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Section 201
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The Honorable James J. Jochum
Assistant Secretary for Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
14th and Constitution Ave., N.W.
Washington, DC 20230

Attention: Section 201 Duties

Re: Section 201 Duties: Comments of Long Products Producers Coalition, Nucor Corporation, and the Rebar Trade Action Coalition

Dear Assistant Secretary Jochum:

On behalf of the Long Products Producers Coalition,[1] Nucor Corporation, and the Rebar Trade Action Coalition,[2] we submit the following comments in response to the Department's request for comments regarding the treatment of section 201 duties and countervailing duties.[3] The nature of section 201 import duties makes it clear that these duties, like other U.S. import

[1] The Long Products Producers Coalition is an ad hoc trade association, the members of which are domestic producers of carbon and alloy steel products including hot-rolled bars and light shapes, steel concrete reinforcing bars, and cold-finished bars.

[2] The Rebar Trade Action Coalition is an ad hoc trade association, the members of which are domestic producers of steel concrete reinforcing bars

[3] 68 Fed. Reg. 53,104 (Sept. 9, 2003).

duties, should be deducted from the gross unit price to determine export price or constructed export price.[4]

Section 772(c)(2)(A) of the Tariff Act of 1930, as amended, provides that the price used to establish export price and constructed export price shall be reduced by—

> Except as provided in paragraph (1)(C), 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.[5]

The proviso in paragraph (1)(C) of section 772(c) is that the export price and constructed export price is to be increased by "the amount of any countervailing duty imposed on the subject merchandise under subtitle A to offset an export subsidy." That is, the only duty that is to be added to the U.S. price is the countervailing duty arising from export subsidies. The proviso does not apply to countervailing duties arising from domestic subsidies, or to any other duties.

As the courts have noted, the statute does not define the terms "United States Import Duties," or " … Costs, Charges or Expenses" in section 772(d).[6] The courts have stated that, in the absence of such a definition, they will uphold the Department's "reasonable interpretation."[7] If the Department were to change its "reasonable interpretation," the courts would likely uphold

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4 We do not take a position on the issue of whether countervailing duties should be deducted.

5 19 U.S.C. § 1677a(c)(2)(A) (2001) (emphasis added).

6 *Hoogovens Staal BV v. United States*, 4 F. Supp. 2d 1213, 1220 (Ct. Int'l Trade 1998); *AK Steel Corp. v. United States*, 988 F. Supp. 594, 607 (Ct. Int'l Trade 1997). AK Steel had argued that antidumping duties are either "United States import duties" or, alternatively, other "costs, charges or expenses … incident to bringing the merchandise from the place of shipment … to the place of delivery in the United States."

7 *Id.*

the Department as long as it offered an explanation for the change. At the time of the courts' decisions, the Department's interpretation was that antidumping duties were not "United States import duties" because they "derive from a calculated margin of dumping, not from an assessment against value, as is the case for normal customs duties."[8] The Department said they were not "costs" because deducting antidumping duties would, in effect, double-count the margin.[9] The courts (and the Department) have tended to lump antidumping and countervailing duties together in their discussion of the issue, and have come to the same result with regard to both types of duties.[10]

With regard to section 201 duties, the Department first confronted the issue in *Carbon and Certain Alloy Steel Wire Rod From Trinidad and Tobago.*[11] In the preliminary determination, the Department decided not to deduct section 201 duties.[12] But, for the final determination, the Department declined to reach a decision on the issue, pending a "full opportunity for comments by all parties." The Department's current notice is evidently that opportunity. The Department properly chose not to implement any policy in its *Wire Rod* final determination. In fact, its preliminary analysis was flawed, as explained in detail below.

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8 *Hoogovens,* 4 F.Supp. 2d at 1220.

9 *Id.*

10 *AK Steel*, 988 F. Supp. at 607.

11 Decisions Memorandum for the Final Determination of the Antidumping Duty Investigation from Bernard T. Carreau to Faryar Shirzad: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago at Comment 2 (Aug. 30, 2002).

