

TELEPHONE (202) 785-4185

TELECOPIERS

(202) 466-1286/87/88

LAW OFFICES

STEWART AND STEWART

2100 M STREET, N.W.

WASHINGTON, D.C. 20037

E-MAIL

GENERAL@STEWARTLAW.COM

WWW.STEWARTLAW.COM

November 17, 2006

Honorable David M. Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th Street & Constitution Avenue, N.W.
Washington, DC 20230

Attn: Mr. John Kalitka, Office of Policy

Re: Duty Drawback (Announcement of Change in Methodology, Request for Comments)

Dear Mr. Assistant Secretary Spooner:

Please find attached our comments on behalf of the Law Offices of Stewart and Stewart in response to the Department's *Federal Register* notice of October 19, 2006, 71 Fed. Reg. 61716, 61723, entitled *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*. Along with the original and six copies of the comments, we are also submitting them in electronic form on a CD-ROM, as requested in the notice.

Respectfully submitted,



Terence P. Stewart
Wesley K. Caine
Stewart and Stewart



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**Comments Regarding Proposed Changes
to the Department of Commerce's Duty Drawback Methodology
in Antidumping Duty Proceedings**

**Prepared by the Law Offices of Stewart and Stewart
November 17, 2006**

Introduction

These are comments on behalf of the Law Offices of Stewart and Stewart, Washington D.C., a firm with extensive experience representing domestic interests in antidumping proceedings before the U.S. Department of Commerce. They are submitted in response to the notice of the Import Administration, International Trade Administration, styled "*Anti-dumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*," 71 Fed. Reg. 61716, 61723 (October 19, 2006) (the "Notice"), wherein the agency solicited comments on its duty drawback methodology in antidumping calculations and offered a concrete proposal for change.

For the reasons discussed below, we agree with the Department's proposal to modify its current methodology. We also support the proposal advanced.

Discussion

Largely for practical reasons, many countries, including the United States, allow so-called "substitution drawback," a scheme whereunder drawback is granted for duties paid on imported inputs that *might* have been used in the manufacture of the exports on which the claim is based. As the Department's Notice now recognizes, these schemes may allow exporters to pick and choose the export shipments on which they base claims, for example, by allocating their claims disproportionately to exports to the United States. *See* Notice at 61723. Although this practice is unquestionably lawful, it may distort antidumping calculations when the exports are subject to an antidumping duty order, by artificially increasing

U.S. prices and thereby reducing antidumping margins. Of course, the exporter's ability to pick and choose constitutes a *de facto* allocation over which the exporter exercises full control and is therefore not a disinterested calculation.

The Department's new proposed methodology appropriately corrects the problem of distortion. In the words of the Notice itself, it would require a foreign exporter either to (a) "directly trace the particular imported duty-paid inputs through the subsequent production process and into particular finished goods that are exported to the United States" or (b) "allocate the total amount of duty drawback received across all exports that may have incorporated the duty-paid input in question, regardless of destination, to ensure that the adjustment claimed on U.S. sales is not overstated." Notice at 61723-61724. In our view, these alternatives eliminate the potential for manipulating antidumping results. Unless an exporter is able to trace inputs through the production process and into particular exported goods, it would have to perform neutral allocations that would not distort dumping calculations. Thus, when an exporter could not demonstrate that particular exports contained inputs upon which duties were actually paid, it would have to fairly allocate drawback to *all* exports that may have incorporated the imported materials in question – on a fair and disinterested basis. Commerce always requires fairness in allocation methodologies so as to avoid inaccuracies and distortions. 19 C.F.R. 351.401(g). Therefore, requiring fairness in drawback claims would conform to long-standing agency policy. It would eliminate the exporter's ability to pick and choose its drawback claims and thereby distort antidumping results.

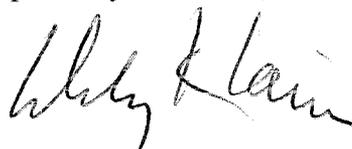
It would conform to the long-standing policy of requiring respondents claiming adjustments to assume and carry their burden of proof. *See, e.g., Statement of Administrative Action*, H. Doc. 103-316, 103d Cong., 2d Sess. 829 (1994). The purpose of the drawback adjustment in the United States price definition, in 19 U.S.C. 1677a(c)(1)(B), is to allow the

exporter to price goods in accordance with the actual costs of production. If the foreign government reduces those costs by refunding duties on imported inputs, it is only appropriate to allow the adjustment, for U.S. antidumping purposes, when the refund reasonably ties to the goods. If the only way to make this correlation is *via* allocation techniques, then the allocation must be fair, and duly showing a fair allocation is part of carrying the burden of proof.

Finally, we emphasize that the Department's current practice, which the agency now views as problematic, is not dictated by the statute, but was only created at the agency's discretion. It is true that the Court of International Trade has accepted the methodology in several cases, as a reasonable exercise of discretion, *see, e.g., Avesta Sheffield, Inc. v. United States*, 17 CIT 1212, 1216, 838 F.Supp. 608, 612 (1993), but the Department has often changed methodologies after gaining experience with the law. It is now evident that the agency sees that its existing method can be distortive, and there is every reason for it to formulate a new practice to eliminate that result. Certainly, after the Department provides reasons for adopting a new methodology, the Court would sustain the change in position as a new but reasonable construction of the law.

Accordingly, we agree with the need for a change and support the current proposal. It would close a loophole in the law and preclude the use of the drawback adjustment to achieve distorted and unfair results.

Respectfully submitted,



Terence P. Stewart
Wesley K. Caine
Stewart and Stewart