STATEMENT OF THE DUTY DRAWBACK COALITION
On
H.R. 1756 and S. 2121

Both Bills to Amend Section 313(j) of the Tariff Act of 1930 (19 U.S.C. § 1313(j))
To effect technical corrections to the drawback laws

Before the Subcommittee on Trade, Committee on Ways and Means
U.S. House of Representatives
And
Subcommittee on International Trade, Committee on Finance
U.S. Senate

June 7, 2002

In response to the House Ways and Means Trade Subcommittee's request for written comments on miscellaneous trade and tariff legislation dated May 3, 2002, we hereby submit the following comments in support of H.R. 1756 (as listed in TR-9), introduced by Representative Sam Johnson of Texas and co-sponsored by Representative Bill Jefferson of Louisiana.[1] H.R. 1756, and the Senate companion bill S. 2121,[2] reinstates original Congressional intent by making a technical correction to 19 U.S.C. § 1313(j) to provide that any and all Federal duties, taxes and fees imposed on imports are eligible for drawback. Currently, drawback is not allowed for all such Federal duties, taxes and fees. The technical correction that would be made by H.R. 1756 will help to ensure that U.S. manufacturers and exports can remain competitive in this era of trade liberalization.

A. Drawback Under 1313(j)

Drawback is the refund of U.S. Customs (Customs) duties, certain Internal Revenue taxes, and certain fees that have been lawfully collected at importation.[3] The refund is administered by Customs after the exportation or destruction of either the imported or substituted product, or the article that has been manufactured from the imported or substituted product.[4] Section 1313(j) of the drawback law grants drawback of *any* Federal taxes, duties and fees imposed upon merchandise when imported, and when the same or substitutable merchandise is later exported. The plain language of subsection (j) broadens the scope of "duties" for which drawback may be claimed due to the fact that drawback is claimed on same condition unused or commercially interchangeable merchandise for sales in order

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[1] These comments are submitted on behalf of the Duty Drawback Coalition, which is an ad hoc coalition that includes Shell Oil Company, Valero Energy Corporation, BP America and Danzas AEI Drawback Services.

[2] Senators John Breaux and Mary Landrieu of Louisiana introduced a companion bill, S. 2121, in the Senate.

[3] See http://www.customs.ustreas.gov/impoexpo/impoexpo.htm.

[4] See Id.

to "hold US importers harmless," and to and place them on a level playing field when competing against foreign entities in the global marketplace. This is supported by the legislative history of the Customs Modernization Act, in which Congress stated simply that "19 U.S.C. 1313 provides for drawback, that is, a refund or remission, in whole or in part, of a customs duty, internal revenue tax, or fee lawfully assessed or collected because of a particular use made of the merchandise and/or exportation of the merchandise on which the duty, tax or fee was assessed or collected . . .". Therefore, drawback under this section was intended by Congress to include claims for all Federal and Internal Revenue taxes, Customs duties, and Federal fees.

B. H.R. 1756 Enjoys Industry-Wide Support

This bill enjoys industry-wide support from a number of companies and associations, including the Joint Industry Group. On February 15, 2002, Congressional staff, Customs and industry representatives met to discuss whether: (1) H.R. 1756 as written would accomplish its objective; and (2) any opposition exists with regard to the bill's inclusion this year in the miscellaneous trade package. At the end of the meeting, all parties agreed to certain changes to the bill that would remove any concern by Customs about its implementation and effectiveness, and there is no known opposition to the bill. Twenty-six people representing Congressional, industry and Customs' interests attended the meeting, and a copy of the attendance list is attached.

C. Reasons Supporting the Technical Correction Made by H.R. 1756: The Current Application of 1313(j) is Contrary to Congressional Intent and the Policy of the Drawback Program

The duty drawback program was established to help U.S. exporters to remain and become more competitive in the global marketplace. Drawback under Section 1313(j) therefore was intended to assist in that regard by granting drawback claims for all Federal and Internal Revenue taxes, Customs duties, and Federal fees, such as the Merchandise Processing Fee (MPF) (a user fee) and the Harbor Maintenance Tax (HMT). Currently, drawback is not granted for all Federal duties, taxes or fees as a result of the U.S. Court of Appeals for the Federal Circuit's (CAFC) ruling in the case of Texport Oil Company v. United States[5] overturning the U.S. Court of International Trade's (CIT) interpretation that § 1313(j) allows drawback of the HMT.