12 Recommendation Memorandum – Section 201 Duties and Dumping Margin Calculations in Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago from Gary Taverman to Bernard T. Carreau (Aug. 13, 2002) ("Recommendation Memo").

I. SECTION 201 DUTIES ARE U.S. IMPORT DUTIES

The tariffs imposed as part of the President's 201 remedy proclamation are U.S. import duties, as described in Section 772 of the Tariff Act. Like all other import duties, section 201 duties are published in the "Harmonized Tariff Schedule of the United States" ("HTS").[13] The President's Proclamation with regard to the Steel 201 Remedy included an Annex that modified the HTS to include a schedule for the assessment of the section 201 duties.[14] For example, HTS number 9903.72.61, for certain flat-rolled steel products entered between March 20, 2003, and March 19, 2004, the duty is "the rate provided in ch. 72 + 24%." The latter figure is the *ad valorem* amount of the section 201 duty for those flat-rolled steel products during the second year of the remedy.[15] Section 201 duties are, in short, the equivalent of the other normal import duties that are assessed in the United States.

The Department's preliminary recommendation memorandum suggested that "section 201 duties are not treated as normal customs duties in the Harmonized Tariff Schedule of the United States (HTSUS); they appear in a separate schedule for temporary duties at subchapter III of chapter 99."[16] This is a distinction without a difference. The first note to Chapter 99 of the HTS states: "The duties provided for in this subchapter are cumulative duties which apply in addition to the duties, if any, otherwise imposed on the articles involved. The duties provided for in this subchapter apply only with respect to articles entered during the period specified in the

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[13] *Available at* http://dataweb.usitc.gov/SCRIPTS/tariff/toc.html.

[14] The Annex is *available at* http://www.ustr.gov/sectors/industry/steel201/2002-03-05-annex.PDF.

[15] A sample page from the HTS is attached as Exhibit 1.

[16] Recommendation Memo at 3.

last column." There is nothing in the notes, or anywhere else, that indicates that these duties are considered anything other than "U.S. import duties," even if they are "additional" U.S. import duties. In this regard, the statutory language is again instructive. Section 772 does not apply only to "normal customs duties." Instead, the statute requires the deduction of "the amount, if any, included in such price, attributable to . . . U.S. import duties." By the way the HTS is structured, the inclusion of the section 201 duties within the tariff schedule alone confirms that the section 201 duties are within the definition of "U.S. import duties."

II. DEDUCTING SECTION 201 DUTIES WOULD NOT BE "DOUBLE-COUNTING"

Furthermore, deducting the amount for section 201 duties in the calculation of export price (or CEP) does not constitute "double-counting" any more than deducting the amount for other import duties would be. The Recommendation Memo purports to show how double-counting occurs, explaining as follows: "if the section 201 duty were 20 percent *ad valorem*, and the entered value of an entry subject to the duty were $10.00, one would expect the U.S. government to collect a $2.00 remedial duty. If the Department were to deduct the 201 duty from EP and CEP, however, approximately $2.00 would be added to the antidumping duty, and the total impact of the section 201 remedy would be $4.00."[17]

This example is oversimplified in several important respects. First, this is precisely the approach of the Department with respect to "normal" customs duties. Nobody disputes that "normal" customs duties are to be deducted from the gross unit price. Still, if the customs duty were 5 percent, and the entered value were $10.00, one would expect the government to collect a

[17] Recommendation Memo at 3.

$0.50 duty. Following the logic of the Department's example above, when the government deducts the duty from the gross unit price, $0.50 would be added to the dumping duty, and the total impact of the customs duty would be $1.00. Yet, the Department has no problem with deducting the customs duty from the gross unit price. When the importer is an affiliated importer, and taking the import duty into effect when setting its price to the unaffiliated purchaser, the importer should charge $10.50 (plus the importer's expenses and the importer's profit).[18] By taking the import duty into account up front—a normal and rational business decision—there would be zero impact from the customs duty, and the amount of the dumping margin would depend on the normal value.

