COMMITTEE TO SUPPORT U.S. TRADE LAWS
3050 K Street, NW #400
Washington, DC 20007
202.342.8450 TEL
202.342.8451 FAX

DAVID A. HARTQUIST
Executive Director

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CSUSTL Duty Drawback Comments

July 13, 2005

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BY HAND DELIVERY

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

Re: **Drawback Practice in Antidumping Proceedings**

Dear Mr. Assistant Secretary:

The Department has announced that it will solicit public comment on the issue of whether the grant of a drawback adjustment should be limited to the "payment of import duties on raw material inputs used to produce merchandise sold in the home market." Department Notice (June 24, 2005), *Duty Drawback Practice in Antidumping Proceedings*, 70 Fed Reg. 37,764 (June 30, 2005). The Appendix to the Notice seeks specific advice on calculation of the adjustment and broadly invites "any additional views" as to drawback practice. Our comments are submitted on behalf of the Committee to Support U.S. Trade Laws, and are provided below; the Department's specific questions are answered at the conclusion of this submission.

The Department correctly set out the rationale for a duty drawback adjustment in early 2002, explaining that "{t}his adjustment is necessary to offset duties that are paid

on inputs used in production of merchandise sold in the home market." *Silicomanganese from Venezuela*, 67 Fed. Reg. 15,533 (Apr. 2, 2002), Decision and Issues Memorandum, Comment 6. In that case, the respondent, "HEVENSA participated in a duty drawback program in which it was exempt from paying import duties on certain inputs used to produce silicomanganese for export." *Id.* HEVENSA was denied a drawback adjustment because it failed "to establish it had paid import duties on inputs used in the production of silicomanganese sold in the home market." *Id.* HEVENSA appealed, but the Court of International Trade upheld the Department's determination and recognized that the Department's policy was in accord with past practice and stated:

> Commerce has reasonably established the payment of import duties on imports used for sales in the domestic home market as a necessary prerequisite for the establishment of a duty drawback claim. See e.g., Final Results of Antidumping Duty Administrative Review: Silicon Metal from Brazil, 63 Fed. Reg. 6899, 6909 (February 11, 1998) (Payment of . . . duties on importation of inputs used for domestic sales, but not for export sales, is necessary to establish a drawback claim). **Hevensa's failure to create a record showing the payment of duties on the importation of inputs used for domestic sales, but not for export sales, defeats its duty drawback claim.**

Hornos Electricos de Venezuela, S.A. v. United States, 285 F. Supp. 2d 1353, 1360 (CIT 2003) ("*HEVENSA*") (emphasis added).[1] The Court explained that the Department's policy was reasonable because:

[1] The court's observation directly rejects the notion, sometimes advanced, that *HEVENSA* did not address the requirement of payment of import duties on domestic market sales.

> a duty drawback adjustment takes into account any difference in the prices for home market or normal value and export sales accounted for by the fact that **such import duties have been paid on inputs used to produce the merchandise sold in the home market,** but have not been paid on inputs used to the merchandise exported to the United States.

HEVENSA, 285 F. Supp. 2d at 1358 (emphasis added).

The *HEVENSA* decision was consistent with a long recognized principle (but one which has sometimes been ignored in administrative review results). As the Court of International Trade stated:

> **Congress allowed this adjustment because purchasers in the home market presumably must pay the passed on cost of import duties when they buy the merchandise.** If the duties are rebated when the merchandise is exported, presumably no similar cost is passed on to purchasers in the United States. By adding the amount of the rebate to United States price {now export price} this adjustment accommodates the difference in cost to the two different purchasers.

Huffy Corp. v. United States, 10 CIT 214, 215-216, 632 F. Supp. 50, 52 (1986) (emphasis added).[2] In sum, the fundamental prerequisite that import duties must be paid on inputs for subject merchandise sold in the home market has been explained and detailed by the Department and accepted by the courts.

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[2] Indeed, a drawback adjustment is no different than any circumstance of sales adjustments that "are made when the seller incurs certain costs in its home market sales that it does not incur when selling to United States market." *NTN Bearing Corp. v. United States*, 24 CIT 385, 397, 104 F. Supp. 2d 110, 122 (2000) *quoting Torrington v. United States*, 156 F.3d 1361, 1363 (Fed. Cir. 1998).

It is also important to recognize that the European Community also imposes the fundamental requirement described in the *HEVENSA* litigation. As specifically stated in the basic EC antidumping regulation, the first condition for a drawback adjustment is that "import charges are borne by the like product and by materials physically incorporated therein when intended for consumption in the exporting country. . . ." EC Basic Regulation Article 2(10)(b).[3]

It is fundamental to a fair comparison that the United States recognize, as does the EC, that if a respondent does not pay import duties on inputs used for products sold in the home market, the home market sales do not include an import duty cost. If the same respondent does use imported inputs for export sales but does not ultimately pay import duties, those export sales likewise do not include an import duty cost. Thus, in this situation, there is no disparity in price comparability which must be remedied by a drawback adjustment.

