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Acting Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
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PUBLIC DOCUMENT

Re: ***Comments on Duty Drawback Practice in Antidumping Proceedings***

Dear Assistant Secretary Spetrini:

On June 30, 2005, the U.S. Department of Commerce (the "Department") published in the Federal Register a request for comments regarding the appropriate duty drawback adjustment policy and practice to be employed by the Department in future antidumping proceedings.[1]

These comments respond to the Department's June 30, 2005 request, specifically addressing the three questions posed by the Department in the notice. First, the Department sought comments on what the requirements should be for making a duty drawback adjustment in an antidumping proceeding, and particularly whether any changes to the Department's current practice would be required to implement any suggested modification. The second question to be considered was how the amount of the duty drawback adjustment is to be determined, assuming

[1] *Duty Drawback Practice in Antidumping Proceedings*, 70 Fed. Reg. 37764 (Dep't Comm. June 30, 2005).

that some domestically sourced and some imported material was used. And finally, the Department laid out a scenario in which duty drawback is claimed for some, but not all, exports incorporating the material input in question, and asking for proposals regarding how the amount of any duty drawback adjustment should be determined. In order to fully address the concerns presented in the Department's questions, the comments below handle each question in turn.

It is important to emphasize at the outset, however, that the Department itself acknowledges that there has been a longstanding policy in antidumping proceedings, based on Section 772(c)(1)(B) of the Tariff Act of 1930, of granting a duty drawback adjustment to export price where a respondent party establishes that: (1) the import duty paid and the rebate payment are directly linked to, and dependent upon one another (or the exemption from import duties is linked to exportation); and (2) there are sufficient imports of the imported raw material to account for the amount of drawback received upon the exportation of the manufactured product. Time and time again, even as recently as two months ago, both the Department and the Court of International Trade have rejected any deviation from the Department's two-prong test, reiterating that only the above two requirements need be satisfied for a duty drawback adjustment to be granted.[2] We submit that, under the present circumstances, a departure from the Department's longstanding and well-refined practice is not warranted.

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[2] *See Allied Tube & Conduit Corp. v. United States*, Slip Op. 05-56, 2005 Ct. Intl. Trade LEXIS 58 (Ct. Int'l Trade May 12, 2005); *Chang Tieh Industry Co. v. United States,* 17 CIT 1314, 1320, 840 F. Supp. 141, 147 (Ct. Int'l Trade 1993); *Avesta Sheffield, Inc. v. United States*, 17 CIT 1212, 1214-1215, 838 F. Supp. 608, 611 (Ct. Int'l Trade 1993); *Light Walled Rectangular Pipe and Tube from Turkey,* 69 Fed. Reg. 53675 (Dep't Comm. Sept. 2, 2004) (final determ.); *Stainless Steel Sheet Strip in Coils from Mexico*, 68 Feg. Reg. 6889 (Dep't Comm. Feb. 11, 2003) (final results); *Certain Welded Stainless Steel Pipe From the Republic of Korea*, 57 Fed. Reg. 53693 (Dep't Comm. Nov. 12, 1992) (final determ.); *Certain Welded Stainless Steel Pipes From Taiwan*, 57 Fed. Reg. 53705 (Dept. Comm. Nov. 12, 1992) (final determ.); *Steel Wire Rope from India*, 56 Fed. Reg. 46285 (Dep't Comm. Sept. 11, 1991) (final determ.).

I. Congressional Intent, International Obligations and Commercial Realities Dictate That There Be No Change to the Department's Two-Prong Test for Duty Drawback Adjustment

A. The Clear Language of the Statute and its Congressional Intent Provide No Support for Adding a Third Prong to the Department's Test Regarding Duty Drawback Adjustments

In order to obtain an adjustment to U.S. price for duty drawback, Section 772(c)(1)(B) of the Tariff Act of 1930 does not require a foreign producer to demonstrate that it paid duties on raw materials, but rather, said producer must merely show that it would have paid duties or that duties would not have been refunded on the raw materials had the finished product not been exported to the United States. Nor does the clear language of Section 772(c)(1)(B) of the Act require the type of inquiry that the Department's notice seems to be considering regarding whether the price for products sold in the home market must necessarily include duties paid for imported inputs. "Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter."[3]