Second, the Department's example fails to account for the intended marketplace effect of the 201 duties. Looking at the Department's scenario again, but assuming that the importer took the section 201 duties into consideration when setting its price, we see a different result: The section 201 duty is 20 percent, the entered value is $10.00, and the affiliated importer charges the customer $12.00 (assuming no other adjustments). The normal value is $11.00. Then, even though the Department deducts the section 201 duty, the impact of the section 201 duty on the margin is zero. The affiliated importer has taken the section 201 duty into account when setting its price, but to avoid dumping the importer should have charged $13.00 rather than $12.00, in order to make sure that the U.S. CEP was not lower than the normal value.[19] Section 201 duties are intended to raise the price to the U.S. purchaser temporarily, in order to allow for recovery

[18] In an EP situation, when the purchaser is the importer of record, neither the "normal" customs duty nor the section 201 import duty enters into the calculation of the net price, since they were not included in the price to the first unaffiliated purchaser.

[19] The goal of the calculations of normal value and EP or CEP is to get back to an ex-mill price. Section 201 duties must be deducted to reach that price.

and adjustment by the U.S. industry. To the extent the price to the purchaser is not increased to account for the section 201 duties, the foreign producer is dumping.

III. FAILURE TO DEDUCT SECTION 201 DUTIES UNDERCUTS THE REMEDIAL PURPOSE OF THOSE DUTIES

Following the recent Steel 201 remedy, when the President imposed duties of up to 30 percent on certain steel products, the landed, duty-paid price of these products did not rise by anywhere near 30 percent. Either the declared entered value was drastically reduced, so that a 30 percent additional import duty was not reflected in the price to the customer, or, in a CEP situation, the affiliated sales company in the United States absorbed the duty so that it was not reflected in the price to the customer. This subverts the purpose of the remedy and the statute, which is to ensure that increased prices are passed through to the marketplace during the temporary relief period, in order to facilitate industry restructuring and investment. Either way, deducting the section 201 import duties in the same way that other import duties are deducted from the gross unit price would prevent this circumvention of the remedial effect that the section 201 action was intended to have.

IV. SECTION 201 DUTIES ARE DIFFERENT FROM ANTIDUMPING AND COUNTERVAILING DUTIES

Finally, section 201 duties are different from antidumping and countervailing duties. They do not derive from a calculated margin of dumping or subsidization, but are instead an assessment against value, as are other U.S. import duties. Section 201 duties do not qualify for payments under the Byrd Amendment. Section 201 duties do not trigger a suspension of liquidation and the deposit of provisional duties pending a final review—they are assessed

immediately upon entry, like all other U.S. import duties. This critical distinction in terms of assessment differentiates section 201 duties from unfair trade remedies.

The Department's Recommendation Memo in *Wire Rod from Trinidad and Tobago* opined 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 by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.'"[20] The process by which the amount of duties is decided upon in section 201 actions is nowhere near like the process by which an antidumping or countervailing duty is calculated. As the Department well knows, those calculations (especially for antidumping duties) involve lengthy computer programs processing voluminous databases through several hundred steps. There is, by contrast, no similar calculation regarding the size of the section 201 duty, nor is one possible. It is as much a political calculation as anything else. If anything, the establishment of 201 duties is more similar to the decisions regarding the rates of other customs duties, which were originally imposed in order to help domestic industries compete with foreign producers. In the case of both section 201 duties and other import duties, the tariff rate is arrived at after consideration of the amount needed to help domestic industries compete with imports balanced against other considerations such as the impact on consumers. The results in both cases are an imprecise compromise, far different from the very precise calculations of antidumping and countervailing duties, which are calculated down to the second decimal place.

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[20] Recommendation Memo at 3.

In short, section 201 duties fall within the definition of "United States import duties." Section 772(c)(2)(A) of the statute, on its face, therefore, calls for the deduction of section 201 duties from the price. Moreover, the remedial purpose of the 201 tariffs will be negated without such deduction. We respectfully request that the Department clarify its practice to state that in any antidumping proceeding involving products subject to section 201 duties, the amount of the duties will be deducted from the gross unit price in the calculation of the export price or the constructed export price.