If the CAFC decision is not corrected, there will remain precedent and policy contrary to Congressional intent and the plain language of the statute regarding the ability to "drawback" any Federal duties, taxes or fees pursuant to 1313(j). Such "bad" precedent will likely result in controversy and instability in the application of 1313(j) to drawback, and would vitiate the effect and intent of the drawback program. Sound policy and legal grounds exist for the proposed change that would be made by H.R. 1756.

First, the establishment of the duty drawback program, and the legislative policy underlying the program, is to ensure the competitiveness of U.S. industry in the global market when competing against lower-priced exports from our trading partners. The drawback program was initiated for the purpose of: creating jobs; encouraging manufacturing; and encouraging exports.[6] Customs states that

[5] Slip Op. No. 98-1352, -1353, -1373 (July 27, 1999). (Hereafter referred to as Texport).
[6] See http://www.customs.ustreas.gov/impoexpo/impoexpo.htm.

> The rationale for drawback has always been to encourage American commerce or manufacturing, or both. It permits the American manufacturer to compete in foreign markets without the handicap of including in his costs, and consequently in his sales price, the duty paid on imported merchandise.[7]

The Continental Congress first established drawback in 1789, and it was initially limited to specific articles, such as salt used to cure meats, that were directly imported and exported.[8] Since that time, drawback has been expanded to include numerous products. It is of interest to note that the World Trade Organization ("WTO") has commented that the effects of drawback programs in other countries create an export incentive, counteracts the negative effects of high import tariffs, create a strong magnet for export-oriented foreign direct investment, benefit exporters and manufacturers, and removes a bottleneck to private sector development. Drawback is an internationally sanctioned export program and the policy and intent of the program should not be restricted.

Second, drawback for Federal duties, taxes or fees under Subsection (j) is based on the fact that the Federal duty, tax or fee is imposed on imported merchandise that is later exported or is substituted for by merchandise that is exported. Thus, drawback is dependent solely upon whether the tax or duty was levied upon importation of the merchandise (that is, because the merchandise is imported, it is taxed).

The HMT is subject to drawback. It is a Federal tax or duty imposed by Federal law on merchandise because the merchandise is imported and in order to raise revenue from imports. The CIT in Texport,[9] and the U.S. Supreme Court in U.S. Shoe, have stated that "Congress [in 26 U.S.C. Sec. 4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of [administration, enforcement and] jurisdiction. Such duties, by their very nature, provide for revenue from imports . . .".[10] The U.S. Supreme Court in U.S. Shoe, explicitly recognized the following additional key points of fact with respect to the assessment or levying of the HMT on imports: Congress codified the HMT as a Federal tax under the Internal Revenue Code under 26 U.S.C. Sec. 4461(a)[11]; and, the HMT is not a user fee but a tax [imposed on foreign imports].[12]

It is clear that the HMT is specifically categorized as a tax on imports. However, in Texport, the CAFC held that the statutory language of 1313(j) does not allow drawback to be collected on payment of the HMT and other nondiscriminatory taxes, because such taxes are generalized Federal fees. The CAFC held that the statute only allows the importer to recover drawback for the payment of duties, fees and taxes in which there is a substantial nexus between the assessed fees and the act of importation. In stating that the HMT is a generalized fee and is payable regardless of whether a good is imported, the CAFC stated that no substantial nexus existed between the payment of the HMT and the act of importation of the merchandise, and, therefore, drawback for HMT cannot be claimed. The opposite is in fact the case.

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[7] See Id.
[8] See Id.
[9] Slip Op. 98-21, Page 27 (March 5, 1998).
[10] See U.S. Shoe, No. 97-372, Page 5 (March 31, 1998), quoting the Court of International Trade.
[11] See U.S. Shoe, Bench Opinion, Syllabus, Page 2 (October Term 1997).
[12] See U.S. Shoe, No. 97-372, Page 3 (March 31, 1998).

