Duties

Re: Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties

Dear Assistant Secretary Jochum:

United States Steel Corporation ("U.S. Steel") submits the following rebuttal comments to the U.S. Department of Commerce (the "Department") pursuant to the Department's request for comments regarding the treatment of section 201 duties and countervailing duties in antidumping proceedings.[1] These rebuttal comments specifically address the question of the treatment of section 201 duties. U.S. Steel is submitting additional rebuttal comments addressing the treatment of countervailing duties in a separate letter.

[1] Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties, 68 Fed. Reg. 53104 (Dep't Commerce Sept. 9, 2003).

Several commenters have argued that deduction of section 201 duties would violate certain WTO obligations. In particular, these commenters claim that such a practice would run afoul of the Antidumping Agreement, the Safeguards Agreement, and the General Agreement on Tariffs and Trade 1994 ("GATT"). These arguments are without support, and should be rejected by the Department.

I. Deduction of Section 201 Duties Would Not Violate the Antidumping Agreement

Certain commenters argue that the Antidumping Agreement precludes the deduction of safeguard duties from export price.[2] To the contrary, Article 2.4 of the Antidumping Agreement states that, in calculating export price, adjustments must be made for "costs, including duties and taxes, incurred between importation and resale." The Antidumping Agreement does not provide a definition for the term "duties"; therefore, the word must be given its "ordinary meaning."[3] In determining

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[2] See Initial Comments of Steptoe & Johnson LLP filed on behalf of Corus Group plc at 5 (Oct. 9, 2003) ("Steptoe Comments"); Initial Comments of O'Melveny & Myers at 10-12 (Oct. 9, 2003) ("O'Melveny Comments").

[3] The Antidumping Agreement requires WTO Dispute Resolution Panels, in construing the meaning of any provision, to apply "customary rules of interpretation of public international law." Antidumping Agreement at Article 17.6(ii). According to Article 31(1) of the Vienna Convention on the Law of Treaties, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

a word's "ordinary meaning," the Appellate Body has looked to dictionary definitions – in particular to *The Shorter Oxford English Dictionary* and *Black's Law Dictionary*.[4] According to these sources, the ordinary meaning of the term "duty" is simply a "payment to the public revenue levied on the import, export, manufacture, or sale of goods,"[5] or "a tax or impost due to the government upon the importation or exportation of goods."[6] Safeguard duties clearly fit within the ordinary meaning of the term "duties," and are therefore properly deducted from export price under Article 2.4.

Two commenters assert that footnote 7 of Article 2.4 prohibits the deduction of section 201 duties.[7] This assertion is entirely without merit. Article 2.4 states:

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4 See, e.g., Appellate Body Report in *Argentina – Safeguard Measures on Imports of Footware* (Dec. 14, 1999), WT/DS121/AB/R at para. 91 and fns. 80-81; Appellate Body Report in Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (Dec. 14, 1999), WT/DS98/AB/R at para. 84 and fns. 47-48; Appellate Body Report in *Canada – Measures Affecting the Importation of Milk* (Oct. 13, 1999), WT/DS103/AB/R at paras. 107-108 and fn. 90.

5 *The New Shorter Oxford English Dictionary* (5th ed. 1993) Volume I at 769.

6 *Black's Law Dictionary* (6th ed. 1990) at 505.

7 See Steptoe Comments at 5; O'Melveny Comments at 10-11.

> 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 which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. . . .
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> [7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

Footnote 7, by its plain language, applies only when an adjustment is double-counted within the margin calculations (i.e., when "duplicate adjustments" are "made under this provision"). No commenter has argued that section 201 duties should be twice deducted from export price in the margin calculations. To the contrary, such duties should be deducted only once from a duty paid export price. Furthermore, footnote 7 accompanies the third sentence of Article 2.4, and – by its express language – applies only to "the above factors" (i.e., those factors listed in the third or earlier sentences). Therefore, footnote 7 does not even apply to the subsequent factors listed in the fourth sentence of Article 2.4 (e.g., "duties and taxes").

These same two commenters also claim deduction of section 201 duties would violate Article 9.3 of the Antidumping Agreement.[8] According to these commenters, that Article requires that "the amount of the anti-dumping duty shall not exceed the margin of dumping."[9] The commenters both fail, however, to cite the full text of the provision, which reads in its entirety:

> The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.[10]

Article 9.3, therefore, says absolutely nothing about how the "margin of dumping" must be calculated. Article 2 is the only provision that sets forth the substantive rules governing such calculations. As shown above, Article 2 in fact requires the deduction of all "duties" from export price, including safeguard duties.