If you have any questions concerning this submission, please do not hesitate to contact us.

Respectfully submitted,

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Alan H. Price
Timothy C. Brightbill

Counsel to
Long Products Producers Coalition
Nucor Corporation
Rebar Trade Action Coalition

EXHIBIT 1

Heading/ Subheading	Stat. Suf-fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
		Flat-rolled products of steel (other than stainless steel or tool steel) which are either (i) not cold-rolled, of a thickness of 4.75 mm or more, not in coils and not plated or coated, or (ii) clad but not plated or coated (all the foregoing provided for in subheading 7208.40.30, 7208.51.00, 7208.52.00, 7208.90.00, 7210.90.10, 7211.13.00, 7211.14.00, 7225.40.30, 7225.50.60 or 7226.91.50), other than products of Canada, Israel, Jordan and Mexico and products of countries exempted by U.S. note 11(d) to this subchapter (except products of Brazil) (con.):				
		Other:				
9903.72.60	1/	If entered during the period from March 20, 2002, through March 19, 2003, inclusive	1/	The rate provided in ch. 72 + 30%	The rate provided in ch. 72 + 30%	The rate provided in ch. 72 + 30%
9903.72.61	1/	If entered during the period from March 20, 2003, through March 19, 2004, inclusive	1/	The rate provided in ch. 72 + 24%	The rate provided in ch. 72 + 24%	The rate provided in ch. 72 + 24%
9903.72.62	1/	If entered during the period from March 20, 2004, through March 20, 2005, inclusive	1/	The rate provided in ch. 72 + 18%	The rate provided in ch. 72 + 18%	The rate provided in ch. 72 + 18%
		Flat-rolled products of steel (other than stainless steel or tool steel) not further worked than hot rolled, the foregoing either (i) in coils or (ii) not in coils and of a thickness of less than 4.75 mm (provided for in subheading 7208.10.15, 7208.10.30, 7208.10.60, 7208.25.30, 7208.25.60, 7208.26.00, 7208.27.00, 7208.36.00, 7208.37.00, 7208.38.00, 7208.39.00, 7208.40.60, 7208.53.00, 7208.54.00, 7211.14.00, 7211.19.15, 7211.19.20, 7211.19.30, 7211.19.45, 7211.19.60, 7211.19.75, 7225.30.30, 7225.30.70, 7225.40.70, 7226.91.70 or 7226.91.80), other than products of Canada, Israel, Jordan and Mexico and products of countries exempted by U.S. note 11(d) to this subchapter (except products of Brazil):				
		Goods excluded from the application of relief under U.S. note 11(b) to this subchapter:				
9903.72.65	1/	Enumerated in U.S. note 11(b)(xv) to this subchapter and designated as X-032	1/	No change	No change	No change
9903.72.66	1/	Enumerated in U.S. note 11(b)(xvi) to this subchapter and designated as X-046	1/	No change	No change	No change
9903.72.67	1/	Enumerated in U.S. note 11(b)(xvii) to this subchapter and designated as X-061or X-011	1/	No change	No change	No change
9903.72.68	1/	Enumerated in U.S. note 11(b)(xviii) or 11(c)(ccx) to this subchapter and designated as X-075	1/	No change	No change	No change
9903.72.69	1/	Enumerated in U.S. note 11(b)(xix) to this subchapter and designated as X-108	1/	No change	No change	No change
9903.72.70	1/	Enumerated in U.S. note 11(b)(xx) to this subchapter and designated as X-116	1/	No change	No change	No change
9903.72.71	1/	Enumerated in U.S. note 11(b)(xxi) to this subchapter and designated as X-122	1/	No change	No change	No change

1/ See chapter 99 statistical note 1.

Note.–At the close of March 21, 2006, subheadings 9903.72.30 through 9903.74.24 and the superior texts thereto shall be deleted from the HTS, as provided for in Presidential Proclamation 7529.