

U.S. Customs and Border Protection



19 CFR CHAPTER I

TERMINATION OF ARRIVAL RESTRICTIONS APPLICABLE TO FLIGHTS CARRYING PERSONS WHO HAVE RECENTLY TRAVELED FROM OR WERE OTHERWISE PRESENT WITHIN THE REPUBLIC OF GUINEA

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Announcement of termination of arrival restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security to terminate arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, the Republic of Guinea. These arrival restrictions were initiated due to outbreaks of Ebola virus disease (EVD) in the Democratic Republic of the Congo (DRC) and in the Republic of Guinea. These restrictions directed such flights to land only at a limited set of United States airports where the United States government had focused public health resources to implement enhanced public health measures.

DATES: The arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, the Republic of Guinea are terminated as of 12:01 a.m. Eastern Daylight Time on May 14, 2021.

FOR FURTHER INFORMATION CONTACT: Alyce Modesto, Office of Field Operations, U.S. Customs and Border Protection at 202-286-8995.

SUPPLEMENTARY INFORMATION:

Background

On March 4, 2021, the Secretary of Homeland Security (Secretary) announced arrival restrictions applicable to flights carrying persons who have recently traveled from, or were otherwise present within, the Democratic Republic of the Congo (DRC) or the Republic of Guinea, consistent with 6 U.S.C. 112(a), 19 U.S.C. 1433(c), and 19

CFR 122.32, in a **Federal Register** document titled “Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the Democratic Republic of the Congo or the Republic of Guinea” (86 FR 12534). On May 3, 2021, the Secretary terminated the arrival restrictions applicable to flights carrying persons who have recently traveled from, or were otherwise present within, the DRC in a **Federal Register** document titled “Termination of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the Democratic Republic of the Congo” (86 FR 23277). However, the May 3, 2021 **Federal Register** notification did not terminate the arrival restrictions for flights carrying persons who have recently traveled from, or were otherwise present within, the Republic of Guinea because the most recent case of EVD in the Republic of Guinea was confirmed on April 3, 2021.

For the reasons set forth below, the Secretary has decided to terminate the arrival restrictions applicable to flights carrying persons who have recently traveled from, or were otherwise present within, the Republic of Guinea. These restrictions funnel relevant arriving air passengers to one of six designated airports of entry where the United States is implementing enhanced public health measures. Since April 3, 2021, there have been no new confirmed EVD cases reported in the Republic of Guinea and all contacts of cases that were being monitored for EVD have passed the 21-day incubation period. With no new hospitalized patients with EVD and no contacts of confirmed EVD cases still requiring monitoring, the potential risk for Ebola virus exposure in the Republic of Guinea has greatly diminished. Therefore, flight restrictions are no longer required for flights carrying persons who have recently traveled from, or were otherwise present within, the Republic of Guinea.

Notice of Termination of Arrival Restrictions Applicable to All Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the Republic of Guinea

Pursuant to 6 U.S.C. 112(a), 19 U.S.C. 1433(c), and 19 CFR 122.32, and effective as of 12:01 a.m. Eastern Daylight Time on May 14, 2021, for all affected flights arriving at a United States airport, I hereby terminate the arrival restrictions applicable to flights carrying persons who have recently traveled from, or were otherwise present within, the Republic of Guinea announced in the Arrival Restrictions document published at 86 FR 12534 (March 4, 2021).

ALEJANDRO MAYORKAS,
Secretary,

U.S. Department of Homeland Security.

19 CFR PART 177

REVOCATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF HARD SELTZER

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of two ruling letters and of revocation of treatment relating to the tariff classification of hard seltzer.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking two ruling letters concerning tariff classification of hard seltzer under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 11, on March 24, 2021. Two comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 1, 2021.

FOR FURTHER INFORMATION CONTACT: Tanya Secor, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0062.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. §1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 11, on March 24, 2021, proposing to revoke two ruling letters pertaining to the tariff classification of hard seltzer. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In New York Ruling Letter ("NY") N315004 and NY N313678, CBP classified hard seltzer in heading 2203, HTSUS, specifically in subheading 2203.00.00, HTSUS, which provides for "Beer made from malt." CBP has reviewed NY N315004 and NY N313678 and has determined the ruling letters to be in error. It is now CBP's position that hard seltzer is properly classified, in heading 2206, HTSUS, specifically in subheading 2206.00.90, HTSUS, which provides for "Other fermented beverages (for example, cider, perry, mead, sakè); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included: Other: Other."

Pursuant to 19 U.S.C. §1625(c)(1), CBP is revoking NY N315004 and NY N313678 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H314978, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated:

For
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H314978

May 11, 2021

OT:RR:CTF:FTM H314978 TJS

CATEGORY: Classification

TARIFF NO.: 2206.00.90

MR. ARTHUR DeCELLE
LEHRMAN BEVERAGE LAW
2911 HUNTER MILL ROAD
SUITE 303
OAKTON, VA 22124

RE: Revocation of NY N315004 and NY N313678; Tariff Classification of White Claw Hard Seltzer

DEAR MR. DeCELLE:

This is in reference to New York Ruling Letter (“NY”) NY N315004, dated October 13, 2020, concerning the tariff classification of certain hard seltzer under the Harmonized Tariff Schedule of the United States (“HTSUS”). In that ruling, U.S. Customs and Border Protection (“CBP”) classified the hard seltzer at issue under subheading 2203.00.00, HTSUS, which provides for, “Beer made from malt: In containers each holding not over 4 liters.” NY N315004 modified NY N313678, dated August 28, 2020, which contained a clerical error and classified the hard seltzer under subheading 2203.90.00, HTSUS. Upon additional review, we have found the classification of this product under heading 2203, HTSUS, to be incorrect. For the reasons set forth below, we hereby revoke NY N315004 and NY N313678.

You have asked for confidential treatment of the details of the production and packaging process in your submission. Inasmuch as your request conforms to the requirements of 19 C.F.R. § 177.2(b)(7), your request for confidentiality is approved. The details of the production and packaging process in your letter and the attachments to your request for a binding ruling will not be released to the public.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Vol. 55, No. 11, on March 24, 2021. Two comments, which will be addressed below, were received in response to this notice. As a result of these comments, we are clarifying the analysis in our decision as it relates to the hard seltzer in question. Specifically, we are clarifying the fact that the White Claw Hard Seltzer is produced primarily from a fermented sugar brew with only trace amounts of malted ingredients. This fermented mixture, although referred to as “beer base,” lacks the color, aroma, and taste typical of beer made from malt, and the addition of seltzer water and flavoring further distinguish the final product from beer. The presence or absence of malted ingredients does not govern classification in heading 2206, rather, whether the hard seltzer lacks the characteristics of what is commonly and commercially recognized as beer made from malt is determinative for purposes of tariff classification in this case.

FACTS:

In NY N315004, the hard seltzer at issue was described as follows:

The subject merchandise is described as five different flavors (Lime, Raspberry, Ruby Grapefruit, Black Cherry and Mango) of Hard Seltzer with the brand name “White Claw Hard Seltzer.” The products consist of Beer Base (15%-17%), Natural Flavors (2%-3%), Water (81%-82%) and trace amounts of Juice Concentrate, Cane Sugar, Citric Acid and Sodium Citrate. The beer base is composed of Sugar (51%), Yeast & Nutrients (less than 4%), Water and trace amounts of Malted Gluten-Free Grains. Malted gluten free grains are mixed with sugar and warm water. The mixture is then pitched with yeast, enzymes and yeast nutrients to aid the fermentation. The fermented mixture is then clarified and filtered to produce the beer base. The beer base is then mixed with the other ingredients, including cane sugar, juice concentrate, juice flavor and water to produce the bulk product with an alcohol by volume content of 5 percent. Each flavor of the bulk finished product is packaged in 12-ounce and 19.2-ounce aluminum beverage cans ready for export to the United States.

In your request for a binding ruling, dated August 3, 2020, you described the White Claw Hard Seltzer as “a relatively new, gluten-free, low-calorie brand that has grown to become a significant subcategory of the U.S. beer market.” You further state that the hard seltzer is sold alongside beer. The White Claw website provides the following description of the finished beverages: “Crafted with quality ingredients, White Claw® Hard Seltzer is made from a blend of seltzer water, our gluten-free alcohol base, and a hint of fruit flavor.”¹ The cans are labeled “Spiked Sparkling Water with a hint of [flavor].”

ISSUE:

What is the tariff classification of White Claw Hard Seltzer under the HTSUS?

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI 2 through 6 may then be applied in order.

The HTSUS headings under consideration are as follows:

2203 Beer made from malt

2206 Other fermented beverages (for example, cider, perry, mead, sakè); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included:

* * *

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of

¹ White Claw, <https://www.whiteclaw.com/> (last visited Feb. 17, 2021).

merchandise under the System. *See* T.D. 89–80, 54 Fed. Reg. 35127 (Aug. 23, 1989).

The EN to heading 2203, HTSUS, provides in pertinent part as follows:

Beer is an alcoholic beverage obtained by fermenting a liquor (wort) prepared from malted cereals (most commonly barley or wheat), water and (usually) hops. Certain quantities of non-malted cereals (e.g., maize (corn) or rice) may also be used for the preparation of the liquor (wort). The addition of hops imparts a bitter and aromatic flavour and improves the keeping qualities. Cherries or other flavouring substances are sometimes added during fermentation.

Sugar (particularly glucose), colouring matter, carbon dioxide and other substances may also be added.

According to the fermenting process employed, the products may be bottom fermentation beer, obtained at a low temperature with bottom yeasts, or top fermentation beer, obtained at a higher temperature with top yeasts.

Beer may be pale or dark, sweet or bitter, mild or strong. It may be put up in barrels, bottles or in airtight tins and may be marketed as ale, stout, etc.

The EN to heading 2206, HTSUS, provides in relevant part as follows:

This heading covers all fermented beverages other than those in headings 22.03 to 22.05.

...

All these beverages may be either naturally sparkling or artificially charged with carbon dioxide. They remain classified in the heading when fortified with added alcohol or when the alcohol content has been increased by further fermentation, provided that they retain the character of products falling in the heading.

* * *

You assert that the White Claw Hard Seltzer is properly classified in heading 2203, HTSUS, as beer. In particular, you claim that the hard seltzer meets the definitions of “beer” in the Internal Revenue Code (“IRC”) and the Alcohol and Tobacco Tax and Trade Bureau (“TTB”) regulations. *See* 26 U.S.C. § 5052(a); 27 C.F.R. §§ 25.11, 25.15, 27.11. You state that although the excise tax is a separate function from tariff classification, the functions are substantially related. The TTB regulations you cite pertain to the collection of federal excise taxes on alcoholic products and are not intended as guidance for classification of imported merchandise under the HTSUS. Statutes, regulations and administrative interpretations relating to ‘other than tariff purposes’ are not determinative of CBP classification disputes. *See Amersham Corp. v. United States*, 5 C.I.T. 49, 56, 564 F. Supp. 813, 817 (1983). However, to the extent that regulations or definitions of other federal agencies may be instructive in a tariff classification decision, we note that TTB regulations refer to both “beer” and “malt beverages” separately; regardless of their tax treatment, TTB clearly acknowledges that not all beverages made from malt are “beer.” We also note that the IRC and TTB definitions of “beer” may

encompass products not classified as beer under the HTSUS, such as sakè, which is explicitly classified in heading 2206, HTSUS. Thus, the IRC and TTB regulations are not binding on CBP for tariff classification purposes.

The present issue is whether the White Claw Hard Seltzer is a beer of heading 2203, HTSUS, or other fermented beverage of heading 2206, HTSUS. Heading 2203, HTSUS, is an *eo nomine* provision for beer. To determine whether a beverage is a beer, CBP examines its manufacturing process, organoleptic properties, and commercial identity. See Headquarters Ruling Letter (“HQ”) H243087 (Jan. 13, 2015); and HQ 084708 (July 21, 1989). CBP has consistently classified flavored malt beverages produced from a filtered fermented malt base to which flavoring is added in heading 2206, HTSUS, rather than heading 2203, HTSUS. HQ H243087 concerned the classification of four different malt beverages: “Green Apple Sparkletini Italian Spumante”; “Raspberry Sparkletini Italian Spumante”; “Peach Sparkletini Italian Spumante; and “Verdi Spumante.” The beverages were manufactured by adding different flavoring to a “beer base” that was produced from a mash of malted barley. The base was filtered after fermentation to remove the color and aroma from the malt beverage in order to create a clear, odorless base. CBP held that the beverages were precluded from classification in heading 2203, HTSUS, because they were entirely distinct from beer and were not marketed, sold, or advertised as beer.

Similarly, in HQ 084708, CBP classified fermented malt beverages described as “French Sparkler” in flavors “Wildberry” and “Raspberry.” The manufacture of the French Sparklers began with fermenting degenerated malt cereals and hops and adding sugar. The product underwent “ultra-filtration” and then flavoring, colorant, and preservatives were added. CBP noted that the beverages were produced using degenerated (old) malt cereals and hops, which are not normally used in manufacturing beer. CBP also noted that the beverages were bottled and labeled as “French Sparkler,” in an effort to compete in the wine cooler market. CBP concluded that the “French Sparkler” was distinct from beer because it did not have the taste, aroma, character or appearance of beer, nor was it commercially or commonly known as beer.

Like the beverages in HQ H243087 and HQ 084708, we find that the White Claw Hard Seltzer is entirely distinct from beer because it does not have the taste, aroma, character or appearance of beer. With regard to appearance of beer, the EN to heading 2203 provides that beer may be pale or dark whereas the White Claw Hard Seltzer has the appearance and consistency of clear sparkling water. The hard seltzer is manufactured in a manner similar to the beverages in HQ H243087 and HQ 084708, which involved filtering a fermented base and then adding flavoring to a neutral alcoholic base. Unlike those rulings, however, the White Claw Hard Seltzer is produced primarily from a fermented sugar brew with only trace amounts of malted ingredients. Even though the neutral alcoholic base is referred to as “beer base,” it lacks the color, aroma, and taste typical of beer made from malt. After the fermented mixture is clarified and filtered, seltzer water and flavoring are added to the neutral base to further distinguish the final product from beer.

Furthermore, White Claw Hard Seltzer is not named beer, and importantly, is not sold or marketed as beer. Beer is a commonly recognized product while White Claw Hard Seltzer is sold in a growing category of alcoholic

beverages known as “hard seltzers” or “spiked seltzers.”² You note that White Claw Hard Seltzer is sold alongside beer, but the appearance of the product alongside beer at a store does not make it a beer for tariff purposes. Other beverages that are sold alongside beer are classified in heading 2206, HTSUS, such as cider and wine coolers. Finally, the hard seltzers are not labeled or presented as beer but as “spiked sparkling water.” Notably, the White Claw website makes no reference to beer and identifies the “beer base” as “gluten-free alcohol base.” The finished products are not what is commonly or commercially known as beer within the scope of heading 2203, HTSUS. The differences in manufacturing, organoleptic properties, and the product’s unique commercial identity distinguish the subject hard seltzer from beer and make classification in heading 2206, HTSUS, appropriate.

In view of the foregoing, we find that heading 2206, HTSUS, encompasses the subject White Claw hard seltzer. Specifically, the hard seltzer is classified under subheading 2206.00.90, HTSUS, which provides for, “Other fermented beverages (for example, cider, perry, mead, sake); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included: Other: Other.”

In response to CBP’s notice of the proposed action to revoke NY N315004 and NY N313678, two comments were received. One commenter argues that the dictionary, TTB, and IRC definitions and regulations for beer, which do not require the presence of malt in beer, apply to hard seltzer and should guide tariff classification in heading 2203, HTSUS. Heading 2203, HTSUS, covers “beer made from malt” and external definitions that do not require malt do not supersede the language of the heading. In classifying the hard seltzer in heading 2206, HTSUS, we do not take into consideration the presence or absence of malted ingredients - rather, we consider that the alcohol base lacks any beer characteristics, and the hard seltzer is not commonly nor commercially recognized as beer. As discussed above, TTB regulations and the IRC are entirely distinct legal authorities from the HTSUS, which controls the tariff classification of goods imported into the United States and does not apply to domestic products. The TTB and IRC definitions of beer are instructive, but do not control tariff classification under heading 2203, HTSUS. The commenter also notes that heading 2206, HTSUS, applies to unique wine products and not hard seltzers as they do not meet any of the formal standards of identity or consumer understanding of any of the wines fermented from fruit that are specifically referenced under heading 2206, HTSUS. We find that hard seltzers are no more distinct from wine products as they are from beer because they are a relatively new category of alcoholic beverages. Pursuant to GRI 1, the hard seltzer does not meet the terms of heading 2203, HTSUS, because it is not beer, but it does meet the terms of heading 2206, HTSUS, as “other fermented beverages.”