Under Section 772(c)(1)(B) of the Act, United States price must be increased by "the amount of import duties *imposed* by the country of exportation which have been rebated."[4] The statute dictates that U.S. price be adjusted by the amount of any import duties that have been rebated or not collected by reason of exportation. The only limitation placed on the duty drawback adjustment is that the adjustment to the U.S. price may not exceed the amount of import duty actually paid.[5] The statute definitively mandates the grant of the duty drawback

[3] *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998).
[4] *Carlisle Tire & Rubber Co., Div. of Carlisle Corp. v. United States*, 10 CIT 301, 307, 634 F. Supp. 419, 424 (Ct. Int'l Trade, 1986) (emphasis in original).
[5] *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 70 Fed. Reg. 12443, Issues and Decision Memorandum, Comment 4 (Dep't Comm. March 14, 2005) (final results).

adjustment without any reference to whether products sold in the home market are made with imported raw materials.[6]

Furthermore, the legislative history of the antidumping law itself confirms that Congress intended that the antidumping calculation be conducted in a tax-neutral fashion. During the process leading to enactment of the original Antidumping Act, the Senate approved a provision that allowed upward adjustment to U.S. price to prevent a dumping margin from arising solely due to a foreign government's forgiveness of taxes on exports.[7] The House-Senate Conference Committee responsible for reconciling the bills from the separate houses of Congress adopted the Senate provision, and this version became law.[8] Thus, Congress specifically endorsed adjusting U.S. price in an effort to create a tax-neutral comparison between export price and normal value. As the purpose of the Tariff Act is to ensure a measure of tax neutrality, it would be counter to Congressional intent for antidumping duties to create margins where none exist, which would be the result if the Department required a respondent party to demonstrate payment of import duties on raw material inputs used to produce merchandise sold in the home market. The policy of tax neutrality behind the adjustment to export price for uncollected import duties requires nothing more than an adjustment for antidumping duties on the basis of the Department's two-prong test, in order to avoid the artificial creation of dumping margins.

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[6] *See Certain Welded Stainless Steel Pipe from Republic of Korea*, 57 Fed. Reg. 53693 (Dep't Comm. Nov. 12, 1992) (final determ.).
[7] *See* S. Rep. No. 16, 67th Cong., 1st Sess. 2, 12 (1921).
[8] The Antidumping Act, ch. 14 §§ 203, 204, 42 Stat. 9, 12, 13 (1921) (codified at 19 U.S.C. §§ 1677a(d)(1)(C), 1677b (2005)).

B. The United States' International Obligations Demand the Department to Maintain Its Present Policy Which Satisfies the Applicable International Agreements

The General Agreement on Tariffs and Trade ("GATT"), as integrated into the WTO Antidumping Agreement, supports the proposition that tax differences, which the duty drawback adjustment seeks to level, should not affect antidumping duties. Article VI (1) describes the conditions under which dumping takes place. The text of the WTO Agreement describes the exact situation that the Department highlighted as precipitating their notice for comments in that the duties were exempted by reason of exportation of the merchandise, requiring that no antidumping duties be imposed "by reason of the exemption" of duties due to exportation. As Article VI prescribes, "no product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."[9] It would be remiss for the Department to move away from WTO-compliance by changing its present policy regarding duty drawback adjustment.

As explained by the Court of Appeals for the Federal Circuit in *United States v. Federal Mogul Corp.*, "GATT agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations."[10] The U.S. Supreme Court's expression of this cannon of construction can be applied to weigh the options at hand: "It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction

[9] General Agreement on Tariffs and Trade (GATT), Art. VI, para. 4.
[10] *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995).

remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country."[11] Trade policy is an increasingly important aspect of foreign policy, an area in which the executive branch is traditionally accorded considerable deference.[12] Antidumping duties are not simply tools to be deployed or withheld in the conduct of domestic or foreign policy.[13] When the Department is presented with a choice between methodologies for calculating dumping margins that are tax-neutral and methodologies that are not tax-neutral, "{t}ax-neutral methodologies clearly accord with international economic understandings, negotiated by this country, regarding fair trade policy."[14]

Those parties that seek to convince the Department to condition the conferral of the duty drawback adjustment upon the use by foreign entities of imported inputs in the production of domestic merchandise, as opposed to inputs produced in their home market, are seeking a change in Department practice that would contravene U.S. obligations under the WTO Agreements by providing a benefit under U.S. antidumping law to the foreign producer for the use of imported inputs, as opposed to inputs produced domestically in its home market, thereby causing injury to the foreign industry.

