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PUBLIC DOCUMENT

VIA HAND DELIVERY

Hon. Joseph A. Spetrini
Acting Assistant Secretary of Commerce
For Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

Attn: John C. Kalitka

Re: *Comments on Duty Drawback Policy*

Dear Mr. Spetrini:

Enclosed are an original and six copies of the comments of the **Borusan Group ("Borusan")** in connection with the Department's review of its policy with respect to the duty drawback adjustment antidumping duty proceedings.[1] The Borusan Group includes, *inter alia*, two companies that have had extensive experience as respondents in the Department antidumping duty proceedings involving Turkey: Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. ("BMB"), a Turkish producer of welded carbon steel pipe and tube and Borçelik Çelik Sanayii Ticaret A.S. ("Borçelik"), a Turkish manufacturer and exporter of cold-rolled carbon steel sheet.

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[1] *See Duty Drawback Practice in Antidumping Proceedings,* 70 Fed. Reg. 37764 (June 30, 2005).

A. Introduction

The Department's notice indicates that it is considering whether to make changes to the standard two-prong test analysis in determining eligibility for a duty drawback adjustment. As explained in the notice:

> For instance, some parties have argued that the Department's practice should be modified by requiring a respondent party seeking a duty drawback adjustment to demonstrate payment of import duties on raw material inputs used to produce merchandise sold in the home market. They argue that such a requirement is consistent with principles of price comparability and the implementation of Congressional intent with respect to the duty drawback adjustment. In addition, according to such parties, any duty drawback adjustment made should also be limited to the amount of duties actually paid on material inputs used to produce merchandise sold in the home market. . . Certain parties have also argued that the Department should allocate the total pool of relevant drawback available under some systems to the total exports of subject merchandise to ensure that the adjustment claimed on U.S. sales is not overstated. . .
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> Parties advocating a change in Department practice argue that in creating the duty drawback adjustment, 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 payment of import duties on inputs. As a result, the duty drawback adjustment was designed to prevent dumping margins from arising simply because of the rebate (or non-collection) of import duties on inputs resulting from export of subject merchandise to the United States. Yet, these parties argue, to permit a drawback adjustment where home market sales do not include import duties leaves nothing for the rebate or exemption to offset.[2]

In analyzing whether to change its practice in this regard, the Department must first consider whether any such changes are permitted by the statute and only secondarily whether they make good policy. Borusan contends that the first two changes identified above -- requiring a showing that duties were paid on inputs used to produce goods for sale in the domestic market and limiting the amount of the adjustment to the amount of duties actually paid on material inputs used to produce goods sold in the domestic market -- are clearly contrary to the plain language of the statute and thus would not constitute a "permissible" interpretation of the statute.

[2] *Id.*, at 37765 (citations omitted).

Furthermore, such changes would be inconsistent with the intent of Congress which was to permit an adjustment for both the direct and indirect effects of a tariff wall, without requiring a precise measurement of the indirect effects. Therefore, Borusan urges the Department to continue with its current practice as explained in the Department's recent final-less-than-fair-value-sales determination in *Light-Wall Rectangular Pipe and Tube from Turkey*.[3]

The third proposed change is also inconsistent with the plain language of the statute and unnecessary in order to prevent "overstatement" of the amount of the adjustment.

B. The Department Should Continue Its Current Position on the Duty Drawback Adjustment

The issues raised in the Department's notice were considered and resolved in the Department's 2004 final affirmative sales-at-less-than-fair-value determination in *Light-Walled Rectangular Pipe and Tube from Turkey* and in the recent decision of the United States Court of International Trade in *Allied Tube & Conduit Corp. v. United States*.[4] In *Light-Walled Rectangular Pipe and Tube*, the Department took the position that the existence of imports of raw materials for use in finished products destined for the consumption in the home market is *not* a prerequisite to the duty drawback adjustment. Furthermore, the Department asserted that this position flows directly from the statute and the legislative history, and reflects the Department's consistent practice for more than ten years.

As *Light-Walled Rectangular Pipe and Tube from Turkey* addresses a number of the issues now under consideration by the Department, it bears extensive quotation:

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[3] *Light-Walled Rectangular Pipe and Tube From Turkey: Notice of Final Determination of Sales at Less Than Fair Value*, 69 Fed. Reg. 53,675 (Sept. 2, 2004). *See also Certain Welded Carbon Steel Pipe and Tube from Turkey*, 69 Fed. Reg. 48,843 (Aug. 11, 2004)

[4] ___CIT___, Slip Op. 05-06 at 10 (May 12, 2005). *See* discussion *infra* at 10-11.

