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Central Records Unit, Room 1870
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PUBLIC DOCUMENT

Attn: Section 201 Duties

Dear Assistant Secretary Jochum:

On behalf of the Committee on Pipe and Tube Imports (CPTI), we provide these comments in rebuttal to those previously filed by parties which are opposed to the treatment of section 201 duties as import duties in the calculation of export price or constructed export price. On the issue of statutory construction, the representations made by those opposed are misleading as to current legislative actions. Moreover, the administrative and judicial precedent cited by those opposed do not support their position but rather favor characterization of section 201 duties as import duties. The policy arguments of those opposed are disingenuous in their reliance on the canard that treatment of section 201 duties as import duties would result in a double benefit to the domestic industry. Under the statute, the deduction of section 201 duties only occurs where the section 201 tariff relief has been negated by absorption of the duties by the producer/exporter. The same statutory treatment applies to the deduction of regular customs duties when they are negated by absorption. However, the absurd reasoning of the "double

benefit" argument is explicitly revealed in some comments which argue that dumping margins should be offset by section 201 duties, whether paid by the exporter or by unaffiliated importers. Those engaged in dumping are not entitled to a credit against price discrimination for section 201 duties paid.

The Statutory Requirement for Deduction of Absorbed Section 201 Duties is Not Undercut by the Comments of Parties Opposed to Deduction

(a) Congressional legislation arguments

Parties opposed to the treatment of section 201 duties as import duties argue that their position is supported by Congressional legislation, judicial and administrative precedent, as well as U.S. WTO obligations. Commenters direct the Department's attention to legislation in Congress which would specifically authorize the deduction of countervailing duties in the calculation of EP/CEP.[1] Some parties explicitly conflate the treatment of section 201 duties with the treatment of countervailing duties to create the incorrect impression that the Congressional legislation relates to the treatment of section 201 duties.[2] Specifically, those opposed to

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[1] *See e.g.*, Comments of Akin Gump Strauss Hauer & Feld on behalf of Changwon Specialty Steel. Co. Ltd. and Dongbang Special Steel Co., Ltd., and identical comments filed on behalf of Hyundai HYSCO, at 2 n.2 citing S. 219 and H.R. 2365 ("Thus, Congress recognizes that a statutory amendment is necessary to treat countervailing duties as a cost in dumping calculations. Section 201 is not different.")

[2] For example, the British Columbia Lumber Trade Council *et al.* claims that:

> "Members of both the U.S. House of Representatives and the U.S. Senate have introduced bills this year to legislate the change contemplated in the Department's request for comments as a change in policy. Some of these legislators apparently consider that, to authorize the deduction of CVD **or 201 duties from EP or CEP**, statutory amendments are necessary, rather than a simple course correction in Department policy."

Comments at 15 (emphasis added) citing S. 136, S. 219, H.R. 491, H.R. 2092, and H.R. 2365 as well as 149 Cong. Rec. S1,671 (January 28, 2003).

treatment of section 201 duties as import duties argue that since Congress believes legislation is necessary to permit a deduction, then the current statute cannot be read as authorizing such a deduction. Whatever the validity of this argument as it relates to treatment of countervailing duties, it cannot support the same conclusion as to treatment of section 201 duties. None of the cited legislation addresses the issue. There simply is no legislative implication that section 201 duties should not be treated as import duties or that anyone in Congress believed there was a need for legislation when the clear language of the statute requires the deduction of all U.S. customs duties paid by related parties. Indeed, the argument by those opposed supports the contrary position, *i.e.*, that although Congress thought legislation was necessary in the context of countervailing duties, no legislation was thought necessary in the context of section 201 duties.

(b) Judicial and administrative precedent arguments

Those opposed to the treatment of section 201 duties as import duties also rely on administrative and judicial precedent to support their claims. Nevertheless, the reasoning of these decisions militate toward a conclusion contrary to that urged by those opposed to treatment of section 201 duties as import duties. Thus, the Department's earlier justification for not deducting antidumping and countervailing duties from export price is inapposite in the case of section 201 duties, as section 201 duties do not "derive from the margin of dumping or the rate of subsidization found." *Cf. Certain Cut-to-Length Carbon Steel Plate from Germany*, 62 Fed. Reg. 18,390, 18,395 (April 15, 1997) ("Unlike normal duties which are an assessment against value, AD and CVD duties derive from the margin of dumping or the rate of subsidization found.")