The second commenter also urges CBP to follow TTB’s classification of the product as beer. This commenter further argues that hard seltzers are classified *prima facie* in both headings 2203 and 2206, HTSUS, and consequently GRI 3(a) should be utilized to classify the product in heading 2203, HTSUS.

² For example, grocery chains in the United States categorize and sell White Claw as “hard seltzer” or “spiked seltzer.” See Albertsons, <https://www.albertsons.com/shop/aisles/wine-beer-spirits/beer/spiked-seltzers.177.html> (last visited Feb. 17, 2021); Safeway, <https://www.safeway.com/shop/aisles/wine-beer-spirits/beer/spiked-seltzers.3132.html> (last visited Feb. 17, 2021); Total Wine & More, <https://www.totalwine.com/beer/specialty-styles/hard-spiked-seltzers/c/9191919> (last visited Feb. 17, 2021).

We are not persuaded that GRI 3 is appropriate in this case because the hard seltzer is not classified by GRI 1 in heading 2203, HTSUS. The commenter's second concern, claiming that malt substitutes should be encompassed in "malt" under subheading 2203.00.0060, HTSUSA, does not affect classification of the White Claw Hard Seltzer at issue. Finally, the commenter argues that the revocation should be prospective only and not apply retroactively for the time period covered by NY N315004 and NY N313678. We note that pursuant to 19 U.S.C. § 1625(c), the final ruling or decision shall become effective 60 days after the date of its publication in the Customs Bulletin. *See also* 19 C.F.R. §177.12(e)(2)(i) (stating that the revocation will, provided that liquidation of the entry in question has not become final, apply to merchandise entered, or withdrawn from warehouse for consumption, sixty calendar days after the date of publication in the Customs Bulletin).

HOLDING:

By application of GRI 1, we find that the hard seltzer at issue is classified under heading 2206, HTSUS, and specifically in subheading 2206.00.90, HTSUS, which provides for, "Other fermented beverages (for example, cider, perry, mead, sakè); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included: Other: Other." The 2021 column one, general rate of duty is 4.2 cents per liter.

EFFECT ON OTHER RULINGS:

NY N315004, dated October 13, 2020, and NY N313678, dated August 28, 2020, are hereby REVOKED.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Sincerely,

For

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

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**MODIFICATION OF TWO RULING LETTERS AND
REVOCATION OF TREATMENT RELATING TO THE
COUNTRY OF ORIGIN OF CERTAIN WRISTWATCHES
PRODUCED IN MORE THAN ONE COUNTRY**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Modification of two ruling letters and revocation of treatment relating to the country of origin of certain wristwatches produced in more than one country.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modern-

ization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying two ruling letters concerning the country of origin of certain wristwatches produced in more than one country. Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Two comments were received in response to CBP’s proposed action.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 1, 2021.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–0046.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. §1625(c)(1), a notice was published in the Customs Bulletin, Vol. 55, No. 12 on March 31, 2021, proposing to modify two ruling letters, Headquarters Ruling Letter (HQ) H304105, dated June 25, 2019, and HQ H047115, dated June 22, 2009, pertaining to the country of origin of certain wristwatches produced in more than one country. Two comments were received in response to the proposed action. One comment was general in nature and policy oriented and set out different watch production scenarios. This commenter’s concerns were primarily with the impact of Section 301 duties upon the importation of Chinese components used in the assembly of watches in the United States. In two of the scenarios presented, the movement is of U.S. origin and the assembly also

occurs in the United States. In another scenario, the origin of the watch and assembly also take place in the same country. As such, there would be no section 301 implications. In some of the other scenarios, foreign watch components are primarily just assembled in the United States. In general, the resolution of the issues presented would involve updating the Chapter 91 provisions which is outside the scope of this section 1625 modification. The other commenter's comments are addressed in HQ H306338. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In HQ H304105, CBP found that, although the country of origin of the watch was the country of origin of the movement, the origin of the case components for duty purposes did not change when the case and movement were joined to form a watch. A similar finding was made in HQ H047115 with regard to a Japanese watch movement joined with an Israeli case in Israel. CBP has reviewed HQ H304105 and HQ H047115 and has determined the ruling letters are in error as to the origin of the watch cases for duty purposes.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying HQ H304105 and HQ H047115, and revoking or modifying any other ruling not specifically identified, to reflect the analysis contained in HQ H306338 and HQ H315335, set forth as Attachments "A" and "B" to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated: May 14, 2021

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

HQ H306338

May 14, 2021

OT:RR:CTF:VS H306338 CMR

CATEGORY: Origin

SHARA L. ARANOFF, ESQ.
WILLIAM R. ISASI, ESQ.
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ONE CITYCENTER
850 TENTH STREET, NW
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RE: Modification of Headquarters Ruling Letter (HQ) H304105; Country of origin of imported watches; Section 301 Trade Remedies

DEAR MS. ARANOFF AND MR. ISASI:

This is in response to your submission, dated October 28, 2019, submitted on behalf of the American Watch Association (“AWA”) and certain of its member companies, including Casio, Citizen, Fossil, Movado, Seiko and Selco, requesting U.S. Customs and Border Protection (CBP) reconsider and revoke Headquarters Ruling Letter (HQ) H304105, dated June 25, 2019, issued to Seiko Watch of America, LLC, one of your member companies, regarding the country of origin to declare in Block 10 of the CBP Entry Summary Form (CBP 7501)¹ or its electronic equivalent in ACE, and for purposes of the constructively segregated components as required in Block 27² for certain imported watches, and whether Section 301 duties apply.³ In reaching our decision to modify HQ H304105, set forth below, CBP has taken into consideration the additional arguments submitted in your supplemental submission, dated June 17, 2020.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice proposing to modify HQ H304105 was published on March 31, 2021, in Volume 55, Number 12 of the *Customs Bulletin*. Two comments were received in response to the proposed action, but only one commenter specifically addressed the modification of HQ H304105. Those comments are addressed in this decision.

¹ The instructions for the CBP Form 7501 state, in relevant part: “The country of origin is the country of manufacture, production, or growth of any article. If the article consists of material produced, derived from, or processed in more than one foreign territory or country, or insular possession of the U.S., it shall be considered a product of that foreign territory or country, or insular possession, where it last underwent a substantial transformation.”

² The instructions of the CBP Form 7501 state with regard to Block 27, in relevant part: “A ‘line number’ refers to a commodity from one country, covered by a line which includes a net quantity, entered value, HTS number, charges, rate of duty and tax. However, some line numbers may actually include more than one HTS number and value. . . . [M]any items in Chapter 91 of the HTS require as many as four HTS numbers. Watches classifiable under subheading 9101.11.40, for example, require that the appropriate reporting number and duty rate be shown separately for the movement, case, strap, band or bracelet, and battery.”

³ The Section 301 duties became effective for goods classified in heading 9101 or 9102 on September 1, 2019 per Executive Order.

FACTS:

Seiko is a wholly owned U.S. subsidiary of Grand Seiko Corporation of America which is, in turn, a wholly owned subsidiary of Seiko Watch Corporation, headquartered in Tokyo, Japan. Seiko distributes watches and related products in the United States. The chart below sets forth the four scenarios that you presented.

	Movement Production	Case Production	Band Production	Battery Production	Assembly of entirety to wearable watch
1	Japan	China	China	Japan	Japan
2	Japan	China	China	Japan	China
3	Japan	China	China	Japan	Thailand
4	Malaysia	China	China		China

In the fourth scenario, the watch movement was mechanical and, therefore, the watch did not contain a battery.

The complete wristwatches are classified in headings 9101 or 9102 of the Harmonized Tariff Schedule of the United States (HTSUS), specifically, subheadings 9101.11.40, 9101.11.80, 9101.19.40, 9101.19.80, 9102.11.10, 9102.11.25, 9102.11.30, 9102.11.45, 9102.11.50, 9102.11.65, 9102.11.70, 9102.11.95, 9102.19.20, 9102.19.40, 9102.19.60 and 9102.19.80, which are listed in Statistical Note 1(a), Chapter 91, and subheadings 9101.21.80, 9101.29.10, 9101.29.20, 9101.29.30, 9101.29.40, 9101.29.50, 9102.21.10, 9102.21.25, 9102.21.30, 9102.21.50, 9102.21.70, 9102.21.90, 9102.29.10, 9102.29.15, 9102.29.20, 9102.29.25, 9102.29.30, 9102.29.35, 9102.29.40, 9102.29.45, 9102.29.50, 9102.29.55 and 9102.29.60, which are listed in Statistical Note 1(d), Chapter 91.

On June 25, 2019, CBP issued HQ H304105 and determined that the country of origin of the watches was Japan in scenarios 1, 2, and 3, based upon the country of origin of the watch movement, and Malaysia in scenario 4, again based upon the country of origin of the watch movement. However, with regard to the components of the watches, *i.e.*, and for purposes of constructive segregation, HQ H304105 explained that the movement's origin and where the entire watch was assembled with its components was relevant. Therefore, in scenario 1, CBP held that because the movement was made in Japan and the assembly of all of the components to form the watch occurred in Japan, the country of origin of all of the components would be Japan. However, in scenario 2, because the assembly of all of the components to form the watch occurred in China (not the country of origin of the movement which was Japan), the assembly of the components did not substantially transform the case or band and their origin remained China. Similarly, in scenario 3, as the assembly of the components to form the watch occurred in Thailand (a country other than the country where the movement was made which was Japan), the assembly of the components did not substantially transform the case or band and their origin remained China. Finally, in scenario 4, again, as the assembly of the components in China to form the watch did not occur in the same country as the origin of the movement which was Malaysia, the case and band retained their origin of China.

Based upon the analysis in HQ H304105, CBP held that although the origin of the watches in scenarios 1, 2, and 3 was Japan, and the origin of the watch in scenario 4 was Malaysia; the watch cases and watch bands in scenarios 2, 3, and 4 did not undergo substantial transformations and retained their original origin which was China. In calculating the duties owed on these constructively segregated components of the subject watches, the Section 301 duties were found to apply as these components remained products of China.

You seek reconsideration and revocation of HQ H304105 because you believe it incorrectly held that the watch cases and watch bands in scenarios 2, 3, and 4 were products of China subject to the Section 301 duties. You submit that CBP (and its predecessor the U.S. Customs Service) has, for decades, continuously and consistently found a watch to be a single article with a single country of origin which is determined by the country of assembly of the watch movement. You assert that HQ H304105 effectively modified or revoked Customs' treatment of watches without complying with the notice and comment procedures of 19 U.S.C. § 1625 and 19 C.F.R. § 177.12(c)(2). You request that CBP find that the watches at issue are products of Japan or Malaysia for country of origin purposes, and likewise, are products of Japan or Malaysia for purposes of duty assessment. As such, they should not be subject to Section 301 duties.

Further, you submit that CBP should immediately revoke HQ H304105 because the Automated Commercial Environment (ACE) does not permit importers to enter their imports in accordance with the ruling's holding. You assert that the inability to comply with the ruling in ACE demonstrates the need for CBP to reconsider and revoke the ruling.

You commented on the proposed modification of HQ H304105 raising concerns that CBP's determination regarding watches and watch bands entered with them is inconsistent with Section 301 and the United States Trade Representative's instructions to CBP. You also submit that CBP's determination is inconsistent with its treatment of similar products. You cite to Headquarters Ruling Letter (HQ) H302801, dated October 3, 2019, which dealt with the country of origin of a Fitbit, and New York Ruling Letter (NY) N305154, dated July 31, 2019, which dealt with the country of origin of a Roomba robotic vacuum cleaner and its accessories.

ISSUE:

What is the country of origin for the watches made with components from Japan, China, and Malaysia for purposes of application of the Section 301 measures in the four scenarios described above?

LAW AND ANALYSIS:

For watches listed in Statistical Notes 1(a) and 1(d), Chapter 91, HTSUS, duty is assessed based upon the value of the constructively segregated components of the watch, *i.e.*, the separately valued movement, watch case, and watch band, bracelet or strap. In addition, the battery is separately assessed pursuant to Statistical Note 1(a). The values of these components must equal the declared value of the watch. *See* Statistical Note 1, Chapter 91, HTSUS. The rate set forth in the tariff specifies a set amount per movement, an *ad valorem* rate for the case and band, strap, or bracelet, and a different *ad valorem* rate for the battery.

To understand the tariff treatment⁴ of watches for classification and origin purposes, an understanding of the history of watches under the various tariff schedules of the United States is essential. A review of the previous tariff schedules and various court decisions reveal that watches have received substantially similar treatment under the tariff schedules for more than 80 years. As stated in a report prepared by the United States International Trade Commission in the early 1980s, when the Tariff Schedules of the United States (TSUS) were in effect, the tariff structure for watches and parts of watches dates from 1930. Under the TSUS, “the duty on a watch classified under item 715.05 [was] composed of separate duties assessed on the case, the movement, and the bracelet (if any).”⁵ This is the case in the specific subheadings at issue here, *i.e.*, the various subheadings of headings 9101 and 9102, HTSUS, identified above, with the addition of duties assessed on the battery, if applicable. Duty rates are established by Congress, and Congress did not change the manner in which duty is assessed for imported watches. Duty is not assessed against the watch, but based upon the value of the separately identified components of the watch. As the structure of the tariff with regard to the assessment of duty for watches has changed little over the years since 1930, reference to court cases involving watches under previous tariff schedules is not misplaced.⁶

First, it is vital that all parties understand the definition of a watch for tariff purposes. Additional U.S. Note 1(a), Chapter 91, HTSUS, states:

For purposes of this chapter:

The term “watches” embraces timepieces (including timepieces having special features, such as chronographs, calendar watches and watches designed for use in skin diving) of a kind for wearing or carrying on the person whether or not the movement contained therein conforms to the definition of “watch movements” in note 3, above. Timepieces incorporating a stand, however simple, are not classifiable as watches.

We note that the definition of watches in Chapter 91, HTSUS, is substantially similar to the definition of watches in Headnote 2(a), Subpart E, Schedule 7, TSUS, which provided:

[T]he terms “watches” embraces timepieces (including timepieces having special features, such as chronographs, calendar watches, stopwatches, and watches designed for use in skin diving) suitable for wearing or carrying on or about the person, whether or not the movement therein is within the definition of “watch movements” in headnote 2(b), below.

Item 715.05, TSUS, was a new provision for “watches.” The previous tariff act had no provision for watches, but provided “for them by separate classi-

⁴ The term “treatment” is used in the ordinary sense of the word here and is not to be confused with “treatment” as defined in the CBP Regulations at 19 CFR § 177.12.

⁵ All watches were classified under item 715.05, TSUS, until the Court of Customs and Patent Appeals decided in 1982 that solid-state watch modules did not fit the TSUS definition of a watch movement and those watches were reclassified under item 688.45, TSUS. See *United States v. Texas Instruments, Inc.*, 69 C.C.P.A. 136

⁶ The assessment of duties on the components of watches, as opposed to watches themselves, may be found as far back as the Tariff Act of 1897. See *Racine v. United States*, 107 F. 111 (“The word ‘watches’ was one well known to congress. It had appeared in the earlier tariff acts. . . . The natural conclusion is that congress decided not to lay any duty upon ‘watches’ as such.”)

fication provision for their movements and for their cases.” See *Tariff Classification Study, Explanatory and Background Materials, Schedule 7*, United States Tariff Commission (November 15, 1960), at 166. See *Mitsui & Co., v. United States*, 70 Cust. Ct. 53 (February 7, 1973), at 61, wherein the court noted that:

. . . prior to [the] TSUS, watches had not been provided for *eo nomine* under the Tariff Acts of 1897 down through 1930. See *Concord Watch Co., Inc. v. United States*, 41 CCPA 13, C.A.D. 523 (1953). Therefore, watch movements and watch cases were held to be dutiable as separate entities. Accordingly, if a complete watch, or a clock incorporating a complete watch movement, were imported, the case was held to be separately dutiable from the movement; and the movement, complete with dial and hands, was assessed as a watch movement. *United States v. Continental Lemania, Inc.*, 21 CCPA 192, T.D. 46726 (1933); *United States v. John Wanamaker, Philadelphia, Inc.*, 20 CCPA 367, T.D. 46132 (1933); *United States v. European Watch & Clock Co.*, 11 Ct. Cust. Appls. 363, T.D. 39160 (1922); *United States v. Strasburger & Co.*, 9 Ct. Cust. Appls. 138, T.D. 37982 (1919); *Racine et al. v. United States*, 99 F. 557 (S.D. N.Y. 1899), *aff'd*, 107 F. 111 (2d Cir. 1901).