Section 772(c)(1)(B) of the Act states that "the price used to establish EP and CEP shall be increased by ... (B) 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." In determining whether a duty drawback adjustment is appropriate, the Department applies a two-prong test establishing that: (1) the import duty paid and rebate payment are directly linked to, and dependent upon, one another; and (2) that the company claiming the adjustment can demonstrate that there were sufficient imports of the imported raw material to account for the drawback received on the exports of the manufactured product. The CIT has consistently found this test to be reasonable. See, e.g., Far East Machinery II. In applying this test, the Department requires that respondents provide documentary evidence to demonstrate that both prongs of the test have been satisfied.

As stated in the Preliminary Determination, MMZ has provided documentary evidence demonstrating that it has satisfied both prongs of the Department's test. The Department verified this information and found no discrepancies with the reported information. Moreover, the petitioners do not dispute that MMZ has met both prongs of the test. Instead, the petitioners argue that the Department should deny the duty drawback offset because MMZ did not pay any import duties on imports of inputs used to produce the finished products sold in the home market.

Contrary to the petitioners' assertion, the Department does not require a respondent to demonstrate that it paid import duties on raw materials used in the production of merchandise sold in the home market as a prerequisite for being granted the duty drawback adjustment. In making this argument, the petitioners seek to impose a third prong to the Department's duty drawback test, which is not required by the statute, the regulations, or past Department practice. There is no basis for the petitioners' argument that the Department should not make a duty drawback adjustment, unless it determines that the cost of products sold in the home market includes duties on imported raw materials. The only requirements of section 772(c)(1)(B) are (1) "import duties imposed," and (2) rebate, or non-collection, of those duties "by reason of the exportation of the merchandise to the United States." The statute provides for the adjustment without reference to whether products sold in the home market are made with imported raw materials. 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. See Laclede Steel Co. v. United States, slip op. 94-160 (1994) (citing Far East Mach. II at 311-12). Therefore, we disagree with the petitioners that the Department should add a third prong to the test for drawback adjustments requiring that a respondent demonstrate that it paid import duties on raw materials used in the production of merchandise sold in the home market.

However, when examining a duty exemption program, where duties are foregone by the government of the exporting country contingent upon the producer

exporting a specified amount of finished product, the Department may satisfy itself that the duty regime imposed by the country of exportation is valid. If a producer in the home market imports raw materials subject to an import duty, but does not participate in the duty exemption program because it has no intention of exporting the finished product, a valid duty regime would require the producer to pay the import duty. Alternatively, if the producer imported the raw material while participating in the duty exemption program, but failed to export the required quantity of finished product, a valid duty regime would require the producer to pay the import duty. If the government of the exporting country failed to collect the duties from producers under either scenario, the Department would conclude that the duty regime is not valid and deny the duty drawback adjustment. In a duty exemption program, the Department may request information from the respondent regarding whether it paid duties on inputs used in the production of finished products sold in the home market in order to determine whether a duty regime is valid. Such requests should not be confused with arguments made by the petitioners as discussed above.

In making their argument, the petitioners rely on the recent CIT decision in HEVENSA, and the underlying case Silicomanganese from Venezuela, which involves a duty exemption program. In Silicomanganese from Venezuela, the Department's primary concern was that the respondent did not provide adequate documentation to validate its claims that duties were payable absent exportation. Although the Department did state that "payment of these taxes and duties on the importation of inputs used for domestic sales, but not for export sales, is necessary to establish a drawback claim," the Department did not intend to establish a third prong to the Department's duty drawback test. See Silicomanganese from Venezuela at Comment 6. Rather, the Department was attempting to satisfy itself that the Venezuelan duty regime was valid – that duties are, in fact, paid by producers when raw materials are imported without participation in the duty drawback program, or that duties are payable in the event the producer fails to export the specified quantity of finished merchandise. Specifically, the respondent in that case failed to provide the particular information about the duty drawback program that the Department requested in a supplemental questionnaire. In HEVENSA, the CIT affirmed the Department's denial of the duty drawback adjustment because the respondent failed to satisfy the first-prong of the duty drawback test; namely, establishing that "import duties are actually paid and rebated, and there is a sufficient link between the cost to the manufacturer (import duties paid) and the claimed adjustment (rebate granted)." See HEVENSA, 285 F. Supp. 2d at 1358, citing Far East Machinery II (quoting Huffy Corp. v. United States, 632 F. Supp. 50, 53 (CIT 1986)).