II. Deduction of Section 201 Duties Would Not Violate the Safeguards Agreement

Certain commenters argue that deduction of section 201 duties from export price would violate provisions of the Safeguards Agreement.[11] In particular,

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8 See Steptoe Comments at 5-6; O'Melveny Comments at 10.

9 Id.

10 Antidumping Agreement at Art. 9.3 (emphasis added).

11 See Initial Comments of Baker & Hostetler filed on behalf of British Columbia Lumber Trade Council at 17 (Oct. 9, 2003) ("Baker Comments"); Initial (continued...)

these commenters contend that the practice would result in a remedy that exceeds that permitted by the rule, set forth in Article 5.1, that safeguard measures be applied "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment."[12] In addition, these commenters claim that the practice would "extend the impact of the safeguard measures beyond the three year limit," thereby violating Article 7.1's requirement that members apply safeguard measures "only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment."[13]

These arguments are baseless. Articles 5.1 and 7.1 of the Safeguards Agreement, by their plain language, deal only with the application of safeguard measures. They state that "a Member shall apply safeguard measures" only for such time and to the extent necessary to remedy the serious injury. These Articles do not govern the methodology by which antidumping duties are calculated and imposed. Whatever the Department decides to do with respect to the calculation of export prices under the antidumping statute, it will have no impact on the magnitude or

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11 (...continued)
Comments of European Confederation of Iron and Steel Industries at 5-7 (Oct. 9, 2003) ("EUROFER Comments"); O'Melveny Comments at 18-19.

12 See O'Melveny Comments at 18.

13 See id. at 19.

duration of the safeguard measures applied by the President. In short, Articles 5.1 and 7.1 of the Safeguards Agreement simply do not apply.[14]

III. Deduction of Section 201 Duties Would Not Violate Article VI.5 of the GATT

Article VI.5 of the GATT states that "no product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization." Certain commenters contend that this provision indicates that deduction of section 201 duties from export price would also result in the double-counting of remedies.[15] This position is entirely without merit.

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[14] One commenter complains that deduction of section 201 duties would impact cash deposit requirements "for two years or more after the termination of the safeguard measure." See EUROFER Comments at 6. However, as soon as the safeguard measures are terminated, importers will know with certitude that they will receive refunds – with interest – for any component of the cash deposit rate going forward that relates to the section 201 duty deduction. Thus, the methodology of deducting section 201 duties from U.S. price will have no commercial impact beyond the period during which safeguard measures are imposed.

[15] See Initial Comments of Hogan & Hartson filed on behalf of CITAC at 7-8 (Oct. 9, 2003), Baker Comments at 2.

As the Department has recognized,

> The reference in GATT article VI:5 that "no product . . . shall be subject to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization" is merely recognition that one form of unfair trade practice (government subsidization of exports) can in and of itself permit another unfair trade practice (injurious price discrimination) to occur.
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> U.S. practice takes full account of this phenomenon, in accordance with our obligations under the General Agreement. When the Department conducts concurrent antidumping and countervailing duty investigations of the same product, any antidumping cash deposit is adjusted to reflect the amount of export subsidies found in the companion countervailing duty investigation.[16]

Article VI.5 and U.S. law recognize that export subsidies may allow producers to lower their export prices (and consequently engage in dumping), potentially subjecting the producer to a double-remedy (i.e., countervailing duties to offset export subsidies and antidumping duties) for the "same situation." There is, however, no similar risk that antidumping duties and section 201 duties could "compensate for the same situation." Export subsidies, by providing revenue to the producer for its export sales, directly finance dumping. Section 201 duties, by contrast, add an additional expense to the producer for its export sales, and are

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[16] Fresh and Chilled Atlantic Salmon From Norway, 56 Fed. Reg. 7678 (Dep't Commerce Feb. 25, 1991) (final affirmative countervailing duty determ.).

intended to result in increased prices.[17] The rationale embodied in Article VI.5 with respect to the relationship between antidumping duties and countervailing duties to offset export subsidies simply cannot logically be extended to the relationship between antidumping duties and section 201 duties.

In sum, the deduction of section 201 duties does not raise any of the WTO concerns suggested by certain commenters. Accordingly, the Department should reject those comments and, as required by the statute, deduct section 201 duties from U.S. price.

Respectfully submitted,

Robert E. Lighthizer
John J. Mangan
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-7000

Alan Wm. Wolff
Bradford L. Ward
DEWEY BALLANTINE LLP
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4605
(202) 862-1000

Counsel to United States Steel Corporation

[17] See Steel, Inv. No. TA-201-73, USITC Pub. 3479 (Dec. 2001) at 354 ("the tariff-based remedies we are recommending are intended to increase domestic prices . . .") and 363 ("we found that a tariff will not unduly restrict imports but will allow domestic prices to rise . . .").