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Joseph A. Spetrini
Acting Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, DC 20230

Re: Comments on Duty Drawback Practice in Antidumping Proceedings

Dear Mr. Spetrini:

On behalf of the Korea Iron & Steel Association and its member companies, we are filing an original and six copies of this letter in response to the Department's request for comments on whether the Department should change its current practice of granting a duty drawback adjustment to export price and constructed 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 were sufficient imports of the imported raw material to account for the drawback received upon the exports of the manufactured product. *Request for Comments: Duty Drawback Practice in Antidumping Proceedings*, 70 Fed. Reg. 37,764 (Dep't Commerce June 30, 2005) ("*Request for Comments*"). As explained in detail below, the suggested changes are not only unwarranted and unnecessary, they are also unlawful.

A. The Plain Language of the Statue Prohibits the Suggested Changes to the Department's Duty Drawback Adjustment Practice.

The plain language of the statute prohibits the changes suggested in the *Request for Comments*. Section 772(c)(1)(B) of the Tariff Act states that the price used to establish export price and constructed export price shall be increased by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise *to the United States*." 19 U.S.C. § 1677a(c)(1)(B) (emphasis added). The statute clearly requires that an adjustment be made for all duty drawback that is received on exports of subject merchandise to the United States. There is nothing in the statute to suggest that the adjustment be conditioned on any payment of import duties on material inputs used to produce merchandise sold in the home market. The statute also does not permit an adjustment based on an allocation of duty drawback to a company's total exports of subject merchandise – it expressly states that the adjustment will be made for the amount of duty drawback received on exports of subject merchandise to the United States. Accordingly, the modifications suggested in the *Request for Comments* are prohibited by the plain language of the statute.

If Congress had intended to condition the duty drawback adjustment as suggested in the *Request for Comments*, it would have done so expressly. The duty drawback adjustment is not limited by any condition except that it must be received "by reason of the exportation of the subject merchandise *to the United States*." 19 U.S.C. § 1677a(c)(1)(B). Limiting the duty drawback adjustment to import duties incurred in the home market or by reference to duty drawback received on sales to other foreign markets would amount to treating duty drawback as a circumstance of sale adjustment. However, in contrast to duty drawback, circumstance of sale

adjustments are provided for in a different statutory section and specifically deal with direct selling expenses and assumed expenses that account for differences in selling conditions in the United States and foreign markets. *See* 19 U.S.C. § 1677b(a)(6)(C)(iii); *see also* 19 C.F.R. § 351.410 (Differences in circumstances of sale).

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, (1983); *see also City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 433-434 (2002); *B.F. Goodrich Co. v. United States*, 16 C.I.T. 333, 339 (Ct. Int'l Trade 1992). The duty drawback adjustment is not conditioned on the payment of import duties on material inputs used to produce merchandise sold in the home market or the receipt of duty drawback in other export markets, and the Department cannot read such conditions into the statute.

B. The Suggested Changes Are Counter to the Purpose of the Statutory Adjustment.

The statutory adjustment for duty drawback was implemented to ensure that antidumping duties are not imposed simply because import duties are rebated. *See* S. Rep. No. 67-16, at 11-12 (1921); *Allied Tube & Conduit Corp. v. United States*, Court No. 04-439, slip op. 05-56 at 10 (Ct. Int'l Trade May 12, 2005). There is no evidence that the "Congress intended that an increase in the export price resulting from the duty drawback adjustment was designed to offset an increase in the home market price resulting from the payment of import duties on inputs." *Request for Comments*, 70 Fed. Reg. at 37,765. Indeed, there is no mention of home market price in the discussion of this issue in the legislative history, and whatever economic theorizing parties may engage in about the impact of duty drawback on home market input prices is legally

irrelevant. The Senate Report states only that "any drawback given by the country of exportation upon the exportation of the merchandise . . . shall not constitute dumping." S. Rep. No. 67-16, at 12 (1921). For that reason, "it is necessary also to add such items to the purchase price." *Id.*

As with the addition to export price and constructed export price of the amount of countervailing duties imposed to offset an export subsidy under Section 772(c)(1)(C), the addition of duty drawback received on exports of subject merchandise to the United States under Section 772(c)(1)(B) reflects the intent of the statute to compare net revenue in the two markets. *See* S. Rep. No. 96-249 at 94; S. Rep. No. 67-16 at 12 (1921). The duty drawback adjustment to export price and constructed export price reflects the fact that the exporter is receiving revenue, in addition to the price, when the good is exported. That revenue is received regardless of whether import duties are also paid on inputs used to produce goods sold in the home market.

While the principle behind the additions to export price and constructed export price under Section 772(c)(1) is to "achieve comparability between the price {sic} which are being compared," Congress' intent was to ensure that the comparisons between markets be based on comparable revenue to the seller. *See* S. Rep. No. 96-249 at 94. To eliminate or reduce the amount of the duty drawback adjustment received on exports of subject merchandise to the United States would eviscerate Congress' stated purpose by creating dumping margins where the only difference in the price is based on the receipt of duty drawback.

C. The Department's Current Practice Is in Accord with the Plain Language and Purpose of the Statute, as well as Court Precedent.

The Department has implemented this statutory directive consistently for more than twenty years through its traditional two-prong test, by granting a duty drawback adjustment to export price and constructed export price where (1) a respondent can demonstrate that the import

duty and rebate are directly linked to, and dependent upon, one another, and (2) there were sufficient imports of imported raw materials to account for the duty drawback received on the exports of the manufactured product.