The Department further notes that Silicon Metal from Brazil, the antidumping proceeding cited in both Silicomanganese from Venezuela and HEVENSA, also involved a request for additional information based on the particular facts before the Department rather than an attempt to establish a third prong to the Department's duty drawback test. See Final Results of Antidumping Duty

Administrative Review: Silicon Metal from Brazil, 63 FR 6899 (February 11, 1998) (Silicon Metal from Brazil), and accompanying Issues and Decision Memorandum at Comment 22. In that case, which also involved a duty exemption program, the Department's primary concern was that the respondent did not provide adequate documentation to validate its claim for a duty drawback adjustment. Specifically, the Department rejected Electrosilex's claim for a drawback adjustment because "Electrosilex failed to demonstrate on the record that it claimed and received a duty and tax drawback." See Silicon Metal from Brazil at Comment 22. The Department acknowledged Electrosilex's claim that it paid import duties on the importation of electrodes used in producing finished products sold in the home market. However, Electrosilex provided import declaration forms that were dated after the POR as its evidence of payment of duties on imported electrodes. Thus, the issue was not whether the respondent paid duties on imported inputs used in the production of finished goods sold in the home market, as the petitioners contend, but was instead that "Electrosilex failed to substantiate its drawback claim by not providing appropriate payment documentation on Customs duties and IPI taxes and no payment documentation on ICMS taxes imposed on importation of electrodes used for the production of home market sales or any support documentation for the POR." Id. This closing statement establishes that the issue in Silicon Metal from Brazil was limited to whether the respondent provided adequate documentation to substantiate that it paid import duties under the Brazilian tax regime if the imported materials were not used in exports.

Furthermore, the CIT explicitly rejected the petitioners' argument that, as a prerequisite to receiving a duty drawback claim, a respondent must demonstrate the payment of duties on raw materials used to produce merchandise sold in the home market in Avesta Sheffield and Chang Tieh Industry. See Avesta Sheffield, Inc. v. United States, 838 F. Supp. 608 (CIT 1993) (Avesta Sheffield); and Chang Tieh Industry Co. Ltd., Avesta Sheffield, Inc., Bristol Metals, Inc., Damascus Tube Division, Damascus-Bishop Tube Co., Trent Tube Division of Crucible Materials Corporation, and the United Steel Workers of America (AFL-CIO/CLC) v. United States, 840 F. Supp. 141 (CIT 1993) (Chang Tieh Industry).

. . .

The underlying cases in Avesta Sheffield and Chang Tieh Industry are WSSP from Korea and WSSP from Taiwan, respectively. See Final Determination of Sales at Less Than Fair Value: Certain Welded Stainless Steel Pipe from the Republic of Korea, 57 FR 53693 (November 12, 1992) (WSSP from Korea) and Final Determination of Sales at Less Than Fair Value: Certain Welded Stainless Steel Pipe from the Taiwan, 57 FR 53705 (November 12, 1992) (WSSP from Taiwan). In these investigations, the Department found that payment of import duties on raw materials used to produce finished goods sold in the home market was not required by the Act. The Department stated in both investigations, "the statute mandates the adjustment without reference to whether products sold in the home market are made with imported raw materials ... Therefore, we disagree

> with the petitioners that the Department should add a third prong to the test for drawback adjustments requiring examination of the relative usage of imported materials in export and home market sales." See WSSP from Korea, 57 FR at 53694 and WSSP from Taiwan, 57 FR at 53709.[5]

Therefore, the Department has clearly taken the consistent position that the preconditions proposed by parties advocating a change in the Department's practice are not required by the statute and that, indeed, "the statute *mandates the adjustment* without reference to whether products sold in the home market are made with imported materials."[6]

C. The Proposed New Preconditions to and Limitations on the Duty Drawback Adjustment Are Not Permissible Under the Statute

To the extent that the Department is willing to entertain the changes to its policy mentioned above, the Department must first consider whether it has any latitude under the statute to change its practice in this area. In answering this question, the Department should consider how any change in its policy or practice would be evaluated by its reviewing courts.

1. The Department Does Not Have the Discretion To Impose a Requirement that Is Contrary to the Plain Language of the Statute

In determining whether the Department's interpretation and application of the antidumping statute is "in accordance with law," the United States Court of International Trade (CIT) and United States Court of Appeals for the Federal Circuit undertake the two-step analysis set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[7] Under the first prong, the Court reviews Commerce's construction of a statutory provision to determine whether

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[5] Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Light-Walled Rectangular Pipe and Tube from Turkey, Sept. 2, 2004, at 8-11 (emphasis added).

[6] *Id.* (emphasis added).

[7] 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

"Congress has directly spoken to the precise question at issue."[8] "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.'"[9] "The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning. 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."[10] "Only if, after this investigation, we conclude that Congress either had no intent on the matter, or that Congress's purpose and intent regarding the matter is ultimately unclear, do we reach the issue of *Chevron* deference."[11]

If, after employing the first prong of *Chevron*, the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether Commerce's construction of the statute is permissible.[12] Such a determination essentially focuses on whether the agency's interpretation is reasonable.[13]

2. Under the Plain Language of the Statute, the Department May Not Condition the Grant of a Duty Drawback Adjustment on the Payment of Import Duties on Inputs Intended for Consumption in the Home Market

Section 772(c)(1)(B) of the Tariff Act of 1930, as amended ("the Act") provides that the Export Price and Constructed Export Price "*shall be* . . . increased by . . . the amount of any

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[8] *Id.* at 842.

