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August 15, 2005

The Honorable Carlos M. Gutierrez
Secretary of Commerce
Central Records Unit, Room 1870
U.S. Department of Commerce
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

PUBLIC DOCUMENT

Attention: John C. Kalitka

Re: *Duty Draw Back: Request for Comment*

Dear Mr. Secretary:

Pursuant to the notice published in the *Federal Register* on June 30, 2005, on behalf of the Royal Thai Government ("RTG"), we hereby submit the following comments concerning duty drawback. (attached at Exhibit 1).

If you have any questions, please contact the undersigned.

Respectfully submitted,

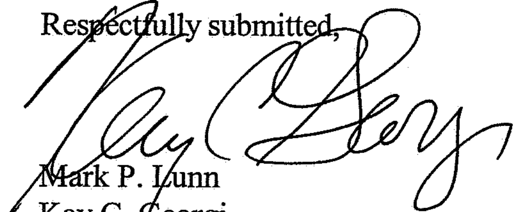

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EXHIBIT 1

ROYAL THAI GOVERNMENT
COMMENTS ON DUTY DRAWBACK

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 of 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.

As the Department is aware, the argument made in the Light Walled Rectangular Pipe and Tube from Turkey case (69 Fed. Reg. 53675 September 2, 2004) (comment 1) was that no adjustment should be made for duty drawback because the respondent could not demonstrate that it had paid duty on imported raw materials *used to make goods sold domestically.*

The RTG believes that the Department correctly rejected this argument, finding that there was no basis in the statute to create a third requirement to the standard two-party duty drawback test. Indeed, the Court of International Trade affirmed the Department's decision, finding that "the statute is clear on its face and Commerce is not required to find that the costs of the subject merchandise sold in the home market includes import duties." Allied Tube & Conduit Corp. v. United States, slip op 05-556, at 17 (Ct Intl Trade May 12, 2005).

Nevertheless, it is the RTG's understanding that the Department may now be reconsidering whether to add this requirement -- that respondents demonstrate that they actually paid import duties that were not rebated on some portion of raw material inputs during the relevant period. For the reasons discussed below, the RTG opposes such a change and believes that such a change would be inconsistent with U.S.

obligations under the WTO.

Article VI.4 of the General Agreement on Tariffs and Trade states that:

> 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.

Moreover, Article 2.4 of the WTO Antidumping Agreement ("AD Agreement") states:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. *Due allowance shall be made in each case, on its merits, for differences which affect price comparability*, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, *and any other differences which are also demonstrated to affect price comparability*.[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties. (footnotes omitted)

The Appellate Body in the Case of United States Hot-Rolled Steel From Japan at paragraph 177 discussed this provision as follows:

> Article 2.4 of the Anti-Dumping Agreement provides that, where there are "differences" between export price and normal value, which affect the "comparability" of these prices, "[d]ue allowance shall be made " for those differences. The text of that provision gives certain examples of factors which may affect the comparability of prices: "differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences". However, Article 2.4 expressly requires that "allowances" be made for "any other differences

which are also demonstrated to affect price comparability." (emphasis added).[1]

Thus, WTO Members are required to make allowances for any difference "affect[ing] price comparability."

Duty drawback has not been specifically discussed by a WTO Panel or the Appellate Body. However, it can reasonably be argued that it is a difference (between a home market and export sale) that affects price comparability. Imported raw materials used in goods sold in the domestic market are not eligible for duty drawback while imported raw materials used in exported goods are. The availability of a duty refund (drawback) or duty exemption for exports affects the comparability of the prices of the exported products with those sold domestically. As the Panel in United States - Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip From Korea explained at paragraph 6.77:

> **In our view, the requirement to make due allowance for differences that affect price comparability is intended to neutralize differences in a transaction that an exporter could be expected to have reflected in his pricing.**[2]

The fact that a manufacturer would receive duty drawback on imported materials used in its exported products is a factor that "could be expected to have reflected in his pricing" and failure to adjust for this condition would result in an unfair comparison. Moreover, imposing the additional burden of showing that domestically sold products are produced using imported goods would go beyond the requirement of the WTO

1 WT/DS184/AB/R (July 24, 2001).
2 WT/DS179/R (December 22, 2000)

because it is the fact that the exported goods receive the duty drawback that affects price comparability.

The United States in the case cited above also made a statement that supports this point (discussed at footnote 84 of the case):

> Footnote 84: "The United States appears to have a similar view. Thus, it states that "[s]elling expenses such as warranty costs and bad debt not only reflect conditions of sale in the market, they are also an element of price.[footnote omitted]. Therefore, differences in such selling expenses affect price comparability". First Submission of the United States, para. 84, Annex 2-1.3

Similar to warranty costs and bad debt, duty drawback and duty exemption schemes are an element that exporters reasonably take into consideration when setting prices for export, but not when setting prices in the domestic market. Accordingly, DOC should continue to adjust for duty drawback without imposing an additional requirement that domestically produced goods be manufactured using imported raw materials on which duty was paid. Duty drawback is only available when goods are exported and this is what impacts the pricing differences between exported and domestically sold product. Therefore, the duty drawback should not be allocated over all production.

Moreover, there is an additional reason why the Department should not add a requirement that import duties actually be paid on inputs used to produce goods sold domestically: a given foreign producer might have procured the inputs for their domestically sold products from domestic sources rather than having imported the

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3 *Id.*

inputs and paid duty on them. Thus, the Department would be imposing an impossible burden of proof in such cases. It is the knowledge that duty drawback will be paid on exported goods that impacts the pricing decision on exports and not any difference between what is paid for domestic and export production.

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

The exact method of how the adjustment should be made will depend somewhat on the duty drawback scheme and the records maintained by the respondent. In certain instances total duty drawback received will be known and this will have to be allocated over all exports. However, in some instances an exporter may be able to tie certain duty drawback to specific exports. Therefore, the Department should retain flexibility - as it has in the past - on the exact method of calculating the adjustment.

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?

As discussed above, this will depend on the program involved and the records maintained by the manufacturer.

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

In addition to being a factor in pricing, duty drawback and duty exemption schemes also affect the cost of materials, which is a component of the cost of production and constructed value. The AD Agreement at Article 2.2.1.1 states:

> **Costs shall normally be calculated *on the basis of records kept by the exporter or producer under investigation provided that such records are in accordance with generally accepted accounting principles* of the exporting**

country and reasonably reflect the cost associated with the production and sale of the product under consideration.

Duty drawback and duty exemption schemes result in a reduction in the cost of material that would be reflected in the cost of production.

Under recent case law (see Light Walled Rectangular Pipe and Tube from Turkey case (69 Fed. Reg. 53675 September 2, 2004) (comment 2), the Department adjusts both constructed value (CV) and the Cost of production (COP) for duties which have not been paid or collected (i.e. duties that are exempted). This is even the case where a manufacturer does not include the duties not paid in their normal cost accounting system maintained in accordance with local Generally Accepted Accounting Principles (GAAP). The Department's argument appears to be that those duties should have been recorded in the company's books and records because the goods were "dutiable" (to use the Department's words), even though the duties were never in fact paid (or, for duty drawback, were rebated upon export). However, as noted above, the AD Agreement states that cost used should be those cost that are "associated with the production and sale of the product under consideration" "on the basis of records kept by the exporter or producer under investigation."

Duties that have not been paid and are not recorded on the records of the exporter or producer kept in accordance with local GAAP are not costs associated with the production of the product under consideration. Accordingly, including such imaginary costs in the cost of production and constructed value violates Article 2.2.1.1 of the AD Agreement.