Before the United States Commerce Department
International Trade Administration

Comments of
The European Confederation of Iron and Steel Industries
(EUROFER)
On the Propriety of Deducting
Section 201 Duties in Antidumping Margin Calculations

Charles H. Blum
US Representative
International Advisory Services Group, Ltd.
1620 I Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 296-6625

October 9, 2003

Introduction and Summary

In response to the Federal Register notice issued by the Department of Commerce on September 9, 2003,[1] this submission offers the comments of the European Confederation of Iron and Steel Industries ("EUROFER") on the appropriateness of deducting Section 201 duties in antidumping duty calculations. EUROFER appreciates this opportunity to comment on a matter of vital concern to its members. Collectively, EUROFER members produce more than 160 million metric tonnes of crude steel and are major exporters of rolled steel products to the United States.

In summary, EUROFER urges the Department to adopt the position that Section 201 duties not be deducted from the export price ("EP") or constructed export price ("CEP") in making antidumping ("AD") comparisons. This position was adopted by the Department in its preliminary recommendation in *Steel Wire Rod from Trinidad and Tobago*[2] and is consistent with the antidumping statute's prescription that the Department deduct normal import duties. It is clear that Section 201 duties are not "normal import duties" and that they do not fall within any other adjustment permitted by the antidumping statute. Thus, any decision to deduct Section 201 duties from AD comparisons would be contrary to U.S. law. Moreover, the deduction of Section 201 duties would also likely violate the international obligations of the United States. Finally, as a matter of policy, the deduction of Section 201 duties would have unfair, and

---

1 *See* 68 Fed. Reg. 53104 (September 9, 2003). These comments address Section 201 duties only; we reserve the right to address countervailing duty issues in the rebuttal phase.

2 *See* Memorandum to Bernard T. Carreau, Deputy Assistant Secretary for AD/CVD Enforcement II, from Gary Taverman, Director, Office 5, AD/CVD Enforcement, in Case No. A-274-804 regarding Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago dated August 13, 2002 (herein after "Recommendation Memorandum").

devastating consequences for exporters to, as well as importers and consumers in, the United States. For these reasons, we urge the Department to reaffirm its current policy.

I. The Department's Preliminary Decision On This Issue Should Be Adopted

In the antidumping proceeding involving *Steel Wire Rod from Trinidad and Tobago,*[3] the Department decided not to deduct Section 201 duties in the course of making antidumping price comparisons. In its preliminary recommendation memorandum, the Department appropriately and soundly concluded that the deduction of such duties would be inconsistent with its longstanding practice regarding remedial duties.[4] The Department has expressly acknowledged that this policy has been upheld by the Court of International Trade.[5] Given that antidumping duties, countervailing duties and Section 201 duties are all intended to remedy various forms of injury, the Department rightly considered the deduction of Section 201 duties to be inappropriate. Thus, in the considered view of the Department, neither the statute nor any policy consideration required the deduction of such special duties.

II. A. The Antidumping Statute Does Not Require The Deduction Of Section 201 Duties

Nothing in the antidumping statute authorizes or requires the Department to deduct Section 201 duties in the calculation of antidumping duty margins. Section 772(c) of the Trade Act of 1930 makes clear that the Department must deduct certain costs and expenses from the

---

3 *See* Memorandum to Faryar Shirzad, Assistant secretary for Import Administration, from Bernard T. Carreau, Deputy Assistant Secretary for AD/CVD Enforcement II, in Case No. A-274-804, Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago (herein after "Final Decision Memorandum").

4 *See* Final Decision Memorandum at 4 *citing* 19 U.S.C. §1677f 1(a)(2).

5 *See* Recommendation memorandum at 2,3, *citing Hoogovens Staal v. United States*, 4 F.Supp. 2d 1213 (1998) and *Bethlehem Steel v. United States*, 27 F. Supp. 2d 201 (1998).

starting price in the United States (EP or CEP), including "United States import duties" and "additional costs, charges or expenses" incident to importing the merchandise to the United States.

