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November 7, 2003

HAND DELIVERY **PUBLIC DOCUMENT**

The Honorable James J. Jochum
Assistant Secretary for Import Administration
U.S. Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

Attn: Section 201 Duties;
Becky Erkul, Office of Policy
Import Administration

Re: Antidumping Proceedings: Treatment of Section 201 Duties: Rebuttal Comments of International Steel Group Inc. and the United Steelworkers of America

Dear Mr. Secretary:

On October 9, 2003, International Steel Group Inc. (ISG) and the United Steelworkers of America (USWA) submitted initial comments in response to the Department's request for public comments "on the appropriateness of deducting section 201 duties and countervailing duties from gross unit price in order to determine the applicable export price or constructed export price used in antidumping duty calculations."[1] Subsequently, the Department extended the time for rebuttal comments to November 7, 2003.[2] On behalf of ISG and the USWA, we now submit rebuttal comments.

For the reasons discussed below and in our initial comments, ISG and the USWA maintain that it is both appropriate and required by the statute, in investigations and

administrative reviews, for the Department to deduct the amount of any Section 201 duties from the gross unit price (or starting price), when the duties are included in the starting price, in determining EP or CEP in antidumping calculations, in accordance with 19 U.S.C. § 1677a(c)(2)(A). Nothing in the comments of parties opposed to the proper deduction of Section 201 duties should persuade the Department to adopt an incorrect methodology in respect of the treatment of these U.S. import duties.

I. THE DEPARTMENT HAS NO LONG-STANDING PRACTICE WITH RESPECT TO THE DEDUCTION OF SECTION 201 DUTIES FROM EP AND CEP.

Some commenters urge the Department to maintain its current practice or uphold its "long-standing" practice in respect of the treatment of remedial duties.[3] In fact, however, the Department has no established practice with respect to the deduction of Section 201 duties and the only relevant analogous precedent supports deduction. The recommendation memorandum in the AD investigation of *Steel Wire Rod from Trinidad and Tobago* conceded that "[t]he Department has never addressed whether duties collected pursuant to a section 201 decision are considered, for purposes of determining the amounts to be deducted from EP and CEP, to be U.S. import duties or U.S. selling expenses."[4] In the final determination in that investigation, the

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1 *Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties*, 68 Fed. Reg. 53,104 (Dep't Commerce, Sept. 9, 2003).

2 *Antidumping Proceedings--Treatment of Section 201 Duties and Countervailing Duties; Extension of Time for Rebuttal Comments*, 68 Fed. Reg. 60,079 (Dep't Commerce, Oct. 21, 2003).

3 *See, e.g.,* Comments of Baker and Hostetler, on behalf of British Columbia Lumber Trade Council, at 9; Comments of de Kieffer & Horgan, on behalf of BGH, at 3.

4 *Recommendation Memorandum - Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, Inv. No. A-274-804, p. 2 (attached to letter from Charles Riggle to Paul C. Rosenthal) (August 13, 2002) (emphasis added).

Department explicitly declined to address the merits of the issue, exercising its discretion because the effect of the deduction would have been statistically insignificant.[5] Hence, arguments of long-standing practice are factually wrong as well as legally irrelevant. As we noted in our initial comments, the Department is bound by the statute, and therefore must determine that, in accordance with the clear language of 19 U.S.C. § 1677a(c)(2)(A), it is appropriate and required to deduct all U.S. import duties from EP and CEP, including Section 201 duties, where the duties are included in the gross price.

II. THE DEPARTMENT MUST BASE ITS DETERMINATION WITH RESPECT TO THE DEDUCTION OF SECTION 201 DUTIES ON THE UNIQUE QUALITIES OF THOSE DUTIES, AND NOT ON FALSE ANALOGIES TO CVD DUTIES AND AD DUTIES.

Section 201 duties and countervailing duties are distinct from antidumping duties and they are distinct from each other. Antidumping and countervailing duties serve to remedy unfair dumping and subsidization, while Section 201 duties are meant to facilitate adjustment by the domestic industry to increased import competition. The processes by which these duties are imposed and other characteristics make each remedy unique. Consequently, the Department need not and should not make a unified determination with respect to the treatment of these different duties.