See also, *United States v. Continental Lemania, Inc.*, 21 CCPA 192, 199 (October 12, 1933), in which the court stated:

In a long line of decisions, among them *United States v. European Watch Co.*, 11 Ct. Cust. App. 363, T.D. 59160, it is definitely settled that watch movements and watchcases had by judicial determination, as well as by departmental direction, attained a settled definite status as separate entities for tariff purposes prior to the act of 1913. See *Racine v. United States*, 107 F. 111; *Chicago Watchman's Clockworks v. United States*, 4 Ct. Cust. App. 105, T.D. 33376; *United States v. Strasburger & Co.*, 9 Ct. Cust. App. 138, T.D. 37982. If this was true then, it is certainly true under the act of 1922.

Although the TSUS provided for watches at item 715.05, the recognition of the cases and movements as separate articles for tariff purposes was evident in the expression of the duty assessment for the provision, *i.e.*, the rate of duty was the rate applicable to the case plus the rate applicable to the movement, as if they had been imported separately. This treatment of cases and movements continues today in the HTSUS as the method of duty assessment is based upon the segregated components of the watch.

Additional U.S. Note 2, Chapter 91, HTSUS, provides:

Watch straps, watch bands and watch bracelets entered with wrist watches and of a kind normally sold therewith, whether or not attached, are classified with the watch in heading 9101 or 9102. Otherwise, watch straps, watch bands and watch bracelets shall be classified in heading 9113.

Further, Additional U.S. Note 3, Chapter 91, HTSUS, provides:

Batteries entered with battery powered watches or clocks, or with the complete, assembled movements thereof, and intended for use therewith, are classifiable under the provision for the watch, clock or movement. Similarly, batteries entered with a complete watch or clock movement, unassembled or partly assembled (movement set) or with an incomplete watch or clock movement, assembled, and intended for use therewith, are

classifiable under the provision for such movement. Batteries are otherwise classifiable in heading 8506 or 8507, whether or not suitable for use with watches or clocks.

We note that Additional U.S. Note 2 addresses the classification of watch straps, watch band and watch bracelets with “the watch” and does not reference them as parts of watches. The same is true of Additional U.S. Note 3 with regard to batteries entered with watches. The note addresses the classification of the item, but does not infer that the item is to be considered a part of a watch.

Based upon the Additional U.S. Notes to Chapter 91, the implementation of item 715.05, TSUS, as evident in the TSUS and discussed in the *Tariff Classification Study*, the method of duty assessment based upon the constructive segregation of the components of the watches at issue, and the historical treatment of watches under the various tariff schedules and reflected in court decisions, CBP believes that for tariff purposes a watch consists of the movement and the case which are separate articles for purposes of tariff assessment. A watch, under the tariff, does not by definition include a band, strap, or bracelet. See *United States v. European Watch & Clock Co.*, 11 Ct. Cust. 363 (April 26, 1922) wherein the court rejected the Government’s argument that watch cases and wristlets should be regarded as entreties and classified as jewelry. The court considered the classification of wristwatches and found that the watch cases and watch movements were classifiable within paragraph 161 of under the Tariff Act of 1913 which provided for, in relevant part, “[w]atch movements, whether imported in cases or not, watchcases and parts of watches[.]” The court noted with approval the decision of the Board of United States General Appraisers that the wristlets or bracelets were a necessary and useful attachment to the watches. We note that neither the Board nor the court viewed the wristlets or bracelets to be classifiable in paragraph 161 as “parts of watches.”

As is evident, determining the classification of a good is a separate exercise from its origin determination. CBP’s long-standing position has been that the origin of a watch (excluding the strap, band or bracelet) is the country of assembly of the watch movement. Although the addition of the hands, dial, case or watchband may add definition to the timepiece, it does not substantially change the character or use of the watch movement, which is the essence of the watch. See HQ 735197, dated January 4, 1994.

In HQ 560471, dated January 5, 1997, CBP held that the assembly in the U.S. Virgin Islands of a watch strap band or bracelet of non-U.S. Virgin Island origin to a watch made in the U.S. Virgin Islands resulted in a substantial transformation of the watch strap or bracelet in the U.S. Virgin Islands. However, in HQ 560471 CBP noted that, as a separate component, the watch band did not serve the function for which it was intended, but when assembled with the watch, the two components operate as a wristwatch. If this assembly takes place in the country in which the watch was produced, the production of the finished wristwatch cannot be stated to have resulted from a “simple assembly.” See, e.g., 19 CFR §10.195(a)(2). Therefore, HQ 560471 modified HQ 733533 and HQ 734565 and held that, when attached in a country to a watch produced in that country, watch straps lose their identity and become an integral part of the finished watch. Therefore, CBP held that the watch bands assembled with their watches did not have to be marked, as they were considered to be a product of the U.S. Virgin Islands, a U.S. insular possession. See also HQ 563287, dated August 23, 2005.

The holding in HQ 560471 applies in the situation (Scenario 1) where the Chinese watch band is assembled with the Japanese movement, Chinese case and Japanese battery in Japan. However, the holding in HQ 560471 does not apply in the situation where the Japanese or Malaysian watch movements are combined with the Chinese watch bands in China or Thailand. As noted in HQ 560471, the rulings were only modified therein to the extent that CBP stated or held that, based on the applicable facts, the watch straps assembled with their watches in the country in which the watches were produced must be marked with their own origin, if different from the country of origin of the watch. Based on the facts of some of the rulings mentioned in HQ 560471, it was not always clear where the final assembly of the watch took place.

Therefore, based upon the facts presented, we make the following determinations.

The watch movements, manufactured in Japan or Malaysia, are not substantially transformed in China or Thailand. The country of origin of the watch movements for marking purposes is Japan or Malaysia, as appropriate.

Concerning the bands, it is CBP's position that a watch strap must be separately marked with its country of origin when that country of origin is different from the country of origin of the watch. CBP has reasoned that the watch strap maintains its separate identity from the watch as the attachment of the watch strap to the watch does not effect a substantial transformation of the watch strap. *See*, for example, HQ 560471, dated January 5, 1997 and HQ 968218, dated July 10, 2006 (where it was noted that where the strap would be assembled in a country other than the Philippines, where the movement was made, the strap would be separately marked with its own origin). Therefore, the country of origin of the bands for marking purposes is China, except in scenario 1, as discussed above.

As noted above, CBP has been consistent in ruling that the country of origin of an imported watch for marking purposes, 19 U.S.C. 1304, (excluding the strap, band or bracelet) is the country of assembly of the movement. In HQ H243796, CBP stated that a watch with one country of origin for the movement, another for the case, and another for the battery, was considered, for purposes of 19 U.S.C. 1304, to be a product of the country in which the movement was produced. Therefore, in accordance with HQ H243796, we find that the H304105 was incorrect and that the watch cases should be considered a product of Japan or Malaysia, where the movement was made.

Statistical Note 1 to Chapter 91, HTSUS, provides in pertinent part that "[t]he calculation of duties on various watches, clocks, watch movements and clock movements requires that these articles be constructively segregated into their component parts and each component separately valued."

As the watches are products of Japan or Malaysia, the segregated components of the watch, *i.e.*, the movement, case and battery, are assessed duty based upon the origin of the watch. However, as the bands of the watches are not substantially transformed when joined to the Japanese or Malaysia watches in China or Thailand, the bands remain products of China.

You have raised concerns that this decision is inconsistent with Section 301 and the United States Trade Representative's (USTR's) instructions to CBP. We disagree. Section 301, which is implemented in 19 U.S.C. § 2411, refers to USTR's authority to impose duties or other import restrictions on the goods of a foreign country. *See* 19 U.S.C. § 2411(c)(1)(B). In the relevant *Federal*

Register Notice announcing its actions under Section 301, 84 *Fed. Reg.* 43304, dated August 20, 2019, the USTR referenced “products of China” and provided for new headings created in Chapter 99 of the HTSUS to implement the actions. You specifically reference the language of the Annexes which specifies that the new headings apply to “all products of China that are classified in the following 8-digit subheadings.” Based on this language, you take issue with CBP’s determination that Section 301 duties apply to Chinese bands attached to watches found to be other than of Chinese origin.

You seek to imply that the language of headings 9101 and 9102, HTSUS, somehow limits CBP’s application of Section 301 duties to Chinese bands, straps or bracelets entered with wrist watches. However, this interpretation is flawed. The USTR did not list products by name for application of Section 301 duties, but rather listed subheadings in which products are classified. As noted above, based upon Additional U.S. Note 2, Chapter 91, HTSUS, Chinese bands, straps or bracelets entered with wrist watches and of a kind normally sold therewith, whether or not attached, are classified with the watch in heading 9101 or 9102. As products of China, classified in a designated 8-digit subheading, the bands, straps or bracelets are subject to Section 301 duties.

You also submit that CBP’s determination is inconsistent with its treatment of similar products. You cite to Headquarters Ruling Letter (HQ) H302801, dated October 3, 2019, which dealt with the country of origin of a Fitbit, and New York Ruling Letter (NY) N305154, dated July 31, 2019, which dealt with the country of origin of a Roomba robotic vacuum cleaner and its accessories. We disagree.

HQ H302801 addressed the country of origin of two Fitbit devices which are quite different from a watch. A watch is a time-piece, and while some watches may have added features, the primary feature of a watch is to tell the wearer the time. The Fitbit devices at issue in HQ H302801 were wirelessly-communicative, wearable electronic smart devices. The devices consisted of a Bluetooth radio transceiver; central processing unit (“CPU”); printed circuit board; memory; and certain task-specific integrated circuits; a touchscreen display; vibration motor; rechargeable lithium ion battery; plastic/aluminum housing; a wristband; an accelerometer and certain task-specific integrated circuits.

You submit that “the Fitbit ruling holds that assembly of a band and other parts with the [printed circuit board assembly (PCBA)] (the equivalent of a watch movement for a smartwatch) substantially transforms those parts into a new and different product and changes their country of origin to the country of origin of the PCBA.” You believe this ruling supports your argument that the attachment of a watch band to a watch should be a substantial transformation.

Fitbit “smart” devices are quite different from watches and are classified in a different heading, that is, heading 8517, which provides for “Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof.” As such, one cannot equate an origin determination for a Fitbit device to an origin determination for a watch with a band as these are completely different products with completely different tariff classifications and tariff histories.

As for NY N305154, dated July 31, 2019, the decision in that ruling was based on the classification of the Roomba with its accessories as a General Rule of Interpretation (GRI) 3 set. It is not applicable to the current situation because a band, strap or bracelet classified with a watch with which it is entered, attached or unattached, is classified based upon GRI 1 and the application of the legal notes of Chapter 91. NY N305154 is simply not relevant to the matter at issue.

Finally, we note that you state in your submission that you do “not agree that the constructive separation of component value required by Statistical Note 1 to Chapter 91 of the HTSUS provides a legal basis for treating a watch and its band as distinct articles of commerce for purposes of assessing either ordinary or Section 301 duties because the statistical annotations to the HTSUS have no legal status. While we reference provisions of Statistical Note 1, it is not the basis for our decision. The provisions of Statistical Note 1 serve to explain the application of the duty rate expressed at the legal eight-digit level for articles classified in headings 9101 and 9102, among other headings of Chapter 91. The duty rates imposed at the legal level are written to impose duty on the constructive separation of the components of the articles classified within the headings. This is the legal basis, along with the Additional U.S. Notes, for our decision.

Please note that the subject watches must also satisfy the special marking requirement of Additional U.S. Note 4, Chapter 91, HTSUS, which in part, requires the movement and case to be marked with the name of the country of manufacture. In this situation, the country of manufacture of the movement would be Japan, and the country of manufacture of the cases, for purposes of the special marking requirements would be China.

HOLDING:

HQ H304105 is modified in accordance with the analysis above. The country of origin of the watches is the country of assembly of the watch movements. Thus, for scenarios 1 through 3, the country of origin of the watches is Japan. For scenario 4, the country of origin is Malaysia.

However, with regard to the country of origin of the dutiable components of the imported watches, in Scenario 1, since all of components of the watches are of Japanese origin, the Section 301 duties for Chinese origin products would not be applicable. In Scenarios 2, 3, and 4, the country of origin of the watch components (the movement, case, and battery) is the country of assembly of the watch movement; the watch bands are not substantially transformed, and their country of origin is China. As these watch bands will be products of China, in calculating the duties that will be imposed on the watches, the proposed Section 301 measures would apply to these items in Scenarios 2, 3, and 4.

HQ H304105, dated June 25, 2019, is MODIFIED. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

HQ H315335

May 14, 2021

OT:RR:CTF:VS H315335 CMR

CATEGORY: Classification

RICHLINE GROUP
1385 BROADWAY
NEW YORK, NY 10018

RE: Modification of Headquarters Ruling Letter H047115, dated June 22, 2009; Eligibility of bracelet watches under the United States-Israel Free Trade Agreement Act of 1985

DEAR SIR/MADAM:

On June 22, 2009, we issued Headquarters Ruling Letter (HQ) H047115 to Silpada Designs Inc. In 2016, your company acquired select assets of Silpada Designs Inc., including the brand name, jewelry designs and all sterling silver and fashion jewelry inventory.¹ As the apparent successor company, we are informing you that we intend to modify HQ H047115, which dealt with the eligibility of bracelet watches under the United States-Israel Free Trade Agreement Act of 1985 (“Israeli FTA”). Upon review, we have determined that we erred in the determination of the origin of the watch case for the assessment of duty. For the reasons set forth below, we are modifying HQ H047115 with regard to the origin for duty purposes of the constructively segregated components, specifically, the watch case.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice proposing to modify HQ H047115 was published on March 31, 2021, in Volume 55, Number 12 of the *Customs Bulletin*. Two comments were received in response to the proposed action, but only one commenter addressed the modification of HQ H047115. Those comments are not addressed herein as they are general in nature and policy oriented. Customs and Border Protection (CBP) cannot provide the remedy sought by the commenter.

FACTS:

The relevant facts stated in HQ H047115 are:

Silpada Designs, Inc. (“Silpada”) sells bracelet watches which are produced by a vendor in Israel. Item numbers T1372 and T1749 are at issue here. The bracelet watches are stated to be classified in subheading 9102.11.25, Harmonized Tariff Schedule of the United States (“HTSUS”). The value of the watches is determined by four components: the sterling silver bracelet; the sterling silver case; the watch movement; and the battery. The watch movement and battery are imported into Israel from Japan. The watch movement and battery are imported from Japan into Israel where they are made into the finished watches.

In HQ H047115, Silpada asked that if Customs and Border Protection (“CBP”) did not determine that the country of origin of the bracelet watches was Israel, that CBP issue a ruling regarding the proper allocation of duties

¹ See *Richline Group has Acquired Silpada Designs*, October 21, 2016 at richlinegroup.com/2016/10/21/richline-group-has-acquired-silpada-designs

to the bracelet watches, *i.e.*, Silpada asked that CBP determine that duties were not applicable on the components of the bracelet watches that were produced in Israel.

ISSUE:

Whether the country of origin of the watches is Israel and whether the segregated components of the watches qualify for preferential tariff treatment under the Israeli FTA for duty assessment purposes.