Congress, however, did not differentiate between generalized fees or discriminatory or non-discriminatory taxes or fees, but rather intended that drawback shall be granted based on the particular use and thereafter the exportation of the merchandise (or substituted merchandise) that was imported and upon which the tax or fee was levied. This is clearly set forth in the legislative history of the Customs Modernization Act, in which Congress stated simply that "19 U.S.C. 1313 provides for drawback, that is, a refund or remission, in whole or in part, of a customs duty, internal revenue tax, or fee lawfully assessed or collected because of a particular use made of the merchandise and/or exportation of the merchandise on which the duty, tax or fee was assessed or collected . . .". Therefore, drawback under this 1313(j) was intended by Congress to include claims for all Federal and Internal Revenue taxes, Customs duties, and Federal fees. In addition, with respect to drawback under 1313(j), Customs states unequivocally on its website that

> **Any duty, tax, or eligible fee** (including merchandise-processing fee) paid by reason of importation on merchandise that is not used prior to exportation or destruction is recoverable as drawback. [Emphasis added].[13]

Whether the HMT is a generalized fee is irrelevant because 1313 (j) grants drawback of *any* Federal duty, tax or fee imposed on merchandise upon entry or importation, and whether paid immediately or at a later date, as long as such Federal duty, tax or fee is paid.[14] It is within this category under 1313(j)(1) and (2) that the HMT falls.[15]

Due to the CAFC's ruling in Texport, clarification by Congress is necessary concerning whether the HMT is subject to drawback under 1313(j) as *any* duty, tax or fee imposed under Federal law because of the merchandise's importation, and specifically as a Customs duty or Internal Revenue Tax for which drawback is granted. This clarification would allow for the full implementation of the legislative intent behind this provision of law and allows for the continued competitiveness of U.S. industry in an increasing global marketplace.

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[13] See http://www.customs.ustreas.gov/impoexpo/impoexpo.htm.

[14] A close reading of (j)(1) and (2) reveals that it is unlike any other subsection within 1313. All other subsections within 1313 grant drawback only for "duties", yet subsection (j) expands drawback to Federal taxes and fees.

[15] Drawback must be granted for the HMT pursuant to the plain language and meaning of 1313(j) because the HMT is "any" Federal duty or tax imposed on imported merchandise. The CAFC in Texport also recognized that the U.S. Supreme Court in U.S. Shoe held that the HMT is not a user fee, but is an ad valorem tax based on the value of the goods imported rather then the degree of use of the port facility. Recognition by the Supreme Court, and subsequent affirmation by the court in Texport, that the HMT is not a user fee invalidates the Customs's premise that the HMT is not subject to drawback because it is a user fee. Thus, the Supreme Court, as does Congress, recognizes the HMT as both a Federal tax and a customs duty when imposed upon imports, and as such the HMT is subject to drawback under 1313(j)(1) and (2) as either a Federal duty or tax. The Texport case is not being appealed to the U.S. Supreme Court.

The Customs, in its March 5, 1998 Final Rule concerning drawback stated that the HMT is not subject to drawback inasmuch as the HMT is imposed in connection with port use. (See 63 Fed. Reg. 10970, 10974 (March 8, 1998)). However, this final rule was issued immediately prior to the U.S. Supreme Court's March 31, 1998 opinion in U.S. Shoe and to date has not been modified.

D. <u>H.R. 1756/S. 2121 Will Provide Substantial Benefits to U.S. Producers, Manufacturers, and Exporters When Competing in the Global Market</u>

The changes made to § 1313(j) of the Tariff Act of 1930 would correct the inequities established by the CAFC with respect to the general application of the drawback program as Congress intended it to be operated, thus allowing U.S. manufacturers to compete on a level playing field with foreign producers for sale of goods in the global marketplace. Without this technical change, the door will remain open for additional restrictions on duty drawback of Federal duties, taxes and fees under § 1313(j), constricting U.S. manufacturers' ability to compete in the export market. In addition, by increasing claims eligible for drawback, U.S. producers and manufacturers would be able to make capital investments and expand production to meet future growth and demand for their products in the markets in which they participate. The U.S. is currently attempting to negotiate with many Latin and South American countries with regard to the development of free trade areas and the establishment of open market access. The duty drawback program is essential to this process.

We appreciate your consideration of our comments and we hope that Congress will act favorably on this legislation at the earliest opportunity. If you have any questions or require additional information, please contact either Marc Hebert at (202) 828-5838, or Mike Pate at (202) 828-5841, at Bracewell & Patterson, L.L.P.

Cc: Senator John Breaux

Senator Mary Landrieu

Congressman Sam Johnson

Congressman William Jefferson

United States International Trade Commission
Office of Tariff Affairs and Trade Agreements