[9] *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (*citing Chevron*, 467 U.S. at 843 n.9, 81 L. Ed. 2d 694, 104 S. Ct. 2778).

[10] *Id.* (citations omitted).

[11] *Timex*, 157 F.3d at 882; *cited in* Defendant's Memorandum in Opposition to Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record, submitted in *Allied Tube and Conduit Corp. v. United States*, Court No. 04-00439 (February 15, 2005)("Government Allied Tube Brief")

[12] *See Chevron*, 467 U.S. at 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778.

[13] *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992)(quoting Chevron, 467 U.S. at 844).

import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of exportation of the subject merchandise to the United States . . . ."[14] The words "shall be . . . increased by" indicate that this adjustment is mandatory; it is not within the discretion of the Department to grant or deny the adjustment based on its own policy preferences. This provision "serves to instruct that an adjustment to the purchase price should be allowed when the country of exportation makes a refund payment constituting drawback."[15] There is no qualification in the statute, no prerequisites for the grant of the adjustment other than a showing that import duties have been exempted or rebated "by reason of exportation of the subject merchandise to the United States." Certainly, there is no condition based on whether or not domestic sales prices for the foreign like product are duty-inclusive.

Thus, there is simply no requirement that can reasonably be read into the the statute that a respondent show that it paid import duties on any of the material inputs used to produce goods sold in the domestic market if it did not, in fact, import material inputs for that purpose. Nor is it reasonable to infer from this language that the amount of the drawback adjustment could be limited to the amount of import duties actually paid on material inputs incorporated into merchandise sold in the domestic market. Under the plain language of the statute, all that must be shown in order to establish entitlement to the adjustment is that certain import duties would have been paid, or not refunded, on the raw materials used to produce the subject merchandise had that merchandise not been exported to the United States.

Under the first prong of *Chevron*, this is the end of the analysis. Since the conditions proposed by certain domestic interests cannot be reconciled with the absolute language of the

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[14] 19 U.S.C. § 1677a(c)(1)(B)(emphasis added), *cited in Huffy Corp. v. United States*, 10 C.I.T. 214, 215, 632 F. Supp. 50, 52 (1986).

[15] *Roquette Freres v. United States*, 7 C.I.T. 88, 92, 583 F. Supp. 599, 602 (1984).

statute commanding an adjustment if a few simple requirements are met (now incorporated into the two-prong test), a reviewing court will afford the Department no deference should it ever be asked to rule on the first two changes identified in the Department's notice.

The recent decision in *Allied Tube & Conduit Corp. v. United States*,[16] and the position taken by the Department itself in that case, strongly supports this analysis. In its brief to the Court, the Department argued:

> Allied contends that, because Commerce did not require proof that domestic market sales used inputs upon which duties were paid, Commerce's assessment of Borusan's request for a duty drawback adjustment is contrary to the requirements of 19 U.S.C. § 1677a(c)(1)(B). **However, the only statutory requirements are (1) "import duties imposed," and (2) rebate, or noncollection, of those duties "by reason of the exportation of the merchandise to the United States."**
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> **Not only does the statutory language clearly exclude any requirement that a company provide proof of import duties actually paid upon inputs used in the home market, but the legislative history of the provision also demonstrates that no such requirement was imposed.** The Senate Report upon the provision, initially included in the Antidumping Act of 1921, states that '[i]n order that any drawback given by the country of exportation shall not constitute dumping, it is necessary to add such items to the purchase price. **Congress did not qualify entitlement to this adjustment in either the statute or the Senate Report. Where Congress's "purpose and intent on the question at issue is judicially ascertainable," the Court must give effect to the clear intention of the statute.**[17]

If, as the Government told the Court, "the statutory language clearly exclude{s} any requirement that a company provide proof of import duties actually paid," and "Congress did not qualify entitlement to the adjustment in either the statute or the Senate Report," then the proposed changes simply cannot be adopted by the Department without exceeding the Department's authority under the law.

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[16] ___ CIT ___, Slip Op. 05-06 at 10 (May 12, 2005).

[17] Government Allied Tube Brief at 11-12 (citations omitted, bold emphasis added).