In their initial comments, some commenters attempted to confuse the questions the Department is considering by intermingling arguments against deducting countervailing duties with arguments against deducting Section 201 duties.[6] Antidumping, countervailing, and

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5 *Decision Memorandum for the Final Determination of the Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, p. 5 (not dated).

6 *See, e.g.,* Comments of Baker and Hostetler, on behalf of British Columbia Lumber Trade Council.

safeguard measures, however, are all quite different, and any analogies that might be drawn between antidumping duties and countervailing duties cannot properly be applied to Section 201 duties. Thus, the Department should make a separate determination with respect to the deduction of Section 201 duties that is distinct from its determinations with respect to the deduction of countervailing duties and antidumping duties. Furthermore, the reasoning and explanation of such a separate determination should take into account the unique aspects of Section 201 duties, which distinguish those duties from the other remedies.

Antidumping duties are imposed as a remedy for unfairly traded goods, which are sold at less than fair value, and which cause or threaten material injury. Antidumping duty rates are derived from a calculated margin of dumping, *i.e.*, the difference between normal value and export price, and they are meant specifically to remedy the unfair price discrimination where a domestic industry has been found to be materially injured or threatened with such injury. Rates are determined on a retrospective basis in investigations and reviews, which examine distinct time periods. The duty deposit rate, which must be posted upon entry, is based upon the original investigation or subsequent administrative review and is an estimate which is subject to change if a subsequent administrative review occurs. Hence, at the time of deposit it is not an amount certain but an estimate based on prior conduct.

It is in light of some of these specific aspects of the antidumping remedy that courts have upheld the Department's decision not to deduct cash deposits of estimated antidumping duties. The courts have agreed with the Department that the estimated deposits "may not bear any relationship to the actual dumping duties owed."[7] The courts have also found that, because antidumping duties "derive from a calculated margin of dumping," rather than "from an

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[7] *Federal-Mogul Corp. v. United States*, 813 F. Supp. 856, 872 (Ct. Int'l Trade 1993).

assessment against value," they are unlike "normal customs duties."[8] Furthermore, the courts have upheld the Department's reasoning that deducting antidumping deposits, and even assessed antidumping duties, "would work to open up a margin where none otherwise exists."[9] The reason that the dumping margin would be "artificially" increased, however, is because of what has been called the "recursive effect." The recursive effect results from factoring the AD deposits back into the AD margin calculation through deduction from EP and CEP, such that even with every other variable held constant, the AD margin would increase in each review.[10]

The reasoning affirmed by the courts with respect to antidumping duties, however, is not applicable to the issue of deducting Section 201 duties. While some commenters have drawn analogies between antidumping duties and countervailing duties,[11] no reasonable analogy can be drawn between antidumping duties and Section 201 duties. As the table on the following page shows, Section 201 duties are much more like "normal customs duties" than they are like antidumping duties:

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8 *Hoogevens Stall BV v. United States*, 4 F. Supp. 2d 1213, 1220 (Ct. Int'l Trade 1998).

9 *PQ Corp. v. United States*, 652 F. Supp. 724, 737 (Ct. Int'l Trade 1987).

10 For example, in an AD investigation, NV is 110, gross unit price and EP are 100, and the resulting margin and deposit rate is 10. In the first review, NV remains 110, gross unit price remains 100, but is adjusted by downward by 10 to account for the AD deposits, so EP is 90, and the margin and new deposit rate is now 20. In the next review, with the downward adjustment of 20, EP becomes 80, and the margin rises to 30. This continues (recursively) and the margin increases continually with each review.

11 *See, e.g.,* Comments of de Kieffer & Horgan, on behalf of BGH, at 3-4.