The Lumber Council quotes the Department's statement that:

> The Senate Report accompanying the legislation {the 1921 Act} however, uniformly refers to antidumping duties as "special dumping dut[ies]" and uniformly refers to ordinary customs duties as "United States import duties." The rigorous use of these distinct terms indicates that the new "special dumping duties" (payable only to offset dumping) were considered to be distinct from the existing "United States import duties" (payable, *ad valorem*, upon importation).

Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea (62 Fed. Reg. 18,404, 18,421 (April 15, 1997) (Final Results).[3] Section 201 duties, like ordinary customs duties, are "payable, *ad valorem*, upon importation," on all covered imports regardless of any dumping or subsidization. Thus, the quoted Department precedent supports the characterization of section 201 duties as import duties and not the contrary decision urged by the Lumber Council.

Analysis of oft-cited judicial precedent follows the same course. Section 201 duties are unlike antidumping duties in that they are a fixed charge. Unlike antidumping duties, they are not estimates and they do not fluctuate from period-to-period and transaction-to-transaction. Rather, section 201 duties are paid in definite form as set out in the HTS and as known in advance. They are not dependant on post-entry antidumping calculations, but rather are an *ad valorem* assessment that is accurately and definitely determinable. *Cf. Federal Mogul v. United States*, 813 F. Supp. 856, 872 (CIT 1993) (antidumping duties contrast with "deposits of the actual normal import duties owed which can be accurately determined"); *Hoogovens Staal v. United States*, 4 F.Supp.2d 1213, 1220 (CIT 1998) (upholding Commerce distinction based on the fact that antidumping deposits are estimates of price discrimination); *Bethlehem Steel v.*

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[3] *See also* the cited determination in *Certain Cold-Rolled Carbon Steel Flat Products from Korea*, 63 Fed. Reg. 781, 787 (January 7, 1998) (Final Results) ("antidumping duties are unique in that they represent antidumping duty margins-- a measure of price discrimination").

United States, 27 F.Supp.2d 201, 208 (CIT 1998) (same). In sum, section 201 duties are unlike antidumping duties which "derive from a margin of dumping," and like normal duties which are "an assessment against value." *See Hoogovens*, 4 F.Supp.2d at 1220.

(c) WTO obligation arguments

Contrary to certain comments, characterization of section 201 as import duties is consistent with WTO obligations of the United States. The United States and other WTO Members have made tariff concessions referenced in the tariff schedules of each Member, as agreed to in the rounds of tariff negotiations and the subject of GATT Article II:1(b). Safeguard actions authorize WTO Members to "suspend the obligation in whole or in part or to withdraw or modify the concession." Similarly, Article 6 of the Agreement on Safeguards provides that provisional safeguard measures "should take the form of tariff increases." Thus, the structure of GATT Articles XIX and II and the Agreement on Safeguards confirm the characterization of safeguard duties as simple customs duties.

(d) The statutory language

The argument of some parties opposed to treatment of section 201 duties as import duties that the section 201 duties appear in a separate HTS schedule at subchapter III of Chapter 99 is a distinction without a difference. The first note to Chapter 99 of the HTS states: "The duties provided for in the subchapter are cumulative duties which apply in addition to the duties, if any, otherwise imposed on the articled involved." There is nothing in the HTS notes that indicates that these duties are considered anything other than "U.S. import duties" even if they are "additional" U.S. import duties.[4] Specifically, U.S. Note 11(a) to the HTS states: "The rates of

[4] U.S. Customs regulations refer to "special duties," a term which encompasses antidumping and countervailing duties, but not section 201 duties. *See* 19 C.F.R. §159, subpart D.

duty in such subheadings either incorporate the duty rates specified for such goods in Chapters 72 and 73 of the tariff schedule or are unchanged from the pertinent provisions of such chapters." HTSUS Chapter 99, Note 11(a) (2003).[5] Thus the language of the HTS indicates that any modification of duties in Chapter 99 due to a section 201 action are legally considered to be modification of the regular duties specified in Chapter 72.

President Bush characterized section 201 duties as customs duties when he explained that these duties constituted a safeguard measure in the form of "an increase in duties on imports." *See* 3 C.F.R. § 7529; 67 Fed. Reg. 10,553 (March 7, 2002).[6] The relief proclaimed was pursuant to a statute which expressly states that the President may declare "an increase in, or imposition of, any duty on the imported article." 19 U.S.C. §2253(a)(3)(A). While these duties are authorized for a remedial purpose, they are simply an increase in regular duties and applied through operation of HTS-based assessment.

In sum, section 201 duties are always treated by the HTS as a temporary modification to the regular customs duties, which are the import duties referred to in the antidumping statute.