While not defined by statute or legislative history, "United States import duties" have consistently been distinguished from "special duties." The former comprises "normal import duties" and excludes special duties applied to offset particular trade situations. The Department has argued, and the courts have agreed, that Section 772(c) of the Act requires the deduction of "normal import duties" and that cash deposits of estimated antidumping duties are not normal import duties.[6]

The courts also have affirmed the Department's determination that actual antidumping and countervailing duties cannot be deducted from the U.S. side of the antidumping equation, reasoning that a decision to deduct these duties "would reduce the U.S. price – and increase the margin – artificially." *Hoogovens Staal BV* v *United States*, 4 F. Supp. 1213, 1220 (CIT 1998).[7]

By the same logic, Section 201 duties cannot be considered normal import duties. Normal import duties are negotiated by governments and bound by international agreements, imposed by law after Congressional action, and applied generally to all imports, irrespective of the condition of a U.S. industry. By contrast, Section 201 duties, like AD/CVD duties, are unilateral measures intended as a special remedy, applied at the conclusion of an administrative

---

6 *See, e.g., Federal Mogul Corporation v. United States*, 17 C.I.T. 88; 813 F. Supp. 856, 872 (Ct. Int'l Trade 1993).

7 See *also* Carbon Steel Plate from Germany, 62 Fed. Reg. 18390, 18394 (4/15/97), affirmed in *US Steel Group v United States*, 15 Fed. Supp. 2d 892 (CIT 1998). *See also AK Steel v United States*, 988 Fed. Supp 594 (CIT 1997) affirming Certain Corrosion Resistant Carbon Steel Flat Products from Korea, 61 Fed. Reg. 18547, 18552 (4/26/96).

proceeding for a limited period of time, to just those imports that have been determined to be injurious to a U.S. industry. The purpose of Section 201 duties is to provide an injured U.S. industry the opportunity to make a positive adjustment to import competition and to promote the overall public interest.

As noted in the Recommendation Memorandum, the remedial character of Section 201 duties makes them similar to AD and CVD duties. The Department reasoned that "just as antidumping duties derive from a special calculation of price discrimination, Section 201 duties derive from a special calculation of the amount necessary to 'facilitate efforts to make a positive adjustment to import competition.' "[8]

As yet another reason for treating antidumping duties to be outside the rubric of "normal customs duties," the Department has noted that antidumping duties may be applied to duty-free merchandise.[9] The same distinction applies to Section 201 duties.

For these reasons alone, Section 201 duties should be considered as "special duties." As such, they should not be deducted in calculating U.S. price (EP or CEP).

Under the antidumping statute, "costs ... incident to importing" are deemed to cover charges necessary to transport the merchandise, such as port charges, ocean freight and insurance, and handling costs. This phrase is not intended to cover extraneous charges, such as special duties, imposed by the U.S. government as a remedial trade measure. As a matter of

---

8 Recommendation Memorandum at 3.

9 In distinguishing antidumping duties from normal customs duties, the Department referred to section 202(a) of the Tariff Act of 1921, which "provided that 'special dumping duties' may be applied to 'duty-free merchandise.'" *See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 18404 (April 15, 1997).

longstanding practice, the Department has not treated estimated or final antidumping or countervailing duties as import duties or costs.[10]

The Department's practice on special duties has been upheld by the Courts.[11] The Court of International Trade has specifically held that antidumping and countervailing duties are neither a normal import duty nor an extra "cost" or "expense" to the importer.[12]

It is only logical, then, that the Department should conclude, as it did in the Recommendation Memorandum, that Section 201 duties are analogous to antidumping duties and therefore do not constitute selling expenses or other charges that should be deducted in calculating dumping margins.[13]

II.B. WTO Agreements Neither Require Nor Justify The Proposed Deduction of Section 201 Duties

As with U.S. law, nothing in the WTO agreements requires or authorizes the United States to deduct safeguard remedies in the calculation of dumping margins. To the contrary, it would appear that such a practice could violate some basic WTO obligations.