LAW AND ANALYSIS:

Under the Israel FTA, eligible articles which are the growth, product, or manufacture of Israel and are imported directly to the U.S. from Israel qualify for preferential treatment provided, in pertinent part, the sum of (1) the cost or value of the materials produced in Israel, plus (2) the direct costs of processing operations performed in Israel, is not less than 35% of the appraised value of the article at the time it is entered. *See* General Note 8(b), Harmonized Tariff Schedule of the United States (HTSUS).

Pursuant to General Note 8(b)(i), HTSUS, in order to qualify for duty-free treatment under the U.S.-Israel FTA, the article must be the growth, product, or manufacture of Israel or a new and different article of commerce that has been grown, produced or manufactured in Israel.

You state that the bracelet watches are classified in subheading 9102.11.25, HTSUS. Articles classified under this provision which otherwise satisfy the requirements of the Israel FTA will not be subject to duty upon return to the U.S. Articles are considered “products of” Israel if they are made entirely of materials originating there or, if made from materials imported into Israel, they are substantially transformed into a new or different article of commerce. A substantial transformation occurs when an article emerges from a process with a new name, character or use different from that possessed by the article prior to the processing. *See Texas Instruments v. United States*, 69 CCPA 152, 681 F.2d 778 (1982).

CBP’s long-standing position has been that the origin of a watch (excluding the strap, band or bracelet) is the country of assembly of the watch movement. Although the addition of the hands, dial, case or watchband may add definition to the timepiece, it does not substantially change the character or use of the watch movement, which is the essence of the watch. *See* HQ 735197, dated January 4, 1994. In the instant situation, the country of origin of the watches is Japan as the movement is imported from Japan. *See* HQ 731546, dated October 27, 1978.

Additionally, CBP has also ruled in numerous cases that the country of origin of a watch strap must be separately marked when its country of origin is different from the country of origin of the watch. In these cases, CBP has reasoned that the attachment of the watch strap to the watch does not effect a substantial transformation of the watch strap and that, after attachment, the strap maintains its separate identity. Therefore, the watch would be considered a product of Japan and the band a product of Israel.

In HQ 560471, dated January 5, 1997, CBP held that the assembly in the U.S. Virgin Islands of a watch strap band or bracelet of non-U.S. Virgin Island origin to a watch made in the U.S. Virgin Islands resulted in a substantial transformation of the watch strap or bracelet in the U.S. Virgin Islands. However, in HQ 560471 CBP noted that, as a separate component, the watch band did not serve the function for which it was intended, but when

assembled with the watch, the two components operate as a wristwatch. If this assembly takes place in the country in which the watch was produced, the production of the finished wristwatch cannot be stated to have resulted from a "simple assembly." *See, e.g.*, 19 CFR §10.195(a)(2). Therefore, HQ 560471 modified HQ 733533 and HQ 734565 and held that, when attached in a country to a watch produced in that country, watch straps lose their identity and become an integral part of the finished watch. Therefore, CBP held that the watch bands assembled with their watches did not have to be marked, as they were considered to be a product of the U.S. Virgin Islands, a U.S. insular possession. *See also* HQ 563287, dated August 23, 2005.

However, the holding in HQ 560471 does not apply in the situation where the Japanese watch movement is combined with the Israeli sterling silver case bracelet in Israel. As noted in HQ 560471, the rulings were only modified therein to the extent that CBP stated or held that, based on the applicable facts, the watch straps assembled with their watches in the country in which the watches were produced must be marked with their own origin, if different from the country of origin of the watch. Based on the facts of some of the rulings mentioned in HQ 560471, it was not always clear where the final assembly of the watch took place.

Therefore, based upon the facts presented, we make the following determinations.

The watch movement, manufactured in Japan, is not substantially transformed in Israel. The country of origin of the watch movement is Japan. The battery, manufactured in Japan, is not substantially transformed in Israel. The country of origin of the battery is Japan.

Concerning the bracelet, it is CBP's position that a watch strap must be separately marked with its country of origin when that country of origin is different from the country of origin of the watch. CBP has reasoned that the watch strap maintains its separate identity from the watch as the attachment of the watch strap to the watch does not effect a substantial transformation of the watch strap. *See, for example*, HQ 560471, dated January 5, 1997 and HQ 968218, dated July 10, 2006 (where it was noted that where the strap would be assembled in a country other than the Philippines, where the movement was made, the strap would be separately marked with its own origin). Therefore, the country of origin of the bracelet for marking purposes is Israel.

Regarding the watch case, however, in HQ H047115 it was determined that the country of origin of the watch case was Israel, which for the article under consideration was made in Israel of silver like the bracelet and that held the Japanese movement. After further consideration and review, we have determined that this is in error. While the Additional U.S. Notes to Chapter 91 make it clear that the method of duty assessment is based upon the constructive segregation of the components of a watch, and that for tariff purposes a watch consists of the movement and the case which are separate articles for purposes of tariff assessment, determining the classification of a good is a separate exercise from its origin determination.

As noted above, CBP has been consistent in ruling that the country of origin of an imported watch for marking purposes, 19 U.S.C. 1304, (excluding the strap, band or bracelet) is the country of assembly of the movement. In HQ H243796, CBP stated that a watch with one country of origin for the movement, another for the case, and another for the battery, was considered, for purposes of 19 U.S.C. 1304, to be a product of the country in which the

movement was produced. Therefore, in accordance with HQ H243796, we find that the watch case should be considered a product of Japan, where the movement was made.

Statistical Note 1 to Chapter 91, HTSUS, provides in pertinent part that “[t]he calculation of duties on various watches, clocks, watch movements and clock movements requires that these articles be constructively segregated into their component parts and each component separately valued.”

As the watch is a product of Japan, it does not qualify for preferential tariff treatment under the Israeli FTA. After assembly, the segregated components of the watch, *i.e.*, the movement, case and battery, are assessed duty based upon the origin of the watch. However, as the band of the watch is not substantially transformed when joined to the Japanese watch in Israel, the band, or in this case, bracelet, remains a product of Israel. As such, the bracelet is eligible for preferential tariff treatment under the Israeli FTA.

Please note that the subject watches must also satisfy the special marking requirement of Additional U.S. Note 4, Chapter 91, HTSUS, which in part, requires the movement and case to be marked with the name of the country of manufacture. In this situation, the country of manufacture of the movement would be Japan, and the country of manufacture of the case, for purposes of the special marking requirements would be Israel.

HOLDING:

The origin of the bracelet watch at issue is Japan, *i.e.*, the country of origin of the movement. The movement, case, and battery, which are dutiable as segregated components, are subject to duty as products of Japan as the watch is a product of Japan. The band or bracelet of the wristwatch is not substantially transformed when joined to the watch and retains its origin of Israel. As such, the band or bracelet is dutiable as a good of Israel and eligible for preferential tariff treatment under the Israeli FTA.

HQ H047115, dated June 22, 2009, is hereby MODIFIED with regard to the origin for duty purposes of the constructively segregated components. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

U.S. Court of Appeals for the Federal Circuit

UTTAM GALVA STEELS LIMITED, Plaintiff-Appellee v. UNITED STATES, AK
STEEL CORPORATION, CALIFORNIA STEEL INDUSTRIES, INC., Defendants
ARCELORMITTAL USA LLC, STEEL DYNAMICS, INC., UNITED STATES
STEEL CORPORATION, NUCOR CORPORATION, Defendants-Appellants

Appeal No. 2020–1461

Appeal from the United States Court of International Trade in No. 1:16-cv-00162-
JCG, Judge Jennifer Choe-Groves.

Decided: May 14, 2021

DIANA DIMITRIUC QUAIA, Arent Fox, LLP, Washington, DC, argued for plaintiff-appellee. Also represented by JOHN M. GURLEY, CLAUDIA DENISE HARTLEBEN, MATTHEW MOSHER NOLAN, NANCY NOONAN.

ELIZABETH DRAKE, Schagrin Associates, Washington, DC, argued for defendants-appellants ArcelorMittal USA, LLC, Steel Dynamics, Inc., United States Steel Corporation. Steel Dynamics, Inc. also represented by NICHOLAS J. BIRCH, CHRISTOPHER CLOUTIER, GEERT M. DE PREST, WILLIAM ALFRED FENNELL, PAUL WRIGHT JAMESON, LUKE A. MEISNER, KELSEY RULE, ROGER BRIAN SCHAGRIN.

MELISSA M. BREWER, Kelley Drye & Warren, LLP, Washington, DC, for defendant-appellant ArcelorMittal USA, LLC. Also represented by KATHLEEN CANNON, ROBERT ALAN LUBERDA, PAUL C. ROSENTHAL, DAVID C. SMITH, JR.

THOMAS M. BELINE, Cassidy Levy Kent USA LLP, Washington, DC, for defendant-appellant United States Steel Corporation. Also represented by CHASE DUNN, JAMES EDWARD RANSELL, IV, SARAH E. SHULMAN.

MAUREEN E. THORSON, Wiley Rein, LLP, Washington, DC, argued for defendant-appellant Nucor Corporation. Also represented by STEPHANIE MANAKER BELL, TIMOTHY C. BRIGHTBILL, TESSA V. CAPELOTO, LAURA EL-SABAAWI, CYNTHIA CRISTINA GALVEZ, DERICK HOLT, ALAN H. PRICE, ADAM MILAN TESLIK, CHRISTOPHER B. WELD.

Before DYK, MAYER, and CHEN, *Circuit Judges*.

DYK, *Circuit Judge*.

This appeal arises out of an antidumping duty investigation by the United States Department of Commerce concerning certain corrosion-resistant steel products from India. Following two remands, the United States Court of International Trade (Trade Court) sustained Commerce’s determination that granted Uttam Galva Steels Ltd. a duty drawback adjustment under 19 U.S.C. § 1677a(c)(1)(B) that resulted in no dumping margin. Defendants-Appellants ArcelorMittal USA LLC, Steel Dynamics, Inc., United States Steel Corp., and Nucor Corp. appeal, challenging the propriety

of the Trade Court's first remand to Commerce and arguing that Commerce's original determination should be reinstated. We affirm.

I

As this court has explained, “[d]umping occurs when a foreign firm sells a product in the United States at a price lower than the product’s normal value.” *Home Prods. Int’l, Inc. v. United States*, 633 F.3d 1369, 1372 (Fed. Cir. 2011). By statute, Commerce must impose antidumping duties on imported goods that are being sold, or are likely to be sold, in the United States at a less than fair value in a way that injures the domestic industry in the United States. 19 U.S.C. § 1673. Commerce determines a respondent’s dumping margin by calculating the amount by which normal value exceeds export price (U.S. price) or constructed export price. *Id.* Normal value is generally calculated to be “the price at which the foreign like product is first sold . . . for consumption in the exporting country.” 19 U.S.C. § 1677b(a)(1)(B)(i). To determine normal value, Commerce will disregard sales made at less than the respondent’s cost of production. *Id.* § 1677b(b)(1). Cost of production constitutes (1) the cost of manufacture; (2) “selling, general, and administrative expenses”; and (3) packaging expenses. *Id.* § 1677b(b)(3). If there are no sales in the exporting country that remain after removing the sales below cost of production, then Commerce will base normal value on the constructed value of the subject merchandise. *Id.* § 1677b(b)(1). Constructed value is essentially the cost of production plus profit. *See id.* § 1677b(e). Export price is typically calculated to be the price at which the subject products are first sold to an unaffiliated purchaser in the United States. *Id.* § 1677a(a). Constructed export price is “the price at which the subject merchandise is first sold . . . in the United States . . . by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.” *Id.* § 1677a(b). The export price is subject to several possible adjustments. *Id.* § 1677a(c).

One such adjustment is the “duty drawback adjustment,” which is at issue here. This adjustment involves duties paid or owed on imports (e.g., raw materials) to the home-market country that produces the goods for export to the United States (the country of exportation). *Saha Thai Steel Pipe (Pub.) Co. v. United States*, 635 F.3d 1335, 1340–41 (Fed. Cir. 2011). The import duties on the inputs used to produce home-market goods increase the normal value. The statute provides that the duty drawback adjustment requires an increase to U.S. price, stating that

[t]he price used to establish 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 the exportation of the subject merchandise to the United States.

19 U.S.C. § 1677a(c)(1)(B). In *Saha Thai*, we held that Commerce may appropriately adjust normal value to include “exempted duties in [cost of production] and [constructed value]” when making the duty drawback adjustment in situations in which “[i]t would be illogical to increase [export price] to account for import duties that are purportedly reflected in [normal value], while simultaneously calculating [normal value] based on a [cost of production] and [constructed value] that do not reflect those import duties.” 635 F.3d at 1342–43.

The question here is whether Commerce’s initial duty drawback methodology complied with 19 U.S.C. § 1677a(c)(1)(B).

II

In 2015, several groups, including appellants here, petitioned Commerce and the United States International Trade Commission to initiate an antidumping duty investigation, alleging that imports of corrosion-resistant steel products (“CORE”) from India had been imported to and sold in the United States at prices that violated antidumping laws. Commerce commenced an investigation and selected Uttam and another entity (not involved in this appeal) as mandatory respondents.

During the investigation, Uttam provided Commerce with information about the duty drawbacks that it received from the Indian government in connection with its production of CORE. Uttam explained that it received drawbacks in the form of exemptions and rebates on import duties for three major imported inputs: hot-rolled steel coil, cold-rolled steel coil, and zinc. Because Uttam exports CORE to both affiliated and non-affiliated companies in the United States, Commerce calculated both an export price and constructed export price to determine Uttam’s dumping margin.

On June 2, 2016, Commerce issued its Final Determination that CORE from India was being sold in the United States at less than fair value, calculating a final dumping margin of 3.05% for Uttam. It is not clear from Commerce’s Final Determination whether Commerce based normal value on home-market sales or constructed value. In this Final Determination, Commerce made an adjustment to Uttam’s export price and constructed export price considering Uttam’s re-

ported benefit from the three Indian government duty drawback programs.¹ But Uttam contended that the adjustments were not properly calculated.

Historically, Commerce, in calculating drawback duty adjustments, attributed all of a respondent's reported duty drawbacks to U.S. sales. In other words, Commerce took the respondent's reported duty drawbacks and divided that reported amount by the respondent's total number of subject U.S. exports, attributing to each U.S. export its share of the duty drawback. Here, in initially calculating Uttam's duty drawback adjustment, Commerce departed from this historical practice. Its new methodology allocated the import duties exempted or rebated "based on the import duty absorbed into, or imbedded in, the overall cost of producing the merchandise under consideration." J.A. 6043. The effect was to attribute some portion of the duty drawbacks to home market sales and another portion to U.S. exports, rather than attributing the whole amount to U.S. exports. Commerce explained that it needed to change its methodology because certain respondents, such as Uttam, "source[d] a material input from both domestic and foreign suppliers," which might "result in an imbalance in the comparison of [export price] or [constructed export price] with [normal value]." J.A. 6043. Uttam appealed the Final Determination to the Trade Court.

Uttam argued that Commerce's new methodology of allocating drawbacks was "inconsistent with the statute and the agency's alleged practice of computing exempted and rebated duties over total exports to the U.S." *Uttam Galva Steels Ltd. v. United States (Uttam I)*, 311 F. Supp. 3d 1345, 1352 (Ct. Int'l Trade 2018). The Trade Court agreed, concluding that Commerce's new methodology was not permitted under 19 U.S.C. § 1677a(c)(1)(B) and remanded the Final Determination to Commerce with directions to recalculate the adjustment. *Id.* at 1355–57.

On remand, Commerce calculated the duty drawback adjustment by increasing the export price by the total amount of drawback duties. But Commerce also made a circumstance-of-sale adjustment that Uttam again challenged at the Trade Court. The Trade Court also determined this adjustment to be impermissible and remanded. *Uttam Galva Steels Ltd. v. United States (Uttam II)*, 374 F. Supp. 3d 1360, 1363–65 (Ct. Int'l Trade 2019).