Failure to Treat Section 201 Duties As Import Duties Frustrates Section 201 Relief

Those opposed to treatment of section 201 duties as import duties claim that the domestic industry would obtain a "double" benefit to which it is not entitled. The fundamental error in this reasoning is the unsupported presumption that the domestic industry benefits from section

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[5] Note 11 to Chapter 99 describes the section 201 duties that appear in subheadings 9903.72.30 through 9903.74.24 (which cover the steel products subject to the President's section 201 remedy).

[6] *See also* Presidential Proclamation 7273, 3 C.F.R. § 7273 (65 Fed. Reg. 8,619, 8,622 (February 5, 2000) (section 201 remedy to carbon steel wire rod industry described by President Clinton as an "over-quota rate of duty.").

201 tariff relief notwithstanding the absence of a price effect in the U.S. market. In fact, failure to treat section 201 duties as import duties would open a major loophole, by which section 201 relief can be effectively frustrated and biased in favor of those who are dumping. Foreign producers which absorb section 201 duties subvert the purpose of relief: to ensure that increased prices are passed through to the marketplace during the temporary relief period in order to facilitate industry restructuring and investment.

As recognized by the Commission, and even some comments by foreign producers, the purpose of the section 201 tariff-based remedy was to cause foreign producers to raise their U.S. market prices.[7] As detailed in CPTI's original comments, no issue arises when the section 201 duties are paid by the unaffiliated importer. Only where relief is being frustrated by absorption of section 201 duties would the deduction of section 201 duties appropriately act to increase the dumping margin.

Many other parties opposed to relief adopt the untenable position that the mere proclamation of tariff relief *per se* benefits the domestic industry. Thus, Akin Gump claims that the collection of section 201 duties "fully implement{s} the safeguard measures intended by the President." Comments at 9. Miller & Chevalier asserts that "the intent of the section 201 law is achieved as soon as the temporary duty is imposed." Comments at 6. Steptoe & Johnson suggests the "introduction of the section 201 tariff would not be relevant to the exporter's pricing decision...." Comments at 8. To the contrary, absent volume relief in the form of quotas, only

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[7] *See Steel*, USITC Pub. 3479 (December 2001) at 354 ("the tariff-based remedies we are recommending are intended to increase domestic prices"). Sonnenberg & Anderson states that "The Section 201 duties serve to temporarily and artificially increase market prices so the a fragile domestic industry may retool or reorganize itself into a more globally competitive market participant." Comments at 9.

price relief can provide the domestic industry a safeguard breathing space. But if the tariffs are permitted to have no price effect, the domestic industry does not benefit from tariff-based relief. Specifically, foreign producers and their affiliated importers can choose to absorb the section 201 duties and effectively lower their prices to the first unaffiliated customers in the United States. In that instance, the section 201 duties would have no beneficial impact if they were not deducted from EP/CEP.[8] The same rationale applies to customs duties, which can be increased by Congress to give relief to an industry, such as with ethanol in the 1980s.[9]

The European Union asserts that "to artificially increase the amount of any antidumping duty by deducting 201 duties from the export price, in either a new investigation or a review, would be even less justifiable, since it would effectively add an inflated dumping margin on top of a 201 duty, **the latter having already removed serious injury**." European Union Comments at 2 (emphasis added). Again, this reflects fundamental misstatement of effect. If the section 201 duties are paid by the first unaffiliated purchaser, then it might be said the section 201 had achieved its purpose, and consistently with this effect, the section 201 duties are not deducted (because they are not paid by the producer or affiliated importer). If the section 201 duties are not paid by the unaffiliated purchaser, the foreign producer has absorbed the section 201 duty and frustrated the purpose of 201 relief.

EUROFER indicates that countries with outstanding antidumping orders would be subject to discriminatory treatment as compared to countries without orders, who would be free

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[8] In addition, failure to deduct the section 201 duty would mean the EP/CEP would contain a duty that is not part of the normal value, meaning that the two elements of the dumping equation would not be measured on the same basis.

[9] *See* CPTI Comments at 10-11 on the treatment of increased ethanol duties in *Fuel Ethanol from Brazil*, 51 Fed. Reg. 5,572 (February 14, 1986) Comment 6.

to absorb section 201 duties without negative consequences. EUROFER Comments at 6. To the contrary, all imports into the United States are subject to the same antidumping laws and the same treatment of section 201 duties under the antidumping law. If countries not currently subject to antidumping orders absorb section 201 duties, those exporters are as exposed to antidumping consequences in new investigations as other imports in administrative reviews. Thus, there is no discrimination in the deduction of absorbed customs duties between countries subject to orders and countries not subject.