In response to these arguments, the Court held that "[t]he clear language of 19 U.S.C. § 1677a(c)(1)(B) does not require an inquiry into whether the price of products sold in the home market includes duties paid for import inputs. *See Timex*, 157 F.3d at 882 ('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.')(citations omitted)."[18] In other words, the plain language of the statute enumerates the requirements *in toto*, and therefore, there are no other requirments that the Department can impose. Thus, under *Chevron* prong 1, any attempt by the Department to add additional requirements would not withstand scrutiny by the Court.[19]

3. Any Change in the Department's Practice Would Mark a Dramatic Departure from at Least 20 Years of Consistent Administrative Practice

If the Department were to adopt the preconditions to the duty drawback adjustment mentioned in its notice, it would represent a dramatic departure from consistent practice by the Department for at least the last twenty years. The undersigned counsel has been involved in

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[18] *See also Avesta Sheffield, Inc. v. United States*, 838 F. Supp. 608 (CIT 1993)("*Avesta Sheffield*")("The statute provides for the duty drawback adjustment without reference to any finding that the home market price is reflective of duties.")

[19] The following language in *Chang Tieh Industry v. United States*, 840 F.Supp. 141, 147 (CIT 1993), does not support conclusion that ITA has the discretion to adopt the proposed changes:

> Avesta's arguments provide no basis from which to conclude that duty 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 duty drawback test that is not required by the statute. Assuming *arguendo* that the statute would permit ITA to add a new test, there is nothing in this case which suggests that, under these facts, ITA abused any discretion it had by not adding the test.

Thus, the Court merely assumed, for the sake of argument, that the ITA had such discretion in order to conclude that, even if it had such discretion, it did not abuse that discretion by failing to add the proposed new test. As shown above, and as held in *Allied Tube and Conduit,* the Department does not in fact have such discretion because the intent of Congress that this adjustment be granted without reference to any such findings is evident in the plain language of the statute.

numerous antidumping cases over the past 20 years in which a duty drawback adjustment was requested. Not once did the Department impose the additional requirements mentioned in its latest request for comments,[20] including cases decided after the underlying administrative

[20] *See, e.g., Light-Walled Rectangular Pipe and Tube From Turkey: Notice of Final Determination of Sales at Less Than Fair Value*, 69 Fed. Reg. 53,675 (Sept. 2, 2004)(Final LTFV Determ.); *Certain Welded Carbon Steel Pipe and Tube from Turkey*, 69 Fed. Reg. 48,843 (Aug. 11, 2004); *Certain Cold-Rolled Carbon Steel Flat Products From Turkey*, 67 Fed. Reg. 62,126 (Oct. 3, 2002) (Final LTFV Determ.); *Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Turkey*, 65 Fed. Reg. 15,123 (Mar. 21, 2000) (Final LTFV Determ.); *Certain Welded Carbon Steel Pipe and Tube from Turkey*, 65 Fed. Reg. 37,116 (June 13, 2000) (1998-1999 Final Admin. Review); *Certain Standard Welded Carbon Steel Pipe and Tube Products from* Turkey, 63 Fed. Reg. 35,190 (June 29, 1998) (1996-1997 Final Admin. Review); *Certain Standard Welded Carbon Steel Pipe and Tube Products from Turkey*, 62 Fed. Reg. 51,629 (Oct. 2, 1997) (1993-1994 Final Admin. Review); *Certain Standard Welded Carbon Steel Pipe and Tube Products from Turkey*, 61 Fed. Reg. 69,067 (Dec. 31, 1996) (1994-1995 Final Admin. Review); *Certain Welded Carbon Steel Pipe and Tube Products from Turkey*, 56 Fed. Reg. 23,864 (May 24, 1991) (1988-1989 Final Admin. Review); *Certain Welded Carbon Steel Pipe and Tube Products from Turkey*, 55 Fed. Reg. 42,230 (Oct. 18, 1990) (1987-1988 Final Admin. Review); *Certain Welded Carbon Steel Pipe and Tube Products from Turkey*, 53 Fed. Reg. 36,932 (Oct. 11, 1988) (1986-1987 Final Admin. Review); *Certain Welded Carbon Steel Pipe and Tube Products from Turkey: Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 13,044 (April 17, 1986); *Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 66 Fed. Reg. 53,388 (Oct. 22, 2001) (1999-2000 Final Admin. Review); *Certain Welded Carbon Steel Pipes and Tubes From Thailand*, 65 Fed. Reg. 60,910 (Oct. 13, 2000) (1998-1999 Final Admin. Review); *Certain Welded Carbon Steel Pipes and Tubes From Thailand*, 64 Fed. Reg. 56,759 (Oct. 21, 1999) (1997-1998 Final Admin. Review); *Certain Welded Carbon Steel Pipes and Tubes From Thailand*, 63 Fed. Reg. 55,578 (Oct. 16, 1998) (1996-1997 Final Admin. Review); *Certain Welded Carbon Steel Pipes and Tubes From Thailand*, 62 Fed. Reg. 53,808 (Oct. 16, 1997) (1995-1996 Final Admin. Review); *Certain Welded Carbon Steel Pipes and Tubes From Thailand*, 61 Fed. Reg. 56,515 (Nov. 1, 1996) (1994-1995 Final Admin. Review); *Certain Welded Carbon Steel Pipes and Tubes From Thailand*, 61 Fed. Reg. 1328 (Jan. 19, 1996) (1992-1993 Final Admin. Review); *Certain Welded Carbon Steel Pipes and Tubes From Thailand*, 57 Fed. Reg. 38,668 (Aug. 26, 1992) (1988-1989 Final Admin. Review); *Certain Welded Carbon Steel Pipes and Tubes From Thailand*, 56 Fed. Reg. 58,355 (Nov. 19, 1991) (1987-1988 Final Admin. Review); *Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 3,384 (Jan. 27, 1986). *See also Final Determination of Sales at Less Than Fair Value: Certain Welded Stainless Steel Pipe from the Republic of Korea*, 57 FR 53693 (November 12, 1992) and *Final Determination of Sales at Less Than Fair Value: Certain Welded Stainless Steel Pipe from the Taiwan*, 57 FR 53705 (November 12, 1992).