In contrast, if a respondent does pay import duties on inputs used for domestic sales, but does not for export sales, a price comparability issue arises. Since drawback programs are acceptable under U.S. international trade obligations, U.S. law provides for

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[3] For application of this principle, *see, e.g.*, EC Council Regulation No. 1676/2001 of 13 August 2001 imposing definitive antidumping duty on imports of polyethylene film originating in India and the Republic of Korea (Official Journal L 227, 23/08/2001 p. 0001-0014); *see also* EC Council Regulation No. 2093/2002 of 26 November 2002 imposing a definitive antidumping duty on imports of polyester textured filament yarn originating in India (Official Journal L 323, 28/11/2002, p. 0001-0020) (denial of adjustment "none of the companies could demonstrate that any import charges or indirect taxes were borne by the like product or by materials physically incorporated therein, when intended for consumption in the exporting country, as required by Article (2)(10)(b) of the basic Regulation"). Included in attachment A.

a basis to recognize the difference in price comparability created by receipt of drawback benefits. Thus, to the extent a respondent must pay import duties on inputs used for domestic sales, but not for export sales, a drawback adjustment is warranted. Again, if no duties are paid on inputs for domestic sales, no issue of comparability arises.

Indeed, grant of drawback adjustments unrelated to import duties paid on domestic sales grossly distorts the price comparisons being made and, where import duties are high, becomes essentially a license to dump. Where input import tariffs run to double digits, the improper grant of these adjustments can result in the complete absence of relief from dumping.

In sum, the Department should conform its practice to that detailed in the HEVENSA litigation and should restrict consideration of claims for drawback adjustments to the amount of import duties paid on inputs used for the domestic sales of the foreign producer making the claim. Our responses to the specific questions posed by the Department follow.

QUESTION (1):

What should the requirements be for making a duty drawback adjustment in an antidumping proceeding? For example, should a party seeking such adjustment be required to demonstrate that it actually paid import duties that were not rebated on some portion of raw material inputs during the relevant period, *i.e.*, that exports did not account for all the imported material in question? Please explain, in detail, any changes to the Department's current practice that would be required to implement such a modification.

ANSWER:

The fundamental test for whether the Department should consider grant of a drawback adjustment claim is that the aspect of price comparability has been placed in issue. Specifically, a respondent must establish the payment of import duties on inputs

for home market sales. Thus, eligibility for analysis of a drawback adjustment claim must be predicated on, and limited to, the import duty cost for inputs used in domestic sales of the subject merchandise. Only when an import duty cost disparity is present do the issues of price comparability and the extent of a respondent's drawback benefits become relevant.

In a situation where imports of inputs are fully accounted for by export sales, then a respondent would inherently not have any import duty cost for domestic market sales. Accordingly, the fundamental prerequisite to a drawback claim would be absent. The grant of a drawback adjustment must be limited to a respondent's import duty cost.

CSUSTL believes the Department's decisions, leading to the HEVENSA litigation and relied upon there, are in accordance with the practice described above. Thus, no change in Department practices in these cases would be required. Of course, the Department has also recently made contrary decisions, which are mentioned in the Department's notice.

QUESTION (2):

How do you propose the amount of the adjustment should be determined, assuming that some domestically sourced and some imported material was used?

ANSWER:

The upper limit of a drawback adjustment claim is the import duty cost to the respondent for home market sales of subject merchandise during the investigation or review period. The Department should codify this by defining a drawback ceiling as the average home market duty cost, *i.e.*, the totality of duties paid on home market sales

divided, by total period domestic sales. A drawback adjustment would also be limited to a respondent's qualification for drawback benefits under the present two prong test.

QUESTION (3):

If duty drawback (or exemption) is claimed for some, but not all exports incorporating the material input in question, how do you propose the amount of any duty drawback adjustment should be determined?

ANSWER:

While the drawback adjustment is limited to the import duty cost, it is also limited by the respondent's qualification for drawback benefits. Generally speaking, the Department already forces respondents to allocate drawback over all exports. The Department should codify this practice by defining duty drawback as the totality of duties rebated or waived, divided by total period exports.

QUESTION (4):

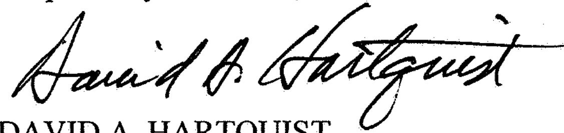
Please provide any additional views on any other matter pertaining to the Department's practice regarding duty drawback adjustments.

ANSWER:

The improper grant of drawback adjustments is particularly objectionable because it encourages maintenance of high import barriers and is at variance with the practice of our major U.S. trading partners. The U.S. has eliminated duties on steel products, and generally has very low tariffs on manufactured products. The U.S. is currently seeking reductions of tariffs in the Doha Round. The Department’s current practice in duty

drawback adjustments undercuts U.S. negotiators' efforts to obtain duty reductions by our trading partners in the Doha Round.

Respectfully submitted,



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