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

Re: Deducting Section 201 Duties from U.S. Price

On September 3, 2003, the Department of Commerce ("Department") requested comments regarding the propriety of deducting Section 201 duties from gross unit price in determining the export price ("EP") and constructed export price ("CEP") (collectively hereafter "U.S. Price") used in antidumping duty calculations (68 Fed.Reg. 53104). On behalf of Gerdau AmeriSteel Corporation and Commercial Metals Company, we hereby submit that there are strong legal and policy justifications for deducting Section 201 duties in antidumping duty calculations, as follows.

A. The Plain Meaning of the Statute Requires that Section 201 Duties be Deducted from U.S. Price.

The Tariff Act of 1930, 19 U.S.C. § 1677a, describes how U.S. Price is calculated. Section 1677a(c)(2)(A) provides that U.S. Price should be reduced by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject

merchandise from the original place of shipment in the exporting country to the place of delivery in the United States."

A venerable principle of statutory construction states that the plain meaning of a statute controls its interpretation. *See, In Re Venture Mortgage Fund, L.P.*, 282 F.3d 185, 188 (2nd Cir. 2002). Under the plain meaning of Section 1677a(c)(2)(A), Section 201 duties are "United States import duties" because they are "incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." Neither the statute nor the legislative history indicates that Section 201 duties are not "United States import duties." Accordingly, Section 201 duties should be deducted from U.S. Price.

B. The Rationale for Not Deducting Antidumping and Countervailing Duties from U.S. Price Does Not Apply in the Case of Section 201 Duties.

Currently, the Department does not deduct antidumping ("AD") or countervailing duties ("CVD") in calculating U.S. Price. The Court of International Trade has upheld this practice, deferring to the International Trade Commission's interpretation of "United States import duties."[1] In *AK Steel Corp. v. United States*, 988 F.Supp. 594 (CIT 1997), the court noted that the Department's longstanding policy against deducting these duties was based on avoiding "double counting." (Double counting would result if, in calculating U.S. Price, a deduction was made for the very antidumping duties that were used to offset price discrimination between the two markets. *AK Steel Corp*., 998

[1] Even in doing so, the Court of International Trade has expressed concern about whether the Department's practice conforms to the requirements of the statute. *See, U.S. Steel Group v. United States*, 15 F.Supp.2d 892 at 899 (CIT 1998).

F.Supp. at 607-608.) The Department has explained further that "[u]nlike normal duties, which are an assessment against value, AD and CVD duties derive from the margin of dumping or the rate of subsidization found. Logically, AD and CVD duties cannot be part of the very calculation from which they are derived." *Certain Cut-to-Length Carbon Steel Plate from Germany,* 62 Fed.Reg. 18389 at 18395 (Dep't Commerce 1997).

The Department's justification for not deducting antidumping and countervailing duties from U.S. Price is inapposite in the case of Section 201 duties. Section 201 duties do not "derive from the margin of dumping or the rate of subsidization found." Indeed, Section 201 duties are intended to remedy a problem unlike that remedied by AD and CVD duties. Whereas AD and CVD duties are intended to address unfair trade practices, Section 201 duties are imposed when "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." 19 U.S.C. § 2251. Deducting Section 201 duties from U.S. Price, therefore, would not trigger the "double counting" concerns underlying the Department's policy against deducting AD and CVD duties from U.S. Price.

C. Section 201 Duties are "Normal" Import Duties.

As noted above, the Department maintains that AD and CVD duties should not be deducted from U.S. Price because they are "unlike normal duties." *See*, *Certain Cut-to-Length Carbon Steel Plate from Germany,* 62 Fed.Reg. 18389 at 18395. Section 201 duties are, however, more analogous to normal import duties than they are to AD and CVD duties because: (a) like typical *ad valorem* duties, Section 201 duties are assessed

as a percentage of the value of the product (AD and CVD duties derive from the margin of dumping or rate of subsidization found); (b) like typical *ad valorem* duties, Section 201 duties are assessed against all imports of a particular product regardless of where those products are produced (AD and CVD duties are assessed against specific subject merchandise); and (c) Section 201 duties are set forth in the Harmonized Tariff Schedule ("HTS"), which lists all U.S. import duties (AD and CVD duties are not contained in the HTS). This is further evidence that Section 201 duties are normal import duties for purposes of calculating U.S. Price.

D. Refusing to Deduct Section 201 Duties from U.S. Price Would Unjustly Deny a Remedy to Domestic Producers Faced with Both a Surge of Imports as Well as Unfair Trade Practices.

The Section 201 "safe harbor" allows the President to impose duties in order to protect domestic producers against a surge of imports that threaten a domestic industry. When President Bush exercised his authority under the Trade Act of 1974 and imposed tariffs on imports of certain steel products, he stated that the measures would "facilitate efforts by the domestic industry to make a positive adjustment to import competition." President's Proclamation of March 5, 2002 (67 Fed.Reg. 10553 at 10555 (March 7, 2002)).

If a domestic industry is faced with both unfair trade practices *and* a surge of imports, the domestic industry is faced with two distinct problems, the remedies for which are prescribed in the Tariff Act of 1930 and the Trade Act of 1974, respectively. If, in an AD proceeding, the Department does not deduct Section 201 duties in

calculating U.S. Price, the domestic industry would be shortchanged because, in effect, it would be denied the full measure of the remedy prescribed under the Tariff Act of 1930.

Calculating U.S. Price without deducting Section 201 duties would be inequitable and inappropriate and it could result in a lower margin of dumping than would be the case if the merchandise involved was not subject to Section 201 duties. In other words, the presence of Section 201 duties, if not deducted from U.S. Price, could constitute a license to dump merchandise that is subject to Section 201 duties.

E. Conclusion

Deducting Section 201 duties from U.S. Price is necessary in order to provide domestic producers who are entitled to relief under both the antidumping and Section 201 remedies (to counter an import surge and unfairly traded merchandise) just that: the benefit of both remedies. As Section 201 duties are not related to the margin of dumping or rate of subsidization found, deducting Section 201 duties from U.S. Price does not raise any double-counting concerns.

The presence of Section 201 duties, if not deducted from U.S. Price, could constitute a license to dump merchandise that is subject to Section 201 duties because the presence of Section 201 duties could result in a lower margin of dumping than would be the case if the merchandise involved was not subject to Section 201 duties.

The Department of Commerce should deduct Section 201 duties from U.S. Price.

This is the only result that is supported by the law, logic and policy.

Respectfully submitted,

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