C. Commercial Reality Argues In Favor Of The Department Maintaining Its Current Practice For Duty Drawback Adjustments

As for the economic rationale underpinning the Department's tried and true two-prong test for duty drawback adjustment, there has not been any transformation in the marketplace that

[11] *Alexander Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). *See also Fundicao Tupy S.A. v. United States*, 11 CIT 23, 652 F. Supp 1538, 1543 (Ct. Int'l Trade 1987) ("An interpretation and application of the statute which would conflict with the GATT Codes would clearly violate the intent of Congress").
[12] *Federal Mogul*, 63 F.3d at 1581.
[13] *Id.*
[14] *Id.*

would signal a need for the Department to change its methodology. In the duty drawback situation, the exporting country typically has imposed a tariff regime against the inputs in question to protect domestic producers from import competition. A domestic supplier of raw material can price its material very close to the world market price plus the import duty without facing any competition from raw material imports used in goods for sale in the home market. As a result, the price of domestic inputs implicitly includes such import duties. When a foreign producer purchases domestic inputs, that producer bears the burden of such implicit duties, while it does not bear the equivalent burden when purchasing imported inputs subsequently used to produce export merchandise. Denying the duty drawback adjustment would improperly deny an adjustment for the difference between the price of imported and locally sourced raw material.

The Department's two-prong test is the proper policy regarding duty drawback because it acknowledges that import duty rates affect home market prices, even if there are limited imports of duty-paid products.[15]

II. In Line With Longstanding Department Practice, Duty Drawback Adjustments Should Be Linked and Applied To The Exportation of The Products In Question

In an efficient, transparent and easily verifiable manner, the Department's two-prong test has appropriately allocated the amount of adjustment to be granted, even in situations where domestically-sourced and imported material were used by the foreign producer. The second prong of the Department's test dictates that there must be sufficient imports of the imported raw material to account for the drawback received upon the exports of the manufactured product, a

[15] *Light-Walled Rectangular Pipe and Tube from Turkey*, 69 Fed. Reg. 53675 (Dep't Comm., Sept. 2, 2004) (final determ.).

position repeatedly upheld by the Court of International Trade.[16] In practice, this means that the duty drawback should be calculated by first determining the total amount of duties rebated or not collected on inputs used in the production of merchandise that was exported during the applicable period. Contingent upon the precise circumstances at hand, an acceptable approach would be for this aggregate amount to then be converted to a per unit amount of duty drawback by dividing it by the quantity of merchandise exported during the period.

Additionally, the position that any duty drawback adjustment should be limited to the amount of duties actually paid on material inputs used to produce merchandise sold in the home market simply ignores the economic realities created by a tariff regime, a situation aptly reflected and taken into consideration in the Department's own longstanding two-prong test. The sales price of the domestic input in question reflects the level of protection afforded by that country's customs duties. Limiting the drawback adjustment merely to the amount explicitly paid by the producer on inputs used to produce the merchandise in the home market blatantly ignores the commercial reality that import duties were implicitly included in the price of the domestic inputs purchased by the foreign producer, and as such have already been included in their costs for the home market. As such, to alter the Department's longstanding practice would undermine the very economic rationale for the duty drawback scheme.

III. Any Applicable Duty Drawback Adjustment Should Be Allocated In Strict Proportion to the Exportation of Subject Versus Non-Subject Merchandise

Assuming that the inputs are used in the production of both subject and non-subject merchandise, and the duty drawback adjustment claimed satisfies the Department's longstanding

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[16] *See Allied Tube & Conduit Corp.*, Slip Op. 05-56, 2005 Ct. Intl. Trade LEXIS 58 (Ct. Int'l Trade May 12, 2005); *Chang Tieh Industry Co. v. United States*, 17 CIT 1314, 1320, 840 F. Supp. 141 (Ct. Int'l Trade 1993); *Avesta Sheffield, Inc. v. United States*, 17 CIT 1212, 1214-15, 838 F. Supp. 608, 611 (Ct. Int'l Trade 1993).

two-prong test, then one approach for the calculation of the adjustment could be based on the total amount of the drawback apportioned to both subject and non-subject merchandise, that is exported. As long as the duty drawback adjustment claimed correlates to the Department's two-prong test, and the amount of import duties paid and rebated are directly linked to, and dependent upon one another (or the exemption from import duties is linked to exportation), then the policy rationales underlying the duty drawback scheme as outlined above would apply just as well. By strictly apportioning the duty drawback adjustment to those exports of both subject and non-subject merchandise, the Department would ensure that principles of tax neutrality would be sustained, as well as ensure that the appropriate amount of the increase in the home market price, which resulted from the payment of import duties on inputs, would be offset.