determination in *Hornos Electricos de Venezuela, S.A. (Hevensa) v. United States,*[21] a case cited by certain domestic interests as support for their position. A change in the Department's practice is not likely to withstand scrutiny by the reviewing courts since it would contradict a long-standing and consistent policy of the Department.[22] "Prior agency practice is relevant in determining the amount of deference due an agency's interpretation. An agency's interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."[23]

4. Adding the Requirements Mentioned in the Department's Notice Would Also Be Inconsistent With Nearly Twenty Years of Court Decisions Reviewing the Duty Drawback Adjustment

None of the court cases addressing the duty drawback adjustment mention the preconditions indicated in the Department's notice, except for three that upheld Commerce's policy against litigants that had argued that Commerce acted inconsistently with the statute by failing to impose such requirements.[24] Two court cases decided in 1993 – *Avesta Sheffield* and

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[21] *Hornos Electricos de Venezuela, S.A. (Hevensa) v. United States,* 285 F. Supp. 2d 1353, 2003 Ct. Intl. Trade LEXIS 133 (Aug. 29, 2003). The underlying determination is *Notice of Final Determination of Sales at Less Than Fair Value: Silicomanganese from Venezuela*, 67 Fed. Reg. 15,533 (Apr. 2, 2002).

[22] *See United States v. Clark,* 454 U.S. 555, 565, 70 L. Ed. 2d 768, 102 S. Ct. 805 (1982); *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.,* 416 U.S. 267, 274-75, 40 L. Ed. 2d 134, 94 S. Ct. 1757 (1974) ("[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration.").

[23] *Tex. Crushed Stone Co. v. United States,* 35 F.3d 1535, 1541 n.7 (Fed. Cir. 1994), *quoting INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987).

[24] In *Carlisle Tire & Rubber Co. v. United States*, 10 C.I.T. 301, 307, 634 F. Supp. 419, 424 (1986), q*uoted in Far East Machinery*, 12 C.I.T at 430, 688 F. Supp. at 611, this Court considered the duty drawback provision and described it as follows:

> Upward and downward adjustments are made to the foreign market value and United States price pursuant to statutory provisions. To prevent dumping margins from arising because the exporting country rebates import duties and taxes for raw materials used in exported merchandise, the antidumping law provides for an

Chang Tieh Industry – expressly came to the conclusion that the statute does not require a finding that that the home market price is reflective of duties in order to grant a duty drawback adjustment.[25] In *Avesta Sheffield*, this Court stated: "{petitioner} argues that ITA applied the statute improperly by adjusting U.S. price without first determining the extent to which foreign

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> offsetting adjustment in the calculation of the United States price. Under 1677a(d)(1)(B)(["old" law)], United States price must be increased by "the amount of import duties *imposed* by the country of exportation which have been rebated." (Emphasis in original)

Notably absent from this discussion is any requirement that the claimant show that it paid import duties on raw materials used to produce goods for sale in the domestic market. That case then went on to discuss whether Commerce's determination was substantiated by the evidence in the administrative record.

In *Far East Machinery Co. v. United States*, 12 C.I.T. at 429, 688 F. Supp. at 611, which followed, *Carlisle Tire & Rubber Co. v. United States*, 11 C.I.T. 168, 657 F. Supp. 1287 (1987)(*Carlisle III*), the applicable requirements set forth by the Department of Commerce in order to establish a claim of duty drawback are just two:

> First, that the import duty and rebate are directly linked to, and dependent upon, one another.
>
> Second, that the company claiming the adjustment can demonstrate that there were sufficient imports of imported raw materials to account for the duty drawback received on the exports of the manufactured product.

The very same analysis is set forth in *Federal-Mogul Corp. v. United States,* 18 C.I.T. 785, 862 F. Supp. 384 (1994), *Allied Tube & Conduit Corp. v. United States,* 132 F. Supp.2d 1087, 1093 (Ct. Int'l Trade 2001), and *Rajinder Pipes Ltd. v. United States,* 23 C.I.T. 656, 665 (Sept. 17, 1999), 1999 Ct. Int'l Trade Lexis 93.