EUROFER also asserts that deduction of section 201 duties would illegally extend the period of section 201 relief. EUROFER Comments at 6. This is untrue. If exporters do not frustrate section 201 relief by absorbing section 201 duties, there is no effect beyond the proclaimed relief. If exporters do frustrate 201 relief by absorbing the duties, then the antidumping consequences of that action extend only to the entries made during the time period of relief.

In Willkie Farr's comments on behalf of the Japan Iron & Steel Federation the question is asked: "Given the underlying purpose of Section 201 relief is always the same (time for the domestic industry to adjust), the question then becomes why should certain types of 201 relief (i.e. when duties are imposed) be taken into account in the antidumping calculation when other types of relief (i.e. quotas) are not." Comments at 11. The easy answer to Willkie Farr's question is contrary to its rhetorical intent. Quotas are a quantitative system which cannot be frustrated by the absorption of relief. To make tariff relief consistent with quota relief, section 201 duties must be treated as import duties in the antidumping calculations. To find otherwise would mean that tariff relief could be easily frustrated by absorption, but quota relief would be immune from such frustration.

Kaye Scholer argues that "the deduction of the Section 201 duties would create 'additional price discrimination that did not exist' in further violation of U.S. law and the WTO Agreements, which mandate that 'the duty collected must not exceed the margin of dumping.'" Comments at 6-7. But no "additional price discrimination that did not exist" is created where pricing in the U.S. market is adjusted as contemplated by section 201 relief. For the same reason, Kaye Scholer's example (page 8) is absurd in that it assumes that section 201 relief should have no price effect in the U.S. market. If the U.S. market price is increased to reflect the section 201 duties, no additional dumping margin is generated.

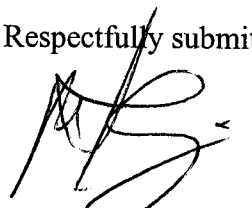
In the same fashion, the Consuming Industries Trade Action Coalition (CITAC) states that "to artificially increase the amount of any antidumping duty by deducting 201 duties from the U.S. price would effectively inflate the dumping margin by the amount of a 201 duty, the latter has already remedied serious injury." Again, the deduction would occur only where absorption that frustrated the President's proclaimed relief was present. As CITAC recognizes, treating section 201 duties as import duties means that an exporter must sell in the U.S. market at a price which reflects the section 201 duties to avoid dumping charges. Comments at 7. This is exactly the intent of the section 201 relief, and exactly the reason the Department must deduct absorbed section 201 duties to prevent frustration of section 201 relief.

Sonnenberg & Anderson believes that "it is beyond fairness to impose further increased costs to U.S. manufacturers and consumers that artificially raise prices beyond 'normal value'." Comments at 3. This is exactly the purpose of section 201 relief, and the Sonnenberg & Anderson comments establish the rationale for the deduction.

Dumpers Are Not Entitled of an Offset for Section 201 Duties Paid

Some foreign producers go well beyond the scope of the Department's request for comments to suggest that section 201 relief should negate any requirement to refrain from dumping. Indeed, O'Melveny and Myers wants dumpers to receive credit for section 201 duties paid by the unaffiliated party against the dumping margins of the exporters. Comments at 19. Other parties suggest that antidumping relief should be revoked.[10] These suggestions penalize fair traders and benefit unfair traders. Indeed, where dumping margins are large enough, section 201 duties would have no impact and thus would be least effective against unfair traders. Section 201 relief was not intended as a license to dump.

Respectfully submitted,



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[10] *See* deKieffer & Horgan Comments on behalf of BGH Edelstahlwerke BmbH at 4 ("The Court's reasoning {in *Hoogovens*} applies equally to section 201 and countervailing duties and raises serious questions concerning the remedial purpose served by the continuation of the underlying antidumping proceeding. If section 201 duties have achieved their purpose (i.e., the elimination of 'serious injury' -- a higher standard than the material injury required for the imposition of antidumping duties), the remedial purpose for the continuation of the underlying antidumping proceedings becomes less apparent."); Government of India Comments at Para. 10 ("The extent to which the protection gets accorded to the domestic industry by a definitive safeguard measure becomes enhanced if the antidumping measure is applied over and above the safeguard measure...It is therefore important that the antidumping measure be adjusted or suspended to take into consideration the protection to the domestic industry already accorded by the safeguard measure.")