As the Department notes in its *Request for Comments*, the courts have consistently upheld this practice. Most recently, in *Allied Tube*, the Court agreed with the Department that "'this Court has rejected explicitly plaintiffs' contention that, as a prerequisite to receiving duty drawback, a company must demonstrate the payment of duties on raw materials used to produce merchandise sold in the home market.'" *Allied Tube & Conduit Corp. v. United States*, Court No. 04-439, slip op. 05-56 (Ct. Int'l Trade May 12, 2005) at 11 (quoting the U.S. Government's opposition to Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record at 12).

In *Laclede*, the Court stated that "the only limit on the allowance for duty drawback is that the adjustment to USP may not exceed the amount of import duty actually paid." *Laclede Steel Co. v. United States*, 18 CIT 965, 974 (1994), *citing Far East Mach. II*, 12 CIT 972, 974-75, 699 F.Supp. 309, 311-12 (1988). In *Avesta Sheffield*, the Court stated that "{a}s it concerns either raw materials or sales, there is no requirement that ITA match overall rebates to overall duties to achieve balanced numbers of both sides of the comparison. *The statute allows for a full upward adjustment to U.S. price for duties 'which have been rebated.'* 19 U.S.C. § 1677a(d)(1)(B)." *Avesta Sheffield, Inc. v. United States*, 838 F. Supp. 608, 612 (Ct. Int'l Trade 1993) (emphasis added).[1]

[1] As a result to amendments in the Uruguay Round Agreements Act, 19 U.S.C. § 1677a(d)(1)(B) became 19 U.S.C. § 1677a(c)(1)(B).

In *Avesta Sheffield* and *Allied Tube*, the Court noted that the statute provides for the duty drawback adjustment regardless of whether the home market price reflects import duties. *Avesta Sheffield* at 611; *Allied Tube*, Court No. 04-439, slip. op. 05-56 at 12. In *Allied Tube*, the Court found that "{t}he clear language of 19 U.S.C. § 1677a(c)(1)(B) does not require an inquiry into whether the price for products sold in the home market includes duties paid for imported inputs. *See Timex*, 157 F.3d at 882 ("Because a statute's text is Congress' final expression of its intent, if the text answers the question, that is the end of the matter.") (citations omitted)." Court No. 04-439, slip op. 05-56 at 12-13. In addition, in *Chang Tieh*, the court noted that petitioner's

> arguments provide no basis from which to conclude that drawback adjustments should not be made unless ITA determines that the cost of the products sold in the home market is duty-inclusive. To require such a finding would add a new hurdle to the drawback test that is not required by the statute.

Chang Tieh Industry Co., Ltd. v. United States, 840 F. Supp. 141, 147 (Ct. Int'l Trade 1993).

In recent administrative reviews, petitioners have raised the issues now offered for comment in the Department's *Request for Comments*, and the Department has conclusively dismissed them as without merit. For example, in *Circular Welded Non-Alloy Pipe from Korea*, 69 Fed. Reg. 32,492 (June 10, 2004) ("*Standard Pipe from Korea*"), the Department stated:

> We agree with the respondents that the duty drawback adjustment is justified in the present review and *should not be limited to the extent that duties were paid on inputs used for home market sales*. The domestic interested parties have attempted to add a third prong to the Department's duty drawback test by proposing that the duty drawback adjustment be conditional on import duties being linked to inputs used for merchandise sold in the home market and limited to the extent that such duties are paid. The statute does not warrant this modification to the Department's requirements for granting the duty drawback adjustment.

Standard Pipe from Korea, Issues and Decision Memorandum, Comment 2: Department's Position at 12 (emphasis in original).

In *Certain Corrosion-Resistant Carbon Steel Flat Products from Korea*, 70 Fed. Reg. 12,443 (March 14, 2005) ("*CORE from Korea*"), petitioners argued that the Department should modify its long-standing practice on the duty drawback adjustment by tying specific duties paid in Korea to specific materials that are used to manufacture specific goods for export to the United States. Petitioners further argued that the Department's rules for allowing the duty drawback adjustment were conducive to manipulation and may yield unfair results, and thus proposed that the Department should obtain information necessary to allocate the total duty drawback between all exports of subject merchandise and respondents' reported U.S. exports. *CORE from Korea*, Issues and Decision Memorandum, Comment 4 at 13.

The Department replied that:

> Petitioners have provided no compelling evidence that our long-standing practice is flawed and should be modified. . . . The statute dictates that U.S. price be adjusted by the amount of any duties that have been rebated or not collected by reason of exportation. *See* section 772(c)(1)(B) of the Act. 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. Respondents provided and we verified such evidence. The statute does not warrant the modification to the Department's requirements for granting the duty drawback adjustments as petitioners proposed. Accordingly, in the final results, we have continued to grant the respondents' claimed duty drawback adjustments in full.

CORE from Korea, Issues and Decision Memorandum, Comment 4: Department's Position at 13-14.

Despite repeated requests by petitioners in prior proceedings, and with repeated affirmation from the courts, the Department has refused to add a third prong to its duty drawback adjustment test that would require respondents to demonstrate equivalent amounts of import duties paid in their home market or duty drawback received in other foreign markets. The

Department has consistently found that there is no basis in the statute for such an additional requirement. It would be unlawful to do so now.

For the foregoing reasons, the Department should maintain its long-standing, and court-approved, policy of applying a two-prong test to determine entitlement to a duty drawback adjustment. There is no statutory support for the suggested changes in the *Request for Comments*.

Respectfully submitted,

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