First, and most notably, the deduction of Section 201 duties would impermissibly prolong their impact far beyond the time necessary to alleviate any serious injury to a domestic industry resulting from increased imports. Article 5 of the WTO Safeguards Agreement provides that a

---

10 *See Hoogovens Staal*, 4 F.Supp. 2d at 1220.

11 *Id.*

12 *Id.*

13 Recommendation Memorandum at 3.

safeguard remedy may be imposed only to the extent and for such a time as may be necessary to remedy serious injury and facilitate a positive adjustment to import competition.[14] Given the retrospective nature of the U.S. antidumping system, the impact of section 201 duties would generate inflated cash deposit requirements for two years or more after the termination of the safeguard measure. Such unwarranted protection would be directly contrary to the requirements of the Safeguards Agreement.

Second, 201 duties are intended to have the same across-the-board effect on exports from all subject countries. By deducting the full amount of 201 duties from EP/CEP, the U.S. would discriminate against countries whose exports are subject to an antidumping order, by treating their shipments in a different manner than shipments from countries not subject to antidumping duties (i.e., by requiring that a producer/exporter of merchandise subject to an antidumping order pass on the full amount of 201 duties).

Third, importers of merchandise subject to Section 201 duties have been required to deposit special, remedial duties of up to 30 percent of import value with Customs at time of entry. These duties must be deposited regardless of whether the goods are or are not subject to an antidumping order and regardless of whether the producer/exporter has raised its prices by the amount of the duties. This is the remedy which Domestic Producers requested (rather than asking for an import quota) and this is the remedy which the Administration imposed. If the Department now were to require that these 201 duties must be deducted in calculating dumping margins, importers who have already paid 201 duties with their entries would now be required to

---

[14] Moreover, regardless of whether the serious injury sustained by the domestic industry has been remedied, the Safeguards Agreement limits the imposition of safeguard remedies to a maximum of eight years.

pay additional antidumping duty solely because of the existence of the 201 remedy. Thus, the additional duty which the importers will be paying and the U.S. government will be collecting as a result of the 201 proceeding will exceed the duty which the Administration determined was sufficient to remedy the injury. This additional collection is impermissible under the International Safeguard Agreement and U.S. law.

III. There Are Important Policy Reasons Not To Deduct Section 201 Duties

None of the major trading partners of the United States has adopted the practice of deducting safeguard duties in making AD comparisons. This is not surprising in that such a practice would clearly violate the international obligations of any WTO member. Beyond the legal considerations, however, there are also important policy reasons not to deduct Section 201 duties from U.S. price in a dumping calculation. In essence, the proposed change in practice would:

- exaggerate the impact of Section 201 remedies for those exporters who are also subject to an antidumping order;
- magnify the uncertainty for both importers and exporters;
- compound the problem of ensuring adequate supply to United States consumers dependent on foreign sources of subject merchandise; and
- in the retrospective U.S. antidumping system, extend the effects of Section 201 duties for years after they have been terminated.

In deciding on the imposition of relief under Section 201, the President is required to determine that the specific measures he proclaims will serve the public interest. The statute

specifically requires that the level of duties be calibrated so that they provide greater economic and social benefits than costs.[15] The above effects would greatly complicate and quite likely invalidate any such determination.

Finally, it would be grossly unfair to exporters, importers and their U.S. customers to alter the rules of the game after a transaction is completed. For them, they would have no way to adjust the terms of completed transactions to comply with a new set of rules imposed *ex post facto*.

IV. **Conclusion**

For the above legal and policy reasons, the proposed change would be unlawful, unnecessary, and unwise. The Department should confirm its established practice of not deducting Section 201 or other special duties in making antidumping comparisons.

---

15 *See* 19 U.S.C. § 2253(a)(1)(A).