In its Second Remand Redetermination (the determination now before us on appeal), Commerce continued to grant the same duty

¹ These programs were: (1) the Duty Drawback Scheme (a rebate program); (2) the Advance Authorization Program (an exemption program); and (3) the Duty Free Import Authorization Program (an exemption program).

drawback adjustment to Uttam’s export price (as required by *Uttam I*). Commerce, however, made three other adjustments to Uttam’s normal value by doing the following:

[1] not including imputed import duties to Uttam Galva’s cost of production . . . ; [2] making a [circumstance of sale] adjustment to remove all booked import duties from constructed value . . . and from Uttam Galva’s home market prices; and [3] making another [circumstance of sale] adjustment to [constructed value] and home market price to add the same amount of the per-unit amount of import duties added to U.S. price.

J.A. 65. In Commerce’s view, these circumstance of sale adjustments “remedy[] the imbalance in the comparison between normal value and [export price] or [constructed export price]” by “remov[ing] unrecovered paid and exempted duties from [constructed value] or home market price as a [circumstance of sale] adjustment” and “add[ing] the per-unit amount [of import duties] to normal value that was added to U.S. price as a second [circumstance of sale] adjustment.” J.A. 83. Making these circumstance of sale adjustments has been challenged in other investigations.² Nevertheless, given this methodology, here, the estimated weighted average dumping margin for the period of investigation for CORE from India was 0.00%.

Reviewing the Second Remand Redetermination, the Trade Court held that Commerce’s duty drawback adjustment continued to be in accordance with the law. *Uttam Galva Steels, Inc. v. United States (Uttam III)*, 416 F. Supp. 3d 1402, 1406 (Ct. Int’l Trade 2019). The court, however, expressed skepticism that the three new adjustments to normal value were “supported by either the statute’s text or Commerce’s implementing regulation.” *Id.* at 1407. But because Uttam had not contested these adjustments, the Trade Court sustained Commerce’s Second Remand Redetermination. *Id.*

The appellants appeal, arguing that the Trade Court improperly set aside Commerce’s original Final Determination and seeking to have the determination reinstated. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

III

“We review the Trade Court’s decision to sustain Commerce’s final results and remand redeterminations de novo.” *Dillinger France S.A. v. United States*, 981 F.3d 1318, 1320 (Fed. Cir. 2020) (citing *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1357 (Fed. Cir. 2010)). We

² *E.g., Habaş Sinai ve Tibbi Gazlar Isthsal Endüstrisi, A.Ş. v. United States*, 415 F. Supp. 3d 1195, 1206–13 (Ct. Int’l Trade 2019), *appeal docketed*, No. 21–1066 (Fed. Cir. Oct. 19, 2020).

will affirm Commerce unless its decision is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

The petitioners argue that the methodology that Commerce used to calculate Uttam’s duty drawback in its original Final Determination was proper and that the Trade Court erred in setting it aside.

We explained the statute’s purpose in our decision in *Saha Thai*:

The purpose of the duty drawback adjustment is to account for the fact that the producers remain subject to the import duty when they sell the subject merchandise domestically, which increases home market sales prices and thereby increases [normal value]. That is, when a duty drawback is granted only for exported inputs, the cost of the duty is reflected in [normal value] but not in [export price]. The statute corrects this imbalance, which could otherwise lead to an inaccurately high dumping margin, by increasing [export price] to the level it likely would be absent the duty drawback.

635 F.3d at 1338. In effect, the duty drawback adjustment constitutes an increase to the U.S. price because the producer receives additional revenue attributable to its U.S. sales by reason of the duty drawback.

In the challenged methodology, Commerce allocated Uttam’s duty drawback adjustment between exported goods and home-market goods, which lessened Uttam’s overall duty drawback adjustment to export price. There is no basis for doing so. The statute provides that

[t]he price used to establish 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 the exportation of the subject merchandise to the United States.

19 U.S.C. § 1677a(c)(1)(B). The duty drawback statute requires an adjustment to “export price” based on the full extent of the duty drawback. It does not impose an additional requirement that the respondent trace particular imported goods to U.S. exports.

It does not make a difference whether the imported inputs that qualified for a drawback were actually incorporated into goods sold in the exporter’s domestic market because the Indian government credited the drawback to the quantity of goods that were in fact exported, whatever the source of the inputs used to produce foreign goods. As its text makes clear, the statute requires an upward adjustment to “export price and constructed export price” based on the drawback that occurred “by reason of the exportation of the subject merchandise to

the United States.” *Id.* § 1677a(c)(1)(B). The entire drawback was allowed “by reason of the exportation.” *Id.*

CONCLUSION

Because Uttam does not challenge the additional adjustments made by Commerce in its Second Remand Redetermination, we have no reason to address these adjustments on appeal. The judgment of the Trade Court is affirmed.

AFFIRMED

U.S. Court of International Trade

Slip Op. 21–60

GUIZHOU TYRE CO., LTD. and GUIZHOU TYRE IMPORT AND EXPORT CO., LTD., et al. Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 17–00100

[Sustaining in part, and remanding in part, an agency decision issued in response to court order in litigation involving a review of an antidumping duty order on off-the-road tires from the People's Republic of China.]

Dated: May 14, 2021

Ned H. Marshak and *Brandon M. Petelin*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY, argued for plaintiffs Guizhou Tyre Co., Ltd., Guizhou Tyre Import and Export Co., Ltd., Aeolus Tyre Co., Ltd., Qingdao Free Trade Zone Full-World International Trading Co., Ltd., and Qingdao Qihang Tyre Co., Ltd. With them on the brief were *Jordan C. Kahn* and *Elaine F. Wang*.

Douglas J. Heffner and *Richard P. Ferrin*, Drinker Biddle & Reath, LLP, of Washington, D.C., for plaintiffs Trelleborg Wheel Systems (Xingtai) Co., Ltd. and Xuzhou Xugong Tyres Co., Ltd.

Robert K. Williams and *Lara A. Austrins*, Clark Hill PLC, of Chicago, IL, for plaintiff Weihai Zhongwei Rubber Co., Ltd.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With him on the brief were *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Paul K. Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

OPINION AND ORDER

Stanceu, Judge:

Before the court is a decision the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) issued in response to the court’s opinion and order in *Guizhou Tyre Co., Ltd. v. United States*, 43 CIT __, 389 F. Supp. 3d 1350 (2019) (“*Guizhou I*”). The court sustains this decision in part and remands it in part.

I. BACKGROUND

Before the court are the *Final Results of Redetermination Pursuant to Court Remand* (Sept. 23, 2019), ECF No. 74 (conf.); (Oct. 10, 2019), ECF No. 81 (public) (the “*Remand Redetermination*”). Background on this litigation is presented in *Guizhou I*, 43 CIT at __, 389 F. Supp. 3d at 1353–55, and summarized and supplemented below.

Following an investigation, Commerce in 2008 issued an antidumping duty order (the “Order”) on certain off-the-road tires from the People’s Republic of China (“China” or the “PRC”) under the authority of 19 U.S.C. § 1673d(a).¹ *Certain New Pneumatic Off-the-Road Tires From the People’s Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624 (Int’l Trade Admin. Sept. 4, 2008) (the “Order”).

In 2017, Commerce, under 19 U.S.C. § 1675(a), published the final results of the seventh periodic administrative review of the Order (the “Final Results”), which is the administrative decision plaintiffs contested in commencing this litigation according to the judicial review provisions of 19 U.S.C. § 1516a. *Certain New Pneumatic Off-the-Road Tires From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2014–2015*, 82 Fed. Reg. 18,733 (Int’l Trade Admin. Apr. 21, 2017) (P.R. Doc. 312) (“*Final Results*”).² To correct certain ministerial errors (which are not at issue in this litigation), the Department later amended the Final Results. *Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2014–2015*, 82 Fed. Reg. 27,224 (Int’l Trade Admin. June 14, 2017) (“*Amended Final Results*”).

Commerce incorporated by reference in the Final Results a final “Issues and Decision Memorandum” (“Final I&D Memorandum”) that contains explanatory discussion. *Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review: Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China; 2014–2015* (Int’l Trade Admin. Apr. 12, 2017) (P.R. Doc. 308) (“*Final I&D Mem.*”).

The seven plaintiffs in this consolidated case, all of which are respondents in the administrative proceeding below, include two “mandatory” respondents, i.e., respondents Commerce selected for individual examination in the seventh review. They were: (1) Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. (collectively, “GTC”), which Commerce treated as a single entity; and (2) Xuzhou Xugong Tyres Co., Ltd., Armour Rubber Co. Ltd., and Xuzhou Hanbang Tyre Co., Ltd. (collectively, “Xugong”), which Commerce also

¹ Citations to the United States Code are to the 2012 edition.

² All citations to record documents are to public versions. References cited as “P.R. Doc. ___” are to documents that were on the record of the proceeding at issue in *Guizhou Tyre Co., Ltd. v. United States*, 43 CIT ___, 389 F. Supp. 3d 1350 (2019) (“*Guizhou I*”), while references cited as “Remand P.R. Doc. ___” are to documents placed on the agency record during the remand proceedings.

treated as a single entity during the seventh review. *Final Results*, 82 Fed. Reg. at 18,733–34. In the Final Results, Commerce assigned Xugong an individual weighted-average dumping margin rate of 33.08%. *Id.* at 18,735. Commerce assigned GTC the rate that, under its practice, Commerce assigns to an exporter it considers to be part of an entity consisting of all exporters of the subject merchandise that it determines not to have rebutted its presumption of government control of export functions. Commerce referred to this entity in the Final Results as the “PRC-wide entity.” *Id.* For the Final Results, Commerce applied a “PRC-wide” rate of 105.31% to this entity and, thus, to GTC, *id.*, a rate Commerce carried over from prior reviews, *id.* at 18,735 n.16.

Plaintiff Aeolus Tyre Co., Ltd. (“Aeolus”), (Ct. No. 17–00102), another respondent Commerce determined not to have rebutted its presumption of government control over export functions, also was assigned the PRC-wide rate of 105.31% in the Final Results. *Id.*

Plaintiffs Qingdao Qihang Tyre Co., Ltd. (“Qingdao Qihang”), Qingdao Free Trade Zone Full-World International Trading Co., Ltd. (“Full World”), Trelleborg Wheel Systems (Xingtai) China, Co., Ltd. (“Trelleborg”), and Weihai Zhongwei Rubber Co., Ltd. (“Zhongwei”), are entities that Commerce determined in the seventh review to have rebutted its presumption of government control and therefore to have qualified for a “separate rate,” i.e., a rate separate from the rate assigned to the PRC-wide entity. *Id.* Commerce did not examine these entities individually and, therefore, did not calculate an individually-determined rate for any of them. Instead, Commerce assigned a rate of 33.08% to Qingdao Qihang, Full World, Trelleborg, and Zhongwei based on the margin it determined for mandatory respondent Xugong. *Id.*

Commerce later corrected a ministerial error and amended Xugong’s separate individual weighted-average dumping margin to 33.14%. *Amended Final Results*, 82 Fed. Reg. at 27,225. Commerce then applied Xugong’s revised rate to Qingdao Qihang, Full World, Trelleborg, and Zhongwei. *Id.* Commerce made no change in the 105.31% rate it applied to the companies it determined to be part of the PRC-wide entity. *Id.*

On January 30, 2018, six plaintiffs—mandatory respondents Xugong and GTC, and separate rate respondents Aeolus, Qingdao Qihang, Full World, and Trelleborg—moved for judgment on the agency record under USCIT Rule 56.2. *Mots. for J. on Agency R., ECF Nos. 48–56 (conf. & public).*³ In response to GTC’s motion, defendant requested a remand to allow Commerce to reconsider GTC’s eligibility

³ Plaintiff Zhongwei did not submit briefing in this case.

for separate rate status. Def.'s Resp. to Mots. for J. on the Agency R. 1–2 (June 1, 2018), ECF No. 58. Defendant opposed the motions in all other respects. *Id.*

In *Guizhou I*, the court granted defendant's request for a remand to allow Commerce to reconsider its separate rate determination as to GTC. *Guizhou I*, 43 CIT at __, 389 F. Supp. 3d at 1360. The court concluded that Commerce's determination that Aeolus did not qualify for a separate rate was unsupported by substantial evidence and remanded that determination to Commerce for reconsideration in light of all record evidence. *Id.* at __, 389 F. Supp. 3d at 1359. The court noted, in particular, that Commerce did not mention a "Rectification Report" that Aeolus claimed demonstrated its independence from government control. *Id.* at __, 389 F. Supp. 3d at 1358. Additionally, the court held that Commerce acted contrary to law in effecting reductions to Xugong's "U.S. price" (export price or constructed export price) for Chinese value-added tax ("VAT"), *id.* at __, 389 F. Supp. 3d at 1361, and directed Commerce to redetermine Xugong's weighted average dumping margin without making deductions for VAT, *id.* at __, 389 F. Supp. 3d at 1370. Finally, because Full World, Qingdao, Trelleborg, and Zhongwei timely contested the Final Results as plaintiffs, the court ruled that these plaintiffs would be entitled to any relief that resulted from the recalculation of Xugong's individually-determined rate. *Id.* at __, 389 F. Supp. 3d at 1370.

Following the court's decision in *Guizhou I*, Commerce prepared a draft remand redetermination and released it to the parties on August 9, 2019. *Remand Redetermination 2* (citing *Draft Results of Redetermination Pursuant to Ct. Remand*(Aug. 9, 2019) ("*Draft Results*")), upon which GTC and Aeolus commented before the agency. *GTC and Aeolus' Comments on the Department's Draft Remand Redetermination* (Aug. 23, 2019) (Remand P.R. Doc. 5).

In the instant Remand Redetermination, submitted on September 23, 2019, Commerce, under protest, redetermined Xugong's margin by eliminating the Department's previous VAT deductions from U.S. price, resulting in a recalculated margin of 16.78%. *Remand Redetermination* 3–4, 43. Based on Xugong's redetermined margin, Commerce assigned rates of 16.78% to Full World, Qingdao Qihang, Trelleborg, and Zhongwei. *Id.* at 43. Commerce again determined that Aeolus failed to rebut its presumption of government control. *Id.* at 14 (" . . . there remains *de facto* government control over Aeolus . . ."). Commerce reached the same conclusion as to GTC. *Id.* at 16 (" . . . we continue to find that GTC is ineligible for a separate rate in the underlying review because it is not free from *de facto* government control over its export activities.").

Six plaintiffs filed comments on the Remand Redetermination. Comments of Consol. Pl[s]. Xuzhou Xugong Tyres Co., Ltd. and Trelleborg Wheel Systems (Xingtai) Co., Ltd. on Final Results of Redetermination Pursuant to Ct. Remand from Slip Op. 10–64 (CIT May 24, 2019) (Nov. 22, 2019), ECF No. 83 (“Xugong’s & Trelleborg’s Comments”); [GTC’s] Comments on Final Remand Redetermination (Nov. 22, 2019), ECF Nos. 84 (conf.), 85 (public) (“GTC’s Comments”); Aeolus’ Comments on Final Remand Redetermination (Nov. 22, 2019), ECF Nos. 86 (conf.), 87 (public) (“Aeolus’s Comments”); Comments [of Full World & Qingdao Qihang] on Final Remand Redetermination (Nov. 22, 2019), ECF No. 88 (“Qingdao’s Comments”). Thereafter, defendant responded to the parties’ comments. Def.’s Resp. to Comments on Remand Results (Feb. 21, 2020), ECF Nos. 97 (conf.), 98 (public) (“Def.’s Resp. to Comments”).

As noted in *Guizhou I*, in this litigation no party challenged the legal basis for the Department’s assigning the 105.31% PRC-wide rate to all respondents it determined to have failed to rebut its presumption of control by the government of China. *Guizhou I*, 43 CIT at ___ n.3, 389 F. Supp. 3d at 1354 n.3. Aeolus and GTC instead have confined their challenges to the Department’s determination that each failed to rebut the presumption of *de facto* government control.

II. DISCUSSION

A. Jurisdiction and Standard of Review

Section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) vests the court with subject-matter jurisdiction of a civil action arising under subsections 516A(a)(2)(A)(i)(I) and 516A(a)(2)(B)(iii) of the Tariff Act of 1930 (the “Tariff Act”), *codified as amended*, 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I), 1516a(a)(2)(B)(iii), which together authorize judicial review of a final determination in an antidumping duty administrative review proceeding conducted under section 751(a), *codified as amended*, 19 U.S.C. § 1675(a). In reviewing a final determination, the court “shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. Nat’l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)).