Although *Huffy Corp. v. United States*, 632 F. Supp. 50, 52 (CIT 1986), states that "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," there is no citation to this part of the Court's decision. It therefore represents the Court's surmise as to the reasons why Congress allowed the adjustment and is correct as far as it goes, but does not support the denial of an adjustment when home market sales are not duty-inclusive.

[25] *Avesta Sheffield, Inc. v. United States*, 838 F. Supp. 608 (CIT 1993)("*Avesta Sheffield*"); *Chang Tieh Industry Co., Ltd. Avesta Sheffield, Inc., et al. v. United States*, 840 F. Supp. 141 (CIT 1993)("*Chang Tieh Industry*").

market value was duty-inclusive. The statute provides for the duty drawback adjustment without reference to any finding that the home market price is reflective of duties."[26]

In *Chang Tieh Industry*, the Court stated:

> Avesta's arguments provide no basis from which to conclude that drawback adjustments should not be made unless the Department 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.[27]

The recent decision in *Allied Tube and Conduit* went even further, holding that "the clear language of 19 U.S.C. § 1677a(c)(1)(B) does not require inquiry into whether the price of products sold in the home market includes duties paid for imported inputs."[28]

As held by the Court in *Allied Tube and Conduit*, the *Hevensa* decision should not be read as authorizing the Department to incorporate an additional prong into the two-prong test, but rather should be read as a case agreeing with the Department that the first prong of the two-prong test had not been satisfied by the respondent.[29]

Accordingly, adding the new hurdles proposed by certain domestic interests would be inconsistent with not only more than 20 years of administrative precedent, but nearly 20 years of Court decisions as well.

D. The Policy and Practice of the EU Is No Different From that of the United States on Duty Drawback

The domestic interested parties in the 2003-2004 administrative review on *Certain Welded Carbon Steel Pipe and Tube from Turkey* have claimed that the practice of the European

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[26] *See Avesta Sheffield*, 838 F. Supp. at 1215.

[27] *See Chang Tieh Industry*, 840 F. Supp. at 147.

[28] Slip Op. at 10.

[29] *See Allied Tube and Conduit*, Slip Op. at 14-15. This is the reading assigned to the case by the Department as well in *Light Walled Rectangular Pipe and Tube from Turkey*.

Union (EU) is the opposite of that of the Department in the area of duty drawback adjustments. Specifically, the domestic interested parties claimed that EU does not allow an adjustment for duty drawback unless the foreign producer "proves that the import duty was paid on inputs used to produce the merchandise sold in the producer's home market. . . ."[30] However the proof offered for this assertion does not in fact demonstrate that the EU's practice is any different from that of the United States.

Specifically, the domestic interested parties pointed to EU regulation (2)(10)(b), which, they say, "specifies that '{a}n adjustment shall be made to normal value for an amount corresponding to any import charges or indirect taxes borne by the like product and by materials physically incorporated therein, when intended for consumption in the exporting country, and not collected or refunded in respect of the product exported.'" However, this regulation does not clearly establish that one must show that sales of the like product are duty-inclusive when or if there are no imports of inputs intended for consumption in the domestic market. The provision addresses three separate issues: prior stage cumulative indirect taxes, final stage indirect taxes and import duties on inputs physically incorporated into the finished product. When it talks of taxes "borne by the like product and by materials physically incorporated therein," the taxes "borne by the like product" are taxes levied directly on the like product and taxes and import charges on the "materials physically incorporated therein" are taxes on material inputs. There is no requirement that taxes on materials be "borne by" the like product except in those cases when the materials are imported and the like product manufactured with those inputs is sold in the domestic market. This is no different than the U.S. practice. What the EU provision does not say is that a producer or manufacturer must import material inputs on a duty-paid basis in order

[30] Domestic Interested Parties Case Brief filed in Case No. A-489-501 (2003-2004 Administrative Review), July 21, 2005, at 9.

to qualify for a drawback adjustment, nor does it stand for the proposition that the amount of the adjustment must be limited to the amount of the duties on inputs incorporated into products sold in the domestic market.