Antidumping Duties	201 Duties	"Normal" Import Duties
Duties imposed on specific unfairly traded imports.	Duties imposed on all imports, with certain exceptions for FTA partners and some developing countries.	Duties imposed on all imports, with certain exceptions for FTA partners and some developing countries.
Rate of duty set based on a determination of the level of prohibited dumping.	Duty rate established by the President, with authority delegated by Congress in the statute, based on policy concerns and the needs of the domestic industry.	Import duty rates today are largely what remains after international trade negotiations, in which the President, through the USTR, with authority from Congress, agreed to terms of rate reductions, balancing policy concerns and the needs of the domestic industry.
Duty rate changes based on administrative reviews.	Fixed duty rate not subject to change in administrative reviews.	Fixed duty rate not subject to change in administrative reviews.
Final duty rate and future deposit rate established after the importation (based on review or not).	Duty rate established in advance of importation.	Duty rate established in advance of importation.
Final duty rate and future deposit rate published in the Federal Register and in instructions to Customs.	Duty rate published in the U.S. Harmonized Tariff Schedule.	Duty rate published in the U.S. Harmonized Tariff Schedule.
Duties based on a calculated margin of dumping.	Duties based on an assessment against the value of the imports. Alternately, while rare, duties may also be fixed - e.g., $0.50 per pound.	Duties based on an assessment against the value of the imports. Alternately, while rare, duties may also be fixed - e.g., $0.50 per pound.
Duty deposits made at the time of entry typically may differ from the final duties, when administrative reviews are requested.	Duty deposits made at the time of entry are the same as what is ultimately owed, barring a successful protest by the importer or change by Customs in the liquidation of the entry to correct a classification or entered value.	Duty deposits made at the time of entry are the same as what is ultimately owed, barring a successful protest by the importer or change by Customs in the liquidation of the entry to correct a classification or entered value.

As this table demonstrates, the rationale articulated by the Department against the deduction of antidumping deposits and duties, as approved by the courts, simply cannot be reasonably applied to the deduction of Section 201 duties. The duties owed because of a Section 201 remedy are fully known at the time of entry and are not subject to change in administrative reviews. Section

201 duties are based on an "assessment against value" exactly like "normal" duties, and are not derived from a margin of dumping or any other calculation. Most importantly, the recursive effect, which is unique to antidumping deposits and duties, does not occur with the proper deduction of Section 201 duties, because Section 201 duties, like "normal" duties, are not determined as part of the AD calculation.[12] Hence, the rationale that the Department has relied on, and which the courts have approved in the past for declining to deduct antidumping deposits and duties is inapplicable. Section 201 duties and antidumping duties are entirely different. The Department must base its determination with respect to the deduction of Section 201 duties on the distinct qualities of those duties, and not on false analogies to other remedies.

III. SECTION 201 DUTIES ARE, IN FACT, U.S. IMPORT DUTIES.

The Department should disregard the suggestion by some commenters that Section 201 duties are somehow not actually U.S. import duties. A number of commenters have suggested that because the duties are imposed to prevent or remedy serious injury and provide domestic industry a period of adjustment, they are not "normal" U.S. import duties;[13] or because the duties are included in a "separate," "special" Chapter of the HTSUS, Chapter 99, they are not actually

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[12] For example, in an AD investigation, NV is 110, gross unit price is 105, the "normal" duty rate is 5, and the 201 duty rate is 5. Thus, adjusted EP is 95, and the resulting margin and deposit rate is 15. In the first review, assuming no changes, NV remains 110, gross unit price remains 105, the "normal" duty rate is 5, the 201 duty rate is 5, adjusted EP is 95, and the resulting margin and deposit rate is, again, 15. The AD margin is not "artificially" and "recursively" increased by the proper deduction of Section 201 duties.

[13] *See, e.g.,* Comments of Akin Gump Strauss Hauer & Feld LLP, on behalf of Changwon Specialty Steel Co., Ltd. and Dongbang Specialty Steel Co., Ltd., at 4-6; Comments of Baker and Hostetler, on behalf of British Columbia Lumber Trade Council, at 7.

part of the U.S. tariff schedule and are not U.S. import duties;[14] or because the duties are proclaimed by the President, they are not "normal" import duties, as "normal" U.S. import duties are established by Congress.[15] As discussed below, however, all of these claims are without merit.