B. Redetermined Margin for Xugong upon Elimination of the Unlawful Deduction for Chinese Value-Added Tax

Commerce, under protest, redetermined Xugong's individually-determined weighted-average dumping margin upon recalculating export price and constructed export price to remove the deductions it made from U.S. price for Chinese value-added tax, reducing the margin from 33.14% to 16.78%.⁴ *Remand Redetermination* 3–4, 43. Because the Department's elimination of the VAT deduction conforms to the court's remand order in *Guizhou I* and is based on the correct interpretation of the governing statutory provisions, and because Xugong raises no objection, the court sustains the Department's decision to assign the new margin of 16.78% to Xugong.

C. Redetermined Margins for the Unexamined Separate Rate Respondents Full World, Qingdao Qihang, Trelleborg, and Zhongwei

In the Remand Redetermination, Commerce applied the margin it redetermined for Xugong (16.78%) to the unexamined separate-rate respondents, i.e., Full World, Qingdao Qihang, Trelleborg, and Zhongwei. Full World, Qingdao Qihang, and Trelleborg expressly agree with the elimination of the VAT deductions and the assignment of this redetermined rate. Xugong's & Trelleborg's Comments 1–2; Qingdao's Comments 1. Defendant advocates that the court sustain the Remand Redetermination in the entirety, Def.'s Resp. to Comments 2, and, specifically, raises no objection to the comments of the separate rate respondents advocating that the court sustain the Remand Results as to the assignment of the 16.78% margin. Because Full World, Qingdao Qihang, and Trelleborg expressly concur, because Zhongwei filed no objection, and because the Department's decision to assign the 16.78% rate to Full World, Qingdao Qihang, Trelleborg, and Zhongwei conforms to the court's previous Opinion and Order, the court sustains this decision.

It is possible that Commerce, on remand, will revise the margin it assigned to GTC, a mandatory respondent, in further proceedings required by this Opinion and Order. Normally, Commerce would base the rate to be assigned to the separate rate respondents on the margins determined for the mandatory respondents. Nevertheless, Full World, Qingdao Qihang, and Trelleborg, having commented that they should be assigned the rate of 16.78% in accordance with the Department's Remand Redetermination, have waived any claim that

⁴ Although stating that Commerce is removing its VAT deduction under protest, the Remand Redetermination states no reasons why Commerce disagrees with the court's holding and reasoning on this issue, as are set forth in *Guizhou I*.

their rates should be redetermined in further proceedings. Because it filed no objection, Zhongwei also has waived any such claim. By advocating that the court sustain the Remand Redetermination in the entirety and by raising no objection in its response to the comments of Full World, Qingdao Qihang, and Trelleborg advocating that the court sustain the assignment of the 16.78% rate, defendant also has waived any argument to the contrary. Accordingly, the court sustains the assignment of the 16.78% rate to the four unexamined separate-rate respondents.

D. Decisions on Separate Rate Status for Aeolus and GTC

In the seventh review, Commerce followed its usual practice for antidumping duty proceedings involving countries it designates as nonmarket economy (“NME”) countries, such as China, by presuming all companies within the country to be government controlled. *Remand Redetermination*6. “Under this presumption, exporters in an NME receive the country-wide rate, unless the exporter can rebut this presumption by affirmatively demonstrating its entitlement to a separate, company-specific margin by showing an absence of government control, both in law and fact, with respect to its export activities.” *Id.* (citing *Sigma Corp. v. United States*, 117 F. 3d 1401, 1405 (Fed. Cir. 1997)).

For the Final Results, Commerce found that Aeolus and GTC had demonstrated *de jure*, but not *de facto*, independence from government control over their export activities. *Final I&D Mem.* 6, 8–9. In the Remand Redetermination, Commerce again concluded that neither Aeolus nor GTC had rebutted the Department’s presumption. Accordingly, Commerce assigned to both the PRC-wide rate of 105.31%, as it had in the Final Results. In explaining the reasoning behind this decision, the Remand Redetermination states that:

Typically, Commerce considers four factors in evaluating whether each respondent is subject to *de facto* government control of its export functions: (1) whether the export prices are set by or are subject to the approval of a government authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

Remand Redetermination 7 (footnote omitted).⁵ The Remand Redetermination states, further, that “Commerce’s separate rate test examines all four *de facto* criteria,” *id.* at 41, but also contains, in the same paragraph, the contradicting statement that “[i]f a respondent is unable to rebut one of the four *de facto* criteria, the company is ineligible for a separate rate,” *id.* at 42 (citing *Zhejiang Quzhou Lianzhou Refrigerants Co., Ltd. v. United States*, 42 CIT __, 350 F. Supp. 3d 1308, 1313 (2018)).

Defendant argues in its response to comments that “Commerce may deny a request for a separate rate if an applicant fails to demonstrate separation from the government with respect to any one of the *de jure* or *de facto* criteria” and that “if an applicant fails to establish any one of the *de jure* or *de facto* criteria, Commerce is not required to continue its analysis and determine whether the applicant has, or has not, established the other applicable criteria.” Def.’s Resp. to Comments 9 (citing *Yantai CMC Bearing Co. v. United States*, 41 CIT __, 203 F. Supp. 3d 1317 (2017)). In addition to *Yantai CMC Bearing Co.*, defendant relies on *Advanced Tech. & Materials Co. v. United States*, 37 CIT 1487, 938 F. Supp. 2d 1342 (2013), *aff’d*, 581 F. App’x 900 (Fed. Cir. 2014).⁶ Def.’s Resp. to Comments 9. Neither decision was based on facts analogous to those of the review at issue. In *Advanced Tech. & Materials Co.*, the respondent attempting to rebut the Department’s presumption was majority-owned by an entity that was 100% owned by a PRC government entity. 37 CIT at 1494, 938 F. Supp. 2d at 1348. Similarly, in *Yantai CMC Bearing Co.*, the respondent at issue, Yantai CMC Bearing Co. (“Yantai CMC”), had a “chain of ownership” that “extended to the Chinese government because Yantai CMC is more than majority owned by CMC [China National Machinery Import & Export Corporation], which is, in turn, more than majority owned by Genertec, and Genertec is wholly-owned by the State-owned Assets Supervision and Administration of the State Council (“SASAC”).” 41 CIT at __, 203 F. Supp. at 1323 (citations omitted).

In contrast, neither Aeolus nor GTC had an ownership structure in which government entities owned a majority share during the POR. As to Aeolus, China Chemical Rubber Co., Ltd. (“China Chem Rub-

⁵ In citing these factors, Commerce does not identify a statute or regulation and relies instead on two of its own prior decisions: *Final Determination of Sales at Less than Fair Value: Silicon Carbide from the People’s Republic of China*, 59 Fed. Reg. 22,585, 22,586–87 (Int’l Trade Admin. May 2, 1994) and *Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People’s Republic of China*, 60 Fed. Reg. 22,544, 22,545 (May 8, 1995).

⁶ This summary affirmance, issued according to U.S. Court of Appeals for the Federal Circuit Rule 36, is not a precedential decision. See *Advanced Tech. & Materials Co. v. United States*, 581 F. App’x 900 (Fed. Cir. 2014).

ber”) had a 42.58% ownership share, the largest share of any company, and this shareholder was 100% owned by a state-owned enterprise, China National Chemical Corporation (“ChinaChem”), which was under the supervision of China’s national State-owned Assets Supervision & Administration Commission (“SASAC”). *Final I&D Mem.* 10, *Remand Redetermination* 7 (citations omitted). Commerce further found that during the POR three other state-owned enterprises owned an additional 6.48% of Aeolus, resulting in a total ownership by state-controlled enterprises of 49.06%. *Final I&D Mem.* 10, *Remand Redetermination* 7. As to GTC, Commerce found according to record evidence that Guiyang Industry Investment (Group) Co., Ltd. (“GIIG”) owned a 25.20% interest and was GTC’s largest shareholder. *Final I&D Mem.* 13, *Remand Redetermination* 17. GIIG was entirely owned by the Guiyang Municipal State-owned Assets Supervision & Administration Commission (“Guiyang SASAC”). *Remand Redetermination* 17.

While explaining that failure to satisfy any one of the four stated factors is sufficient to deny a respondent separate rate status, the Remand Redetermination also states that “in cases where a respondent was not majority owned by the government, Commerce has examined the totality of the circumstances and made a reasonable inference that the respondent does not control its export activities by examining the four *de facto* criteria, as Commerce has done here.” *Id.* at 42 (citations omitted). The court cannot agree that Commerce examined the four criteria. Instead of examining the four criteria, the Remand Redetermination presumes, without evidentiary support, that the Department’s finding of a lack of autonomy in the selection of management was the factual equivalent of a finding that the Chinese government controlled what Commerce termed a company’s “export activities,” *Remand Redetermination* 6, or “export functions,” *id.* at 7, during the POR. Nor can the court agree that, on this record, Commerce made what can be described as a “reasonable inference.” Under the applicable standard of review, the court may not sustain a factual finding that ignores record evidence and relies upon speculation.⁷

The court begins its substantial evidence review of the Department’s findings that Aeolus’s and GTC’s export functions were government controlled by considering the method and purpose of an administrative review of an antidumping duty order under the Tariff

⁷ In remanding to Commerce an administrative decision denying separate rate status, this Court, questioning the Department’s analysis, inquired as to how the Department’s finding of majority equity ownership by an entity Commerce found to be government-controlled “translates into control of export functions.” *Jilin Forest Indus. Jinqiao Flooring Grp. Co., Ltd. v. United States* at 12, Slip Op. 21–49 (Apr. 29, 2021).

Act. Under the administrative review procedure of 19 U.S.C. § 1675(a), the Tariff Act employs a “retrospective” method of antidumping duty assessment. Duties are assessed following the finality of the results of the review, upon liquidation of the entries of merchandise that are subject to it. Stated briefly, the purpose of the review is to determine, retrospectively, whether and at what rate those entries are to be assessed antidumping duties as a remedial measure for “price discrimination,” i.e., the sale of the subject merchandise in the United States at less than normal value. *See* 19 U.S.C. § 1675(a)(2)(A) (directing Commerce to determine, in the review, “the normal value and export price (or constructed export price) of each entry of the subject merchandise, and . . . the dumping margin for each such entry”). Under this retrospective method, the entries subject to the review already have occurred by the time Commerce conducts its review under 19 U.S.C. § 1675(a)(2)(A), during which Commerce, under its typical practice, determines a weighted average dumping margin for the exporter by examining the data on the exporter’s prior sales that occurred during the POR, particularly, the prices at which the exported subject merchandise was sold into the U.S. market.

In an administrative review involving subject merchandise from a country Commerce determines according to 19 U.S.C. § 1677(18) to be an NME country, such as China, Commerce ordinarily determines normal value according to the special procedures of 19 U.S.C. § 1677b(c), as it did in this review, under which Commerce determines normal value by valuing factors of production according to “surrogate” values obtained from market economy countries. *See* 19 U.S.C. § 1677b(c)(1). That leaves the “U.S. price” of the exported subject merchandise (i.e., export price or, alternatively, constructed export price) as the only determinant of a dumping margin that is dependent on prices grounded in economic activity in China. Because Commerce has identified a respondent’s “export functions” (or “activities”) as the subject of its separate rate inquiry, the court, in reviewing a decision placing an exporter within the Department’s “PRC-wide” entity consisting of all government-controlled exporters of the subject merchandise, necessarily must review the Department’s factual identification of the price discriminator, i.e., the party that controlled the setting of the U.S. price of the exported subject merchandise, during the POR.

In the seventh review, the Department’s rationale for including Aeolus and GTC within the PRC-wide entity was that both were parts of a single entity composed of all Chinese exporters of the subject merchandise whose export functions were controlled by the PRC government, and to which Commerce assigned the single antidump-

ing duty rate of 105.31%. *See Final I&D Mem.* 6–7. As the court has explained, by the time Commerce made its separate rate determinations for Aeolus and GTC, all sales and entries upon which the final results of the review were based already had occurred. In other words, if there was price discrimination, i.e., U.S. sales at less than normal value, to be remedied under the antidumping laws, it already had occurred by the time Commerce conducted the seventh review. In light of the retrospective method by which a review of an antidumping duty order is conducted and the purpose of the review, i.e., remedying price discrimination, the issue this case presents is whether the Department’s inclusions of Aeolus and GTC within the PRC-wide entity were supported by valid factual findings that the Chinese government, rather than Aeolus or GTC, controlled the prices at which these companies’ subject off-the-road tires were sold for export during the POR. Because Commerce, in the Remand Redetermination, did not apply the first of its factors—which inquires as to whether the export prices are set by or are subject to the approval of a government authority—the court has no such finding of fact to subject to judicial review under the substantial evidence standard.

The issue presented affects the two respondents differently. For GTC, a mandatory respondent, a valid finding by Commerce that the Chinese government, rather than GTC, set or controlled the prices at which GTC’s subject off-the-road tires were sold for export to the United States during the POR is critical to a decision on whether GTC is to be assigned a rate other than one based on an examination of GTC’s own sales. For Aeolus, which was not individually examined, the issue is whether Aeolus, by setting its prices for exported subject tires free of governmental control during the POR, qualifies for a rate Commerce determines for an unexamined separate rate respondent.

Because dumping is a comparison between normal value and export price (or constructed export price), the absence of findings of fact on the issue of whether the PRC government, as opposed to Aeolus or GTC, was the agent controlling the price of the subject exported merchandise is a critical omission from the Department’s analysis. This is all the more so because, as discussed previously, the methodology by which Commerce, in practically all cases (including this one), calculates dumping margins for Chinese exporters ensures that there is no factual relationship between prices and costs in China and the method of determining normal value. As the court also has explained, the Department’s determination of normal value according to NME-country procedures relies on values obtained from market economy countries rather than prices for inputs in China, leaving U.S. price as the only determinant of a dumping margin that is dependent on

prices grounded in economic activity occurring in China. Despite this, in the seventh review both Aeolus and GTC were assigned the PRC-wide rate of 105.31%, a rate that had no factual relationship to the export prices or constructed export prices of the subject merchandise that Aeolus and GTC exported to the United States or to the export prices or constructed export prices (based on Xugong's sales) that Commerce used to determine a collective rate for the separate rate respondents.

Under the separate-rate methodology Commerce applied to Aeolus and GTC in the Final Results and again in the Remand Redetermination, the sole reason export price and constructed export price became irrelevant to the antidumping duty rate applied to Aeolus and GTC was the Department's insistence that the government of China controlled the export functions of these two respondents. That conclusion rings hollow in the absence of actual findings, supported by substantial record evidence, on whether the PRC government, and not the respondents, controlled the prices of the exported merchandise subject to the review. Here, not only did both exporters place information on the record from which they argue that the Chinese government did not control their activities generally, they also introduced evidence to support their specific contentions that they maintained control over their own prices for the exported subject merchandise. See Aeolus's Comments 23–27, GTC's Comments 21–26. Under the Department's "rebuttable presumption" method of determining government control over export functions, the introduction of that evidence was at least sufficient to require Commerce to make retrospective determinations, based on a full consideration of the entire record, on the issue of whether the PRC government actually did control these respondents' export pricing decisions during the POR.

In challenging the Final Results, Aeolus argued that "Commerce relied exclusively on SOE [state-owned-enterprise] ownership and petitioners' website printouts to deny Aeolus' separate rate based only on the 'selection of management' *de facto* criterion" instead of applying all four factors of its stated analysis. Mem. of Law in Supp. of Mot. for J. on the Agency R. of Consol. Pl. Aeolus Tyre Co., Ltd. 20 (Jan. 30, 2018), ECF No. 56 ("Aeolus's Br."). It argued, further, that the 49.06% level of ownership by state-owned enterprises does not establish government control over Aeolus's business decisions, let alone its export activities, and that the Department's findings to the contrary, which treated the level of ownership as "dispositive," were "mere speculation." *Id.* at 15. According to Aeolus, "[t]here is no evidence that the PRC government interfered with Aeolus' export activities—

the focus of Commerce's separate rate test," *id.*, and "Commerce's finding that the PRC government controlled Aeolus' export decisions is not supported by any record evidence; rather, it is based entirely on speculation," *id.* at 24 (citation omitted). Aeolus maintained that it "submitted uncontroverted evidence that it: independently sets export prices; has negotiating authority; selects management independently; retains the proceeds of its export sales; and makes independent decisions regarding the disposition of profits." *Id.* at 27. Aeolus also challenged the Final Results on the ground that Commerce failed to provide "the requisite explanation for its new separate rate analysis," which Aeolus contends is at variance with the Department's past practice. *Id.* at 32–34.