Neither of the two cases cited by the domestic interested parties leads to a different conclusion. The European authorities, in *Film from India and Korea*, stated: "an adjustment is granted provided two conditions are met cumulatively: first, import charges are borne by the like product and by material physically incorporated into therein when intended for consumption in the exporting country. . . ."[31] Once again, this statement cannot be read to mean that no adjustment need be granted when the exporter does not import material inputs at all for consumption in the exporting country. Rather, all it says is that "when" the exporter or producer imports material inputs for consumption in the exporting country it must be shown that a duty is paid and is included in the cost of the merchandise sold there as a prerequisite to the receipt of a drawback adjustment. This is the first prong of the two-prong test as it is applied by the Department.[32]

Moreover, there is no discussion in any of the cases reviewed by Borusan's counsel that would limit the amount of the adjustment to the absolute amount of the duties included in the price of the like product sold in the domestic market. The limitation on the adjustment is that the same rates apply; that is, that the rate of duty exempted or rebated on export is the same rate of duty that would be collected if the input was imported for domestic consumption.[33]

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[31] Council Regulation (EC) No. 1676/2001 of August 13, 2001, Imposing a Definitive Anti-dumping Duty and Collecting Definitively the Provisional Duty Imposed on Imports of Polyethylene Terephthalate Film Originating in India and the Republic of Korea, Official Journal L 227, 23/08/2001, P. 0001-0014.

[32] See discussion of *Light-Walled Rectangular Pipe and Tube from Turkey, supra* at 3-7.

[33] *See, e.g.*, Council Regulation (EC) No 964/2003 of 2 June 2003 imposing definitive anti-dumping duties on imports of certain tube or pipe-fittings, of iron or steel, originating in the

E. Commerce Should Continue Its Current Policy In Order to Adjust for Both the Direct and Indirect Effects of a Tariff Barrier

The rationale for giving a duty drawback adjustment when goods sold in the home market are not duty-inclusive is that domestic raw material manufacturers can price their products up to the world market price, plus applicable duty, less $1, and still be price-competitive with imports. Therefore, even if a producer of subject merchandise acquires all of its raw material requirements for domestic sales from a home market supplier, the price that it pays for the domestically sourced raw materials is increased by the import duty on the raw material.

Moreover, even if an individual respondent did not pay import duties on the raw materials that it consumed in production for sale in the local market, that does not mean that its competitors did not do so or that the price paid by purchasers of the finished product, which is set through competition among all suppliers of subject merchandise in Turkey, is not influenced by the inclusion of those import duties in that respondent's competitors' costs of production. By not imposing a duty payment prerequisite in connection with the duty drawback adjustment, Congress intended to adjust for these indirect effects of a tariff wall as well. Moreover, Congress chose to mandate this adjustment without requiring fine determinations by the Department concerning the extent to which the tariff wall affects domestic prices.

F. The Department Should Allocate Duty Drawback Over Only Those Exports Made in Fulfillment of a Respondent's Obligation to Export a Sufficient Quantity of Finished Product to Incorporate the Inputs Imported Duty-Free

The Department's notice indicates that it is considering whether the drawback adjustment should be calculated by dividing the total pool of drawback over total exports in all cases. However, depending on the facts of the case, this policy would also be contrary to the plain

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People's Republic of China and Thailand, and those consigned from Taiwan, whether declared as originating in Taiwan or not, Official Journal L 139 , 06/06/2003 P. 0001 – 0015.

language of the law. The Department should continue to allocate duty drawback over only those exports made in fulfillment of a respondent's obligation to export a sufficient quantity of finished products to incorporate the material inputs imported duty-free.

Section 772(c)(1)(B) of the Act provides that the 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 exportation of the subject merchandise to the United States . . . ."[34] In Turkey's drawback system, an exporter earns a duty exemption on imported raw materials based on a commitment to export a sufficient quantity of finished product to have incorporated all of the imported inputs within a specified time-frame. The exporter must then indicate on its export documentation that the export is being submitted in fulfillment of this obligation and provide a closing list to the Government of Turkey showing that it has exported all of the finished product to which it has committed.

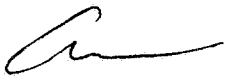
When this is done by BMB or by Borçelik, there can be no dispute that the exports that BMB and Borçelik make to the United States which were used to close their inward processing certificates were expressly relied upon by BMB and Borçelik to earn specific amounts of duty exemption provided for in their inward processing licenses. It was the exports to the United States included in the closing documents that specifically qualified BMB and Borçelik for the drawback received. Therefore, the particular drawback received by BMB and Borçelik and included in its claimed duty drawback adjustment was received "by reason of exportation of the subject merchandise to the United States," not by reason of exportation of subject merchandise to other destinations that were not included in BMB's or Borçelik's closing documents. Because

[34] 19 U.S.C. § 1677a(c)(1)(B)(emphasis added), *cited in Huffy Corp. v. United States*, 10 C.I.T. 214, 215, 632 F. Supp. 50, 52 (1986).

this drawback was, in fact, earned on exports of subject merchandise to the United States, full adjustment must be given under the plain language of Section 772(c)(1)(B).

For this reason, Borusan cautions the Department not to make a sweeping determination on this issue, but to address it on a case-by-case basis, and to ensure that its determinations are consistent with the dictates of the statute.

Respectfully submitted,



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