A. The Remedial Nature of Section 201 Duties and the Fact that They are Imposed Following an Investigation and Determination Made Pursuant to International Obligations Has No Effect on Their Status as U.S. Import Duties.

The WTO Safeguards Agreement foresees "tariff increases" as appropriate provisional safeguard measures, *i.e.*, an increase in existing import duties rather than new, special duties.[16] With respect to definitive safeguard measures, Members are permitted to "suspend [an] obligation in whole or in part or to withdraw or modify the concession."[17] The "obligations" and "concessions" referred to in this provision include those made pursuant to the provisions of GATT 1994 and the other WTO Agreements, in particular the obligation to refrain from imposing quantitative restraints and the concessions that Members make in the form of tariff bindings. Thus, a tariff increase pursuant to Article XIX and the Safeguards Agreement is precisely that, an increase in a Member's existing tariff rate to a level that exceeds the Member's agreed bound rate, rather than a new or "special" duty. Likewise, in U.S. law, Section 201 duties do not constitute "special" customs duties simply because they are imposed subsequent to an

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14 *See, e.g.,* Comments of O'Melveny and Myers, at 15; Comments of Akin Gump Strauss Hauer & Feld LLP, on behalf of Changwon Specialty Steel Co., Ltd. and Dongbang Specialty Steel Co., Ltd., at 5-6.

15 *See, e.g.,* Comments of Akin Gump Strauss Hauer & Feld LLP, on behalf of Changwon Specialty Steel Co., Ltd. and Dongbang Specialty Steel Co., Ltd., at 8.

16 *See Agreement on Safeguards*, Article 6.

17 GATT 1994 Article XIX:1(a).

investigation and determination made pursuant to the United States' international obligations. Section 201 duties are U.S. import duties, and properly should be deducted from EP and CEP when they are included in gross unit price.

B. Contrary to the Claims of Some Commenters, Chapter 99 of the HTSUS is Part of the Legal Text of the HTSUS and the Duties Included in Chapter 99 are U.S. Import Duties.

On its face, the *Preface to the 15th Edition* of the HTSUS demonstrates that Chapter 99 of the HTSUS is, indeed, part of the HTSUS. The Preface states:

> The [HTSUS] contains the legal text of the Harmonized Tariff Schedule, as amended and modified, together with statistical annotations established pursuant to section 484(f) of the Tariff Act of 1930, as amended (19 U.S.C. 1484(f)).
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> * * *
>
> The legal text of the HTS includes all provisions enacted by Congress or proclaimed by the President. These legal provisions are the General Rules of Interpretation (GRIs); Additional U.S. Rules of Interpretation; General Notes; Chapters 1 through 99 (organized into sections I through XXII) [etc.]....
>
> * * *
>
> The HTS also contains nonlegal statistical elements-namely, the annotations, notes, suffixes, units of quantity and other matters formulated under section 484(f) of the Tariff Act of 1930. Last, such elements as the Table of Contents, footnotes, Schedule C, Schedule D, alphabetical index, and Change Record are inserted for ease of reference only. The presence or absence of a footnote and the language contained in footnotes have no affect on the legal text or its interpretation, and users are encouraged to consult the Preface, the Change Record and Chapters 98 and 99 to locate any provisions that may apply to specific goods.[18]

Hence, on its face, the Preface to the HTSUS clearly states that Chapter 99 is a part of the legal text of the HTSUS. Chapter 99 is not listed as one of the "nonlegal" elements of the HTS, nor

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[18] *Harmonized Tariff Schedule of the United States*, Supplement 1, Preface, pp. 1-2 (July 2003).

was it "inserted for ease of reference only." In fact, users of the HTSUS are specifically "encouraged" to consult Chapters 98 and 99 "to locate any provisions that may apply to specific goods."

The terms of Chapter 99 itself also support the conclusion that it is indeed a part of the Harmonized Tariff Schedule. The first U.S. Note of Chapter 99 states:

> 1. The provisions of this chapter relate to legislation and to executive and administrative actions pursuant to duly constituted authority, under which:
>
> (a) One or more of the provisions in chapters 1 through 98 are temporarily amended or modified; or
>
> (b) Additional duties or other import restrictions are imposed by, or pursuant to, collateral legislation.[19]

Likewise, U.S. Note 1 of Subchapter III of Chapter 99 states that "[u]nless the context requires otherwise, any article described in the provisions of this subchapter, for which rates of duty are herein provided, if entered during the period specified, is subject to duty at the rate set forth herein in lieu of the rate provided therefor in chapters 1 to 98."[20] Subchapter III includes duties established pursuant to Section 201. Hence, it is clear that the Section 201 duties set out in Chapter 99 are not merely additional duties, but, in fact, the duty rates listed therein temporarily replace the duty rates identified in other Chapters. Thus, there is no reason for the Department to treat the duties set out in Chapter 99 of the HTSUS differently than any other U.S. import duties set out in any other chapter of the HTSUS, and there is no basis for the Department to treat Section 201 duties as anything other than U.S. Import Duties.

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[19] *Harmonized Tariff Schedule of the United States*, Supplement 1, Chapter 99, U.S. Note 1, p. 99-1 (July 2003).

[20] *Harmonized Tariff Schedule of the United States*, Supplement 1, Chapter 99, Subchapter III, U.S. Note 1, p. 99-39 (July 2003) (emphasis added).

This conclusion is underscored by the Department's action in the *Fuel Ethanol from Brazil* case. In that case, which we referenced in our initial comments, the Department deducted temporarily increased "special" tariffs, which were included in the then Tariff Schedules of the United States (TSUS).[21] As the 1985 TSUS shows, "normal" customs duties were set out in eight separate "schedules." The temporary duties on ethyl alcohol were not included in any of those schedules, but were instead included in an "Appendix to the Tariff Schedules." On its face, duties included in Chapter 99 of the current HTSUS would have a stronger claim to "normalcy" over duties included in an "Appendix." That the Department deducted the "special duties" in the *Fuel Ethanol* case is a strong argument that duties included in Chapter 99 must be deducted as U.S. import duties. Therefore, in keeping with is determination in *Fuel Ethanol*, the Department should determine that it is appropriate to deduct Section 201 duties now.

C. Duties Proclaimed by the President are U.S. Import Duties.

Some commenters attempted to differentiate the temporary duties in the *Fuel Ethanol* case from Section 201 duties.[22] They point out that in *Fuel Ethanol*, Congress imposed the duties, which distinguishes them from Section 201 duties, which are proclaimed by the President. Thus, in their view, the *Fuel Ethanol* duties were more like "normal" duties than Section 201 duties, and this justifies the Department in treating those duties and Section 201 duties differently. This distinction, however, is illogical.

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[21] *See Antidumping; Fuel Ethanol from Brazil; Final Determination of Sales at Less than Fair Value,* 51 Fed. Reg. 5,572 (Feb. 1986); *see also Antidumping Proceedings: Treatment of Section 201 Duties: Comments of International Steel Group Inc. and the United Steelworkers of America*, at 11 (October 9, 2003).

[22] *See, e.g.*, Comments of Akin Gump Strauss Hauer & Feld LLP, on behalf of Changwon Specialty Steel Co., Ltd. and Dongbang Specialty Steel Co., Ltd., at 8.

As noted above, the Preface to the HTSUS states that "[t]he legal text of the HTS includes all provisions enacted by Congress or proclaimed by the President." Hence, it is clear that the HTSUS includes U.S. import duties that have been proclaimed by the President. More fundamentally, though, the power to impose any import duties derives from one source: Article I, Section 8, of the U.S. Constitution, which grants to Congress the power to regulate commerce with foreign nations. The Congress, however, has delegated to the President the authority to proclaim modifications, reductions, and increases in duties as part of the authority to negotiate trade agreements.[23] Congress has likewise delegated authority to the President to proclaim increased import duties in Section 201 cases. Thus, the mere fact that the President proclaims Section 201 duties does not transform them into something other than U.S. import duties.

IV. THE PROPER DEDUCTION OF SECTION 201 DUTIES FROM EP AND CEP, WHEN SUCH DUTIES ARE INCLUDED IN THE GROSS UNIT PRICE, DOES NOT "CREATE" DUMPING WHERE NONE EXISTS.

Some commenters suggest that if the Department deducts Section 201 duties from EP and CEP, exporters that are not dumping would suddenly find themselves subject to antidumping duties, or exporters subject to antidumping duties would see their margins "artificially" increased.[24] They claim that such exporters would be innocent victims of a methodological quirk. In one hypothetical example, it is claimed that "[t]he more than 50 percentage point increase to the dumping margin ... is the direct result of deducting 201 duties in the margin calculation."[25] This is simply not true.

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23 *See, e.g., Trade Act of 2002*, Section 2103(a)(B).

24 *See, e.g.,* Comments of Willkie, Farr, and Gallahger, on behalf of Instituto Brasileiro de Siderugica, at 14.

25 Comments of Kaye Scholer, on behalf of KOSA, at 8.

If an exporter (or the related party importer) passes along the increased duties to its unaffiliated customers by increasing the duty paid, delivered (ddp) price accordingly, the proper deduction of Section 201 duties would not result in any increase in the antidumping margin at all. However, if the exporter reduces its price to effectively offset the 201 duty to be assessed where such duties are included in the export price or the related party importer absorbs the increased duties and maintains its ddp price after the import duty rate has been increased, then the price that is returned to the exporter is in fact lower and dumping will have potentially begun or increased. This was made clear in the examples we provided in our initial submission.[26] It is no different than the case where Congress increases the so-called "normal" tariff rate. In that case, the same exporter that chose to absorb the tariff rate increase on a landed cost, duty paid price sale or the related party importer who chose to absorb the duty increase in its resale price in the US would, without question, be found to be dumping if its export price, adjusted downward by the amount of U.S. import duties included in the gross unit price, was less than normal value. It is not the methodology that creates the dumping. It is the pricing behavior of the exporters that creates the dumping. It is incumbent upon the Department to ensure that such dumping is appropriately remedied.

V. THE PROPER DEDUCTION OF SECTION 201 DUTIES WILL NOT RESULT IN A DOUBLE REMEDY OR DOUBLE COUNTING.

Some commenters suggest that by deducting Section 201 duties from EP and CEP, the duties will be "double counted" or the domestic industry will receive a "double remedy."[27] As we explained in our initial comments, this is simply not the case. For another example, assume

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26 *See* Initial Comments of ISG and the USWA, at 15-17.

27 *See, e.g.,* Comments of Akin Gump Strauss Hauer & Feld LLP, on behalf of Changwon Specialty Steel Co., Ltd. and Dongbang Specialty Steel Co., Ltd., at 8-12.

an exporter is selling for $100 f.o.b. foreign port. The unaffiliated importer pays the $10 cost to ship the goods to the U.S., $10 customs duties, and any antidumping duties. If, after a 30 percent safeguard has been imposed, the exporter changes the terms of sale from $100 f.o.b. foreign port to $120 delivered, duty paid, and pays the safeguard duty itself, then it has cut its price by 30 percent. The importer still pays $120 plus the antidumping duties, but the net back to the factory is only $70 ($120 - $10 - $10 - $30). If the dumping margin determined for this exporter does not fully account for the slashed price, then both the safeguard remedy and the antidumping remedy are undermined. By deducting Section 201 duties, an appropriate adjustment is made to EP or CEP and this adjustment is made once and counted once.

It must also be emphasized that the remedial purposes of safeguard actions and antidumping actions are distinct and not mutually exclusive. Safeguard measures remedy serious injury caused or threatened by unanticipated increases in imports. Antidumping measures remedy unfair price discrimination that causes injury. It is certainly possible, and has been the case in the steel sector, that an unexpected injurious increase in imports and injurious dumping can be ongoing at the same time. Nothing in U.S. law, nor in the WTO Agreement, prohibits the U.S. from taking safeguard action and antidumping action at the same time. GATT 1994 Article VI:5, which prohibits a Member from subjecting a product "to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization" clearly does not limit a Member's ability to impose concurrent safeguard and antidumping measures where necessary. The proper deduction of Section 201 duties from EP and CEP where those duties are included in gross unit price, as we demonstrated in our initial comments, ensures that each remedial measure is given its full, intended effect. Deduction of Section 201 duties

does not create a double remedy. Failure to deduct Section 201 duties, however, as we have shown, could undermine both remedies.

VI. THE PROPER DEDUCTION OF SECTION 201 DUTIES WOULD NOT EXTEND SAFEGUARD RELIEF BEYOND WHAT IS PERMISSIBLE UNDER THE WTO SAFEGUARDS AGREEMENT AND WOULD NOT BE UNFAIR TO EXPORTERS.

A number of commenters have suggested that deducting Section 201 duties in an *antidumping* case would impermissibly extend the *safeguard* measure beyond the time period necessary to provide relief, in violation of Article 7.1 of the WTO Agreement on Safeguards.[28] This is an illogical assertion.

As an initial matter, the Department need not decide now what it will do in the future when safeguard duties are no longer applied on particular products. Any issues that may arise with the termination of safeguard relief could be addressed at the time of termination or in reviews subsequent to termination. Many changes occur between one administrative review and the next, such as exchange rate fluctuation, for instance, and these changes are not immediately reflected in the cash deposit rate. Administrative reviews are conducted, in part, to adjust the cash deposit rate to take into account such changes. It should be noted that the Department has had little difficulty in the past addressing systemic changes in a country whose product is subject to a trade remedy proceeding. For instance, in countervailing duty administrative reviews, where a subsidy program was terminated during the course of the review, the Department demonstrated flexibility by assessing the proper countervailing duties for the period of review, while adjusting the duty deposit rate in light of the terminated program. Nothing prevents Commerce from

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[28] *See, e.g.,* Comments of Willkie, Farr, and Gallahger, on behalf of Instituto Brasileiro de Siderugica, at 12-13.

addressing a termination of relief in a review in a manner consistent with the treatment of terminated subsidy programs.

More fundamentally, though, it is simply incorrect to suggest that, by properly deducting Section 201 duties from EP and CEP, safeguard relief would be extended beyond the necessary time period. Safeguard relief is terminated when the President determines to lift the duties. The additional duties imposed pursuant to Section 201 are only collected and paid while safeguard relief is in place, and Section 201 duties that are included in the gross unit price would be deducted from EP or CEP only for entries made during the time period in which the safeguard measures were in place.

An alternative argument advanced by these commenters is that it would be unfair to exporters that have already entered goods into the U.S. at existing deposit rates to have to pay unexpected, additional antidumping duties.[29] This argument, however, is untenable. Where exporters have not passed along the Section 201 duties to unaffiliated customers, but instead have absorbed the duties themselves and intensified their dumping into the U.S. market, it would be improper and contrary to the antidumping law for the Department to not determine an accurate margin of dumping that accounts for this. Some commenters suggested that exporters could not anticipate that the antidumping margins would increase based on a "new methodology" and therefore they did not have an opportunity to adjust their prices accordingly. This is no argument against the Department applying the correct methodology to arrive at accurate calculations of dumping margins. By refusing to pass the tariff increases along to consumers, some exporters have consciously intensified their dumping, and the Department must address

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[29] *See, e.g.,* Comments of Willkie, Farr, and Gallahger, on behalf of Instituto Brasileiro de Siderugica, at 14.

this activity by properly deducting Section 201 duties from EP and CEP where those duties are included in the gross unit price.

VII. THE DEPARTMENT'S DETERMINATION SHOULD NOT BE SWAYED BY THREATS OF LITIGATION IN U.S. COURTS OR AT THE WTO, AND SHOULD NOT TAKE INTO ACCOUNT THE PURPORTED WTO-INCONSISTENCY OF ANY U.S. SAFEGUARD MEASURES.

Several commenters have included in their comments overt threats of litigation in U.S. courts and before the WTO.[30] Obviously, the Department should not take the possibility that some parties may challenge its determination into account in trying to arrive at a proper and well-founded decision. Furthermore, there is nothing in the WTO Agreements that prohibits deduction of Section 201 duties. On the contrary, to make the proper comparison between export price and normal value, "normally at the ex-factory level," called for by Article 2.4 of the WTO Antidumping Agreement, any import duties included in the gross unit price must be deducted, and Section 201 duties, as we have shown, are U.S. import duties. Likewise, as we have demonstrated, the deduction of Section 201 duties is required by the U.S. antidumping statute, and it is reasonable and prudent as a matter of policy, so a determination to properly deduct Section 201 duties is lawful and would withstand scrutiny by U.S. courts.

An alternative suggestion offered by some commenters is that, if the Department determines that it would be appropriate to treat Section 201 duties as U.S. import duties and to deduct them from EP and CEP, the Department should nonetheless decline to deduct duties paid pursuant to safeguard measures that have been ruled WTO inconsistent by the WTO Dispute

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[30] Comments of Herztein, Ehrenhaft, Nolan, and Altman (of Miller and Chevalier), at 7-8.

Settlement Body (DSB).[31] Such a contention is contrary to US law and the US statutory structure for addressing WTO decisions. No U.S. court has found that any Section 201 duties are illegal. The USITC rendered a decision and set of recommendations, which were forwarded to the President, the President published a modification to tariffs. These actions are consistent with US law and for the entries subject to such duties make these duties the duties that must be deducted from US price when included in the price under US antidumping law.

As is true of any other US-legal action with which trading partners disagree, trading partners may file challenges with the WTO if they choose. Such threat does not create a violation of US obligations nor change the statutory obligation of Commerce to administer U.S. law according to its terms. Where there is an adverse WTO panel or Appellate Body decision adopted by the DSB, US law gives the Administration various options for either bringing its actions into conformance or maintaining the practice complained about.[32] As a sovereign nation, the US is not obligated to modify its law but can offer compensation or face retaliation to the extent of adverse trade effects. And as is true for our trading partners as well, even where the U.S. brings itself into conformance such action is prospective and has no effect on US actions that predate such conformance determination. Thus, the arguments raised by certain commentators are legally irrelevant and contrary to the obligations of the Department of Commerce to administer US law as written.

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31 *See, e.g.,* Comments of O'Melveny and Myers, at 15; Comments of Akin Gump Strauss Hauer & Feld LLP, on behalf of Changwon Specialty Steel Co., Ltd. and Dongbang Specialty Steel Co., Ltd., at 2, 20-22.

32 *See* 19 U.S.C. § 3538.

VIII. CONCLUSION

For the reasons presented above and in our initial comments, the deduction of Section 201 duties from the gross unit price in determining export price and constructed export price for purposes of antidumping duty calculations is both required by the statute and appropriate for policy reasons. The statute clearly requires the deduction of all United States import duties when included in the gross unit price, and Section 201 duties are U.S. import duties. Nothing presented in comments by those who oppose the proper deduction of Section 201 duties can diminish this basic factual reality or the statutory mandate.

Likewise, policy concerns also support the deduction of Section 201 duties. Deduction of Section 201 duties would not "create" dumping. Rather it is critical to make such deductions to avoid the blatant masking of dumping that occurs when such duties are not deducted. There would be no "double counting" or "double remedy"; rather failure to deduct would result in the elimination or undercounting of duties. It would do nothing to extend the safeguard measure beyond what is permissible under WTO rules. Indeed, administrative reviews look at facts for specific entries. When 201 duties are no longer assessed, US price will have nothing to deduct as no 201 duties will be reported. In short, none of the policy arguments raised by those opposing deduction of 201 relief have merit. All would result in the frustration of the remedial purpose of the antidumping law and would specifically reward foreign producers for not adjusting prices in the US to reflect higher customs duties. Such an outcome would not only be bad policy but it would be legally wrong.

Accordingly, ISG and the USWA continue to urge the Department to conform its practice to U.S. law by deducting Section 201 duties that are included in gross unit price in antidumping duty calculations.

Respectfully submitted,

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