Commerce found that "we continue to find that the Chinese government, through an SOE, exerts control over Aeolus's management selection process, through control of its board member selection process." *Remand Redetermination 7* (citing *Final I&D Mem.* 10). Commerce followed this finding with a lengthy discussion of voting procedures for the election of directors and selection of management, a discussion of access to the company's financial information, and the Department's finding that the Rectification Report does not alter its ultimate conclusion. *Id.* at 8–14. Commerce opined that the Rectification Report "describes steps taken to ensure that Aeolus has an independent accounting system, but whether those steps are effective remains unaddressed in the Rectification Report." *Id.* at 13. Commerce concluded its analysis of *de facto* government control with the conclusory statements that "the only purported safeguard is ChinaChem's mere promise to not interfere with a listed company's business operations" and that "[t]herefore . . . despite the Rectification Report showing specific government control issues being 'rectified,' there remains *de facto* government control over Aeolus by virtue of its board of directors and management being nominated and appointed by its SOE shareholders." *Id.* at 13–14. The critical issue of control over pricing of subject exports during the POR was left to speculation.

As to the issue of a separate rate for Aeolus, all of the Department's findings in the Remand Redetermination pertained to the issue of selection of directors and management and to government influence generally. There is no discussion of specific government control over the setting of prices of exported subject merchandise during the POR. Nor does the Remand Redetermination point to specific record evidence contradicting the evidence Aeolus put forth in its separate rate application on the issues of independence from the government in the setting of export prices, the negotiating of contracts, the retention of

export sales proceeds, and the disposition of profits. *See* Aeolus's Comments at 2, 26–27. Without deciding whether Commerce permissibly reached findings under its third factor, autonomy in selection of management, the court concludes that Commerce reached an ultimate decision on Aeolus's separate rate application that was unsupported by substantial record evidence on the whole. The critical flaw was the Department's failure to conduct the review so as to determine whether the Chinese government, during the POR, controlled the prices of Aeolus's subject merchandise that was sold for export to the United States and at issue in the seventh review. If it did not, the inclusion of Aeolus within the PRC-wide entity lacked both an evidentiary basis and sound reasoning when viewed according to the Department's own formulation of its separate rate inquiry, which expressly identifies “export activities” and “export functions.”

Regarding GTC, Commerce summarized its decision with the following finding: “In the instant case, we find that GTC is not free from government control in making decisions regarding the selection of its management and thus is subject to *de facto* government control of its export functions.” *Remand Redetermination* 17. The Remand Redetermination explains, further, that “GTC's board is responsible for the selection of senior management, which controls the day-to-day decisions regarding the company's export activity.” *Id.* at 20 (footnote omitted). As shown by the conclusory nature of both of these findings, the Department's analysis of GTC's separate rate application in the Remand Redetermination suffers from the same fatal flaws as does its analysis for Aeolus. No specific evidence is presented, or addressed, on the critical issue of whether the Chinese government controlled the prices of exports to the United States of GTC's subject merchandise during the POR. Almost all of the Department's discussion in the Remand Redetermination pertained to the factor addressing autonomy in selection of management. One finding pertained to the fourth factor (“makes independent decisions regarding disposition of profits or financing of losses”), which was the finding that “Article 161 (IV) of GTC's AoA [Articles of Association] states, ‘The Board of Director shall put forward {an} annual profit distribution proposal’ As a result, GIIG ultimately controls the selection of GTC's senior management, as well as profit distributions through its influence on GTC's board selection process.” *Id.* at 19 (footnotes omitted). But there is no discussion addressing the question of whether the Chinese government controlled the prices of GTC's exported subject merchandise during the POR.

GTC argues that the evidence shows, at most, that the PRC central government has the potential to control, not that it actually controls,

GTC's affairs. GTC's Comments 27. GTC points out that the Department's decision to treat GTC as part of the PRC-wide entity is unreasonable because Commerce granted GTC separate rate status in the fifth periodic review, when GTC's management and profit distribution structures were substantially similar to those in the instant review. *Id.* at 14–15. GTC contends that Commerce neither acknowledged nor explained the decision to employ a new *de facto* analysis, rendering the Remand Redetermination contrary to law. *Id.* at 28–32.

Without deciding whether Commerce was correct in its finding under its third factor, autonomy in selection of management (a finding GTC, like Aeolus, disputes), the court must set aside as insufficiently supported by substantial evidence on the record the presumption or inference that the Chinese government set or controlled the prices at which GTC sold subject off-the-road tires to the U.S. market during the POR. Commerce sidestepped the issue of whether the record evidence supported a finding of control of those prices during the POR by GIIG, the minority shareholder and government-controlled entity. Therefore, the standard of review requires the court to set aside, as unsupported by substantial record evidence, the denial of separate rate status to GTC as set forth in the Remand Redetermination.

As the court discussed previously, Commerce also ignored the issue of control over pricing of exported subject merchandise during the POR in denying separate rate status to Aeolus. With respect to both plaintiffs, Commerce failed to justify its application of its separate rate methodology for determining *de facto* government control according to remedial purpose of the antidumping duty statute in general and the particular remedial purpose of 19 U.S.C. § 1675(a), which calls for a retrospectively-determined remedy when sales of exported subject merchandise are found to have occurred during the POR at prices lower than normal value.

III. CONCLUSION AND ORDER

The court sustains the following decisions in the Remand Redetermination: (1) to redetermine Xugong's individually-determined dumping margin upon recalculating export price and constructed export price to remove the deduction from U.S. price for Chinese value-added tax, (2) the resulting redetermined margin of 16.78% for Xugong, and (3) the decision to apply the rate of 16.78% to Full World, Qingdao Qihang, Trelleborg, and Zhongwei, who were unexamined separate-rate respondents.

The court remands to Commerce the Department's decisions in the Remand Redetermination to deny separate-rate status to Aeolus and GTC and orders that Commerce reach new decisions in accordance with this Opinion and Order.

Therefore, upon consideration of all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the Remand Redetermination be, and hereby is, sustained with respect to the assignment of a redetermined weighted average dumping margin of 16.78% to mandatory respondent Xugong and the assignment of a rate of 16.78% to separate rate respondents Full World, Qingdao Qihang, Trelleborg, and Zhongwei; it is further

ORDERED that Commerce submit a second determination upon remand ("Second Remand Redetermination") in which it reconsiders its decisions not to accord separate rate status to Aeolus and GTC and revises the antidumping duty rates applied to these respondents as may be required by its reconsideration of those decisions; it is further

ORDERED that Commerce shall submit its Second Remand Redetermination within 90 days of the date of this Opinion and Order; it is further

ORDERED that comments of plaintiffs on the Second Remand Redetermination must be filed with the court no later than 30 days after the filing of the Second Remand Redetermination; and it is further

ORDERED that the response of defendant to the aforementioned comments must be filed no later than 15 days from the date on which the last comment is filed.

Dated: May 14, 2021

New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, JUDGE

Slip Op. 21-61

DIS VINTAGE LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge
Court No. 16-00013

[Denying plaintiffs Motion for Summary Judgment, granting defendant's Cross Motion for Summary Judgment in part and ordering that Customs classify the subject merchandise as "commingled goods" and subject to the duty rate of 16.6% ad valorem because the samples with the highest duty rate applicable are classifiable in subheading 6203.42.40.]

Dated: May 17, 2021

Peter S. Herrick, Peter S. Herrick, P.A., of St. Petersburg, FL, for plaintiff DIS Vintage LLC.

Monica P. Triana, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of New York, NY, for defendant United States. With her on the brief was *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office and *Aimee Lee*, Assistant Director of New York, NY. Of Counsel was *Sheryl A. French*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Reif, Judge:

Pursuant to the court’s Order of June 15, 2020, DIS Vintage LLC (“plaintiff” or “DIS Vintage”) and the United States (“defendant” or “Government”) submitted supplemental summary judgment briefs on the tariff classification of 443 bales of secondhand clothing (the “subject merchandise”) imported into the United States by DIS Vintage. See *DIS Vintage LLC v. United States*, 44 CIT __, __, 456 F. Supp. 3d 1323 (2020) (“*DIS Vintage I*”); Order of June 15, 2020, ECF No. 62 at 1–2; Def.’s Supp. Summ. J. Br., ECF No. 66 (“Def. Supp. Br.”); Pl.’s Supp. Summ. J. Br., ECF No. 75 (“Pl. Supp. Br.”); Def.’s Reply to Pl.’s Supp. J. Br., ECF No. 76 (“Def. Supp. Reply Br.”).

In *DIS Vintage I*, the court determined the meaning of the requirement that merchandise “show signs of appreciable wear” to be classified as “worn clothing and other worn articles” in Heading 6309 of the Harmonized Tariff Schedule of the United States (“HTSUS”). See *DIS Vintage I*, 456 F. Supp. 3d at 1331. However, the court did not decide on the appropriate tariff classification of the subject merchandise. *Id.* at 1339–1340. In part, the court requested further briefing from the Government on the appropriate classification for each of the 41 samples of the subject merchandise so that the court could determine the appropriate rate of duty. Order of June 15, 2020, ECF No. 62 at 1–2 (“Order of June 15, 2020”). The court directed plaintiff to limit its response only to the Government’s classifications. *Id.*

The Government conducted an analysis of each of the 41 samples applying “the Court’s analysis of [Heading 6309] set forth in [*DIS Vintage I*].” Def. Supp. Br. at 4. The Government identified alternative classifications, as instructed by the court in the Order of June 15, 2020, for samples determined to be classified under Heading 6309. *Id.* The Government argues that the 41 samples have varying duty rates and, therefore, that the subject merchandise should be classified as “commingled” and “subject to the highest rate of duty for any part thereof.” See Supp. Def. Br. at 1; see also General Note 3(f). DIS Vintage argues that all 41 samples are “worn,” and, therefore, that

the subject merchandise should be classified under Heading 6309 and should be “duty free.” Pl. Supp. Br. at 3. Parties agree that the 41 samples are representative of the subject merchandise. See *DIS Vintage I*, 456 F. Supp. 3d at 1328. Therefore, the classification of the samples dictates the classification of the subject merchandise.

For the first time, DIS Vintage also raises an alternative argument should the court determine that the subject merchandise is commingled. If the court so concludes, plaintiff urges that the subject merchandise “not [be] dutiable at the ‘highest rate of duty applicable to any part thereof’” because, DIS Vintage asserts, it did not have the chance to address the issue of commingling and, therefore, the exceptions to commingling. Pl. Supp. Br. at 8. Plaintiff further argues that its merchandise falls under two exceptions to commingling: General Note 3(f)(iii) and General Note 3(f)(iv). *Id.* at 8. The Government responds that plaintiff should be precluded from raising this alternative argument because plaintiff’s argument is outside the scope of the court’s request, that plaintiff had a prior opportunity to raise this argument and that waiver, prejudice and impossibility apply. Def. Supp. Reply Br. at 1–13.

The court continues to exercise jurisdiction over this action under 28 U.S.C. § 1581(a).

The court declines to consider plaintiff’s alternative argument because consideration will not aid the court in the proper classification of the subject merchandise. See *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). Further, the plaintiff’s alternative argument is outside the scope of the Order of June 15, 2020, in which the court requested the information that it needed to reach the correct classification for the subject merchandise.

The court’s classification of the 41 samples hinges on parties’ dispute with regard to the classification of 25 samples.¹ Of the 25 samples, the court finds that 16 samples are “worn” under Heading 6309 and that the remaining 9 samples are properly classified under other subheadings of the HTSUS of varying rates of duty. The “highest duty rate” of the 9 samples is 16.6% *ad valorem*.² Accordingly, and for the reasons set forth below, the court holds that the subject merchandise is composed of goods subject to different rates of duty and, therefore, “commingled” pursuant to General Note 3(f)(i). As

¹ Parties agree that the proper classification for 16 of the 41 samples is under Heading 6309. See Declaration of Kimberly Wachtel, ECF No. 66–1; see also Declaration of Daniel Sabban, ECF No. 75–1.

² Exhibit 2, Exhibit 3 and Exhibit 29 fall under subheading 6203.42.40 with a duty rate of 16.6% *ad valorem*.

such, the subject merchandise has the duty rate of 16.6% *ad valorem*, which is the “highest rate of duty to any part thereof.” General Note 3(f)(i).

BACKGROUND

In its initial decision on this case, the court explained that to be classified in Heading 6309, articles “must meet three requirements: (1) be one of the [specified] . . . articles of textile materials or specified footwear and headgear; (2) ‘show signs of appreciable wear’; and, (3) be entered ‘in bales.’” *DIS Vintage I*, 456 F. Supp. 3d at 1331. The court identified the requirements for goods to be considered “commingled” pursuant to General Note 3(f)(i) and determined that the exception in General Note 3(f)(v) for “a particular tariff treatment for commingled goods” that plaintiff identified in its summary judgment motion was not applicable to Heading 6309. *Id.* at 1334–36. The court stayed cross-motions for summary judgment and remanded to U.S. Customs and Border Protection (“Customs”) to determine the classification and appropriate rate of duty in conformity with the decision. *Id.* at 1340.

Pursuant to U.S. Court of International Trade (USCIT) Rule 59, the Government moved for rehearing of the portion of *DIS Vintage I* that required the matter to be remanded to Customs and requested that the parties be allowed to supplement the record so that the court could properly classify the 41 samples without an administrative remand. Def.’s Mot. for Rehearing, ECF No. 61. The Government also requested that the parties be allowed to submit supplemental Rule 56 summary judgment briefs. *Id.*

The court granted the motion for rehearing and withdrew the portion of *DIS Vintage I* that remanded the case to Customs. Order of June 15, 2020, ECF No. 62 at 1. In the Order of June 15, 2020, the court requested from the Government information “only” on:

- (1) the proper tariff classification of each of the 41 samples of the subject merchandise in light of the court’s legal determinations in [*DIS Vintage I*], and where defendant classifies a sample under the U.S. Harmonized Tariff Schedule (HTSUS) Heading 6309, defendant shall also identify an alternative classification in HTSUS Chapter 61 or 62 for each of the samples to inform the court, should the court determine that classification under Chapter 61 or 62, rather than under Heading 6309, is appropriate; (2) whether, based on the classifications of the samples, the merchandise at issue shall be considered ‘commingled’ pursuant

to General Note 3(f); and, (3) if the merchandise at issue is considered ‘commingled,’ the appropriate rate of duty of the commingled goods. . . .

Id. (emphasis underlined in original).

The court further directed “that plaintiff shall have 30 days to respond to the Government’s submission stating *only* with which, if any, of defendant’s classifications or alternative classifications . . . plaintiff disagrees, and stating plaintiff’s proffered classifications and justifications consistent with the legal determinations in [*DIS Vintage I*] for each of those samples.” *Id.* at 2 (emphasis underlined in original). Additionally, the court asked defendant to respond within 15 days “to plaintiff’s submission *only* with respect to the classifications or alternative classifications proffered by plaintiff in its response.” *Id.* (emphasis underlined in original).

STANDARD OF REVIEW

The appropriate standard of review for cases contesting the denial of a protest is *de novo*. *Lerner N.Y., Inc. v. United States*, 37 CIT 604, 606–607, 908 F. Supp. 2d 1313, 1317–18 (2013) (holding “[i]n cases contesting the denial of a protest, the court makes its findings of fact *de novo* based upon the record made before the court, 28 U.S.C. § 2640(a).”) (emphasis in original). The Federal Circuit has recognized that “[t]he plaintiff has the burden of establishing that the government’s classification of the subject merchandise was incorrect but does not bear the burden of establishing the correct classification; instead, it is the court’s independent duty to arrive at ‘the *correct* result, by whatever procedure is best suited to the case at hand.” *Id.* (citing *Jarvis*, 733 F.2d at 878) (emphasis in original). The court should find “the proper classification of the subject merchandise even if the proper classification has not been raised by the parties.” *Cummins Inc. v. United States*, 29 CIT 525, 541, 377 F. Supp. 2d 1365, 1380 (2005) (citing *Jarvis*, 733 F.2d at 878).