IV. Remedial Duties Rebated or Not Collected By Virtue of the Exportation of Merchandise Should Be the Subject of the Drawback Adjustment Just Like Regular Duties

As a final comment, the Department, in light of Section 772(c)(1)(B) and its own recent decisions, should treat remedial duties, *e.g.,* antidumping and countervailing duties, rebated or not collected by virtue of the exportation of merchandise, similarly to regular customs duties for the purposes of granting a duty drawback adjustment. Section 772(c)(1)(B) of the Act provides for an adjustment to export price for *any* "import duties" that are rebated or exempted by reason of exportation of the subject merchandise. While the statute does not explicitly specify antidumping duties, such duties are assessed upon importation, and thus are clearly included under the definition of *any* import duties. This interpretation of the statutory language is further supported by recent Department precedent. The Department has acknowledged that various forms of duties, such as antidumping duties, can fall within the definition of "import duties." The Department explained this view in the context of another type of import duty imposed under

Section 201 of the Trade Act of 1974--"{w}hile 201 duties are a special type of import duty, they are nevertheless a species of import duty, and are thus covered, if at all, by the phrase 'United States import duties.'"[17] Thus, the Department concluded that the term "import duties" can include both regular customs duties and those imposed under remedial circumstances such as safeguard or antidumping duties.

Furthermore, those principles of tax neutrality that underpin the duty drawback adjustment regime are as equally applicable to remedial duties, as they are to regular customs duties. A failure to increase export price for uncollected antidumping duties on imported raw material, just like a failure to increase export price for uncollected customs duties, would similarly undermine the objective of a tax-neutral comparison of export price and normal value. A difference in sales price due to a difference in levels of taxation on inputs does not constitute unfair pricing behavior.[18] It is a difference created by forces outside of the control of the competitor, and does not involve the idea behind the antidumping act --"to prevent foreigners from 'dumping' on this country their surplus products at a price lower than they sell in their country, so as to unfairly compete with us."[19] Thus, a failure to increase export price for antidumping duties would result in the creation of a dumping margin due to tax policy, not due to the pricing decisions of the exporter. The policy of tax-neutrality behind the adjustment to export price requires the adjustment for antidumping duties just as it does for any other type of duty upon importation. Both the clear language of the statute and Department decisions

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[17] *Stainless Steel Wire Rod from the Republic of Korea,* 69 Fed. Reg. 19153, 19160 (Dep't Comm. April 12, 2004) (final results).
[18] *Federal Mogul,* 63 F.3d at 1575.
[19] *Id., quoting*, Anti-Dumping Legislation: Hearings on H.R. 9983 and H.R. 10071, Before the House Comm. on Ways and Means, 66th Cong., 1st Sess. at 16 (1919) (statement of Congressman Kitchin).

interpreting the phrase "import duties," lend credence to the position that antidumping duties are import duties and must be subject to drawback adjustment just like normal customs duties.

Moreover, both the GATT and the WTO Antidumping Agreement also embrace policies of tax-neutrality. Given that U.S. statutes must be interpreted in a way such that they do not conflict with international agreements, the term "import duties" cannot be interpreted so narrowly as to exclude antidumping duties in light of the much broader mandate for tax neutral adjustments in the GATT and Antidumping Agreement. A refusal to make an adjustment to export price for exempted antidumping duties would both undermine the Department's efforts to administer the antidumping law in an equitable manner and be inconsistent with U.S. WTO obligations. As such, the Department should extend its duty drawback adjustments to cover exempted remedial duties, as well.

For the foregoing reasons, we submit that, under the present circumstances, a departure from the Department's longstanding and well-refined practice is not warranted.

Respectfully submitted,

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