LEGAL FRAMEWORK

I. General

The General Rules of Interpretation (“GRIs”) and the Additional U.S. Rules of Interpretation govern the classification of merchandise under the HTSUS. *Link Snacks, Inc. v. United States*, 742 F.3d 962, 965 (Fed. Cir. 2014); *see also Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). In accordance with GRI 1, “classification shall be determined according to the terms of the headings and any relevant section or chapter notes. . . .” GRI 1.

II. General Note 3(f) on Commingling

General Note 3(f)(i) of the HTSUS states: “Whenever goods subject to different rates of duty are so packed together or mingled that the quantity or value of each class of goods cannot be readily ascertained by customs officers (without physical segregation of the shipment or the contents of any entire package thereof). . . the commingled goods shall be subject to the highest rate of duty applicable to any part thereof” General Note 3(f)(i).

General Note 3(f) explicitly includes four exceptions for when commingled goods should not be subject to the highest rate of duty applicable.

First, General Note 3(f)(i) states that commingled goods will not be subject to the highest rate of duty if “the consignee or his agent segregates the goods pursuant to subdivision (f)(ii) hereof.” General Note 3(f)(i). General Note 3(f)(ii) explains the procedural requirements for segregating the goods. General Note 3(f)(ii).

Second, General Note 3(f)(iii) explains that “the foregoing provisions of subdivision (f) of this note do not apply with respect to any part of a shipment if the consignee or his agent furnishes . . . satisfactory proof . . . that such part (1) is commercially negligible, (2) is not capable of segregation without excessive cost and (3) will not be segregated prior to its use in a manufacturing process or otherwise, and . . . that the commingling was not intended to avoid the payment of lawful duties.” General Note 3(f)(iii). If such proof is furnished, the goods “shall be considered for all customs purposes to be dutiable at the rate applicable to the material present in greater quantity than any other material.” *Id.*

Third, General Note 3(f)(iv) contains nearly identical language to General Note 3(f)(iii) but requires satisfactory proof “that the value of the commingled goods is less than the aggregate value would be if the shipment were segregated” instead of proof that such part is commercially negligible. General Note 3(f)(iv).

Fourth, General Note 3(f)(v) notes that “the provisions of subdivision (f) of this note shall apply only in cases where the tariff schedule does not expressly provide a particular tariff treatment for commingled goods.” General Note 3(f)(v).

DISCUSSION

I. Whether the Court Considers Plaintiff's Argument of Not Having an Opportunity to Address the Issue of Commingling and the Applicability of General Note 3(f)(iii) and (iv)

Plaintiff contends that even if the imported goods are considered commingled, “they are not dutiable at the ‘highest rate of duty applicable to any part thereof’” because DIS Vintage did not have the chance previously to address the issue of commingling as Customs failed to provide adequate notice pursuant to HQ 957322. Pl. Supp. Br. at 8. Plaintiff urges the court to remand the case to Customs to give plaintiff the opportunity to address the issue of commingling or, in the alternative, urges the court itself to address the commingling issue by concluding that the commingled goods fall under either exception in General Note 3(f)(iii) or (iv). *Id.* at 9–10.

The court is attentive to its duty to arrive at the “correct result” with respect to the proper classification of the subject merchandise. *See Jarvis*, 733 F.2d at 878. The court would be prepared to consider plaintiff's new argument if it would aid the court in reaching the correct result. *See Arthur J. Humphreys, Inc. v. United States*, 15 CIT 427, 427, 771 F. Supp. 1239, 1241 (1991) (interpreting the “obligation to reach the correct result” in *Jarvis* to allow the court to consider, “in its discretion,” several new arguments and clearer articulations of previous arguments from a party when it raised them during the rehearing stage of the litigation). However, in this case, the court concludes that plaintiff's additional argument will not help the court classify the subject merchandise correctly, and, therefore, the court declines to consider the argument.

The Government argues in its reply brief that plaintiff's claims are outside the scope of the court's Order of June 15, 2020 and should be precluded. Def. Supp. Reply Br. at 6.³ The Government explains, “[t]he Court was not inquiring of either party as to whether additional exceptions to the ‘commingled’ rule that were not previously identified may be applicable. Having already considered and rejected plaintiff's asserted exception, the Court was not inviting plaintiff to attempt to apply another.” *Id.*

The Government is correct. The court requested information from plaintiff “only” on “with which, if any, of defendant's classifications or

³ The Government also raises counter arguments of prior opportunity and waiver, prejudice and impossibility to argue that the court should not consider plaintiff's additional argument. Def. Supp. Br. at 6–13. The court does not discuss, in the interest of judicial economy, these counter arguments.

alternative classifications . . . plaintiff disagrees . . .” See Order of June 15, 2020, ECF No. 62 at 2. The court continued that if plaintiff disagreed with defendant’s classifications or alternative classifications, plaintiff should state “plaintiff’s proffered classifications and justifications consistent with the legal determinations in [*DIS Vintage I*] for each of those samples.” *Id.* The scope of the court’s order did not invite additional arguments.

The court requested only the information that it needed to reach the correct classification for the subject merchandise. *DIS Vintage*’s additional argument pertains not to defendant’s classification of the 41 samples, as the court requested, but rather to the applicable duty rate if the subject merchandise were classified as “commingled.” Plaintiff’s additional argument is, accordingly, outside the scope of the court’s Order of June 15, 2020.

In other cases, it may be appropriate to consider an additional argument that was outside of the scope of an order should it aid the court in correct classification; however, in this case, consideration of plaintiff’s additional argument will not aid the court in determining the proper classification of the subject merchandise. As a result, the court declines to consider plaintiff’s additional argument.

II. Classification of Subject Merchandise

The court now turns to the classification of the 41 samples, and as a result, the classification of the subject merchandise. The Government argues that only 16 of the 25 samples should be classified as “worn” under Heading 6309. See Declaration of Kimberly Wachtel, ECF No. 66–1. As a result, the Government classifies the imported goods as commingled and explains that the goods are dutiable at the “highest rate of duty applicable to any part thereof” in accordance with General Note 3(f). Def. Supp. Br. at 33. The Government argues that since “the highest rate of duty identified for any the 41 samples is 16.6% *ad valorem*,” the court should enter a judgment that 16.6% *ad valorem* is the appropriate duty rate for the subject merchandise. *Id.* at 34. The Government argues that the 16.6% *ad valorem* rate is “applicable to Def. Exs. 1, 2, 3, 10, 28, and 29 as well as Bale 4 [Samples 1 and 3]. . . based on the classification of those samples in either subheading 6203.42.40 or subheading 6204.62.40, HTSUS, which cover, among other things, children’s jeans.” *Id.* at 34.

DIS Vintage disputes the Government’s classification and argues that all 41 samples are “worn.” Pl. Supp. Br. at 3. Plaintiff argues that, as a result, the subject merchandise should be classified under Heading 6309 and should be “duty free.” *Id.*

A. Tariff Classification of the 41 Samples of the Subject Merchandise

The court explained previously that, in accordance with Chapter Note 3, “for the subject merchandise to be covered by Heading 6309, it must meet three requirements: (1) be one of the [specified] articles of textile materials or specified footwear and headgear; (2) ‘show signs of appreciable wear’; and, (3) be entered ‘in bales.’” *DIS Vintage I*, 456 F. Supp. 3d at 1331. The court determined that the subject merchandise meets the first and third requirements. *Id.* at 1336. Consequently, the tariff classification of the subject merchandise “hinges on the requirement of Chapter Note 3(i) — whether the samples of the subject merchandise ‘show signs of appreciable wear.’” *Id.* The court held that the term “appreciable wear” means “noticeable damage or impairment caused by use.” *Id.* at 1331–34. Such damage or impairment must be visible to the eye. *Id.* at 1331. “If ‘use’ is not sufficient to cause damage or impairment, then the merchandise will not and should not meet the definition of ‘wear.’” *Id.* at 1333. The court explained further that “[t]he language of Heading 6309 and Chapter Note 3 permit the possibility that damage to something other than fabric can comprise ‘appreciable wear.’” *Id.* at 1337.

The Government contends that 16 samples should be classified as “worn” under Heading 6309.⁴ The Government maintains that the remaining 25 samples should not be classified as “worn” but rather should be classified under other subheadings of the HTSUS. *See* Declaration of Kimberly Wachtel, ECF No. 66–1. Plaintiffs contend that all 41 samples of the subject merchandise “show signs of appreciable wear” and should be classified as “worn” under Heading 6309. *See* Declaration of Daniel Sabban, ECF No. 75–1.

The court has reviewed the samples of the subject merchandise. The court agrees that 16 of the 41 samples before the court, uncontested by the parties, are “worn” and should be classified under Heading 6309 because the samples “show signs of appreciable wear” — “noticeable damage or impairment caused by use.” The court does not discuss further the 16 uncontested samples. Of the remaining 25 samples, the court finds that 16 samples “show signs of appreciable wear” and are “worn” under Heading 6309, and 9 do not “show signs of appreciable wear” and should be classified under other subheadings of the HTSUS for the following reasons.

⁴ The Government describes the following as “worn” under Heading 6309: Exhibit 4, Exhibit 5, Exhibit 7, Exhibit 9, Exhibit 15, Exhibit 18, Exhibit 20, Bale 1 Sample 4, Bale 2 Sample 1, Bale 2 Sample 2, Bale 2 Sample 3, Bale 2 Sample 4, Bale 3 Sample 2, Bale 4 Sample 2, Bale 4 Sample 4 and Exhibit 30. *See* Declaration of Kimberly Wachtel, ECF No. 66–1.

1. Sixteen “Worn” Samples under Heading 6309

The court finds that the following samples meet the definition of “worn” because they “show signs of appreciable wear” — “noticeable damage or impairment caused by use.” Accordingly, the samples should be classified in Heading 6309 with the applicable duty rate of *free*.

- i. Exhibit 1 shows signs of “noticeable damage or impairment caused by use” because the sample has one rivet missing on the back pocket with damage to the fabric from the removal of the rivet.
- ii. Exhibit 8 shows signs of “noticeable damage or impairment caused by use” because the sample shows signs of washing and has what appear to be detergent stains.
- iii. Exhibit 10 shows signs of “noticeable damage or impairment caused by use” because the elastic of the waist is stretched and threads are loose.
- iv. Exhibit 12 shows signs of “noticeable damage or impairment caused by use” because the sample is a dress that has belt loops and the impairment of a missing belt.
- v. Exhibit 13 shows signs of “noticeable damage or impairment caused by use” because there is loose threading on the underarms.
- vi. Exhibit 16 shows signs of “noticeable damage or impairment caused by use” because there are two holes underneath the waistband.
- vii. Exhibit 17 shows signs of “noticeable damage or impairment caused by use” because there is noticeable fading. Additionally, there are approximately six holes on the back of the shirt.
- viii. Exhibit 19 shows signs of “noticeable damage or impairment caused by use” because the buttons appear stressed and the buttonholes indicate use as they are separated and sagging. In addition, the sample is a dress that has belt loops and also the impairment of a missing belt.
- ix. Bale 1 Sample 3 shows signs of “noticeable damage or impairment caused by use” because the sample has a stain on the back and the label shows signs of washing.

- x. Bale 3 Sample 1 shows signs of “noticeable damage or impairment caused by use” because the sample appears faded through repeated wash. The fading is especially visible on the seam lines.
- xi. Bale 3 Sample 3 shows signs of “noticeable damage or impairment caused by use” because there is fading and a stain on the upper left front pocket of the sample. The stitching, zipper and seams also show signs of damage from use.
- xii. Bale 3 Sample 4 shows signs of “noticeable damage or impairment caused by use” because the tag appears worn and shows signs of washing. There is also a tear on the inside of the waistband.
- xiii. Bale 4 Sample 1 shows signs of “noticeable damage or impairment caused by use” because there is a yellow stain on the rear of the left pant leg just below the seat of the sample.
- xiv. Bale 4 Sample 3 shows signs of “noticeable damage or impairment caused by use” because the knees appear damaged with some fraying on the cuffs. There are two small holes on the back of the lower right leg. The outside label of the waistband also shows signs of damage from use.
- xv. Exhibit 28 shows signs of “noticeable damage or impairment caused by use” because there is a detectable yellow mark on the lining of the left front pocket just below the inside waistband of the sample.
- xvi. Exhibit 31 shows signs of “noticeable damage or impairment caused by use” because there are three places in which the stitches are loose on the seam that holds the left sleeve. The side zipper opening is partially detached from the fabric.

2. Nine Not “Worn” Samples Classified Under Other Subheadings

The court finds that the following samples do not meet the definition of “worn” in Heading 6309 because they do not “show signs of appreciable wear” — “noticeable damage or impairment caused by use” — and should be classified as follows under other subheadings. The court responds to plaintiff’s assertions that the samples “show signs of appreciable wear,” found in the Declaration of Daniel Sabban, ECF No. 75–1, for clarity and to help aid parties in making future classification decisions under Heading 6309.

- i. Exhibit 2 does not show signs of “noticeable damage or impairment caused by use.” No loose threads are discernible, and the sample looks intentionally faded as part of the design rather than from use. Accordingly, the court agrees with the Government’s classification of the sample in subheading 6203.42.40 with the applicable duty rate of 16.6% *ad valorem*. See Def. Supp. Br. at 5.
- ii. Exhibit 3 does not show signs of “noticeable damage or impairment caused by use.” The sample looks intentionally faded as part of the design rather than from use. Accordingly, the court agrees with the Government’s classification of the sample in subheading 6203.42.40 with the applicable duty rate of 16.6% *ad valorem*. See Def. Supp. Br. at 5–6.
- iii. Exhibit 6 does not show signs of “noticeable damage or impairment caused by use.” The undone hem appears intentional as part of the design rather than from use. Accordingly, the court agrees with the Government’s classification of the sample in subheading 6204.59.30 with the applicable duty rate of 16% *ad valorem*. See Def. Supp. Br. at 8.
- iv. Exhibit 11 does not show signs of “noticeable damage or impairment caused by use.” The sample does not appear to be washed out. The fray on the hem appears to be part of the design rather than from use. Accordingly, the court agrees with the Government’s classification of the sample in subheading 6204.52.20 with the applicable duty rate of 8.2% *ad valorem*. See Def. Supp. Br. at 11.
- v. Exhibit 14 does not show signs of “noticeable damage or impairment caused by use.” The sample does not appear to be faded. Accordingly, the court agrees with the Government’s classification of the sample in one of subheadings 6204.41, 6204.42, 6204.43, 6204.44 or 6204.49⁵ with the highest applicable duty rate of 16% *ad valorem*. See Def. Supp. Br. at 12–13.

⁵ The Government states that “[t]he classification of garments under these subheadings is tied to the fiber content of the product.” Def. Supp. Br. at 13. The Government further states that the plaintiff failed to provide the fiber content of the garment to Customs and that the garment lacks a fiber content label. *Id.* Therefore, the Government is unable to advise the court as to the sample’s six-digit or eight-digit classification level. *Id.* The court is unable to and, further, does not find it necessary to come to its own conclusion on the classification of Exhibit 14 at the six-digit or eight-digit level, as the court’s conclusion of commingling or the duty rate for the subject merchandise will not be affected.

- vi. Bale 1 Sample 1 does not show signs of “noticeable damage or impairment caused by use.” There are no loose threads detected. Accordingly, the court agrees with the Government’s classification of the sample in subheading 6204.44.40 with the applicable duty rate of 16% *ad valorem*. See Def. Supp. Br. at 17.
- vii. Bale 1 Sample 2 does not show signs of “noticeable damage or impairment caused by use.” There are no loose threads or broken stitches detected. Accordingly, the court agrees with the Government’s classification of the sample in subheading 6204.44.40 with the applicable duty rate of 16% *ad valorem*. See Def. Supp. Br. at 17–18.
- viii. Exhibit 27 does not show signs of “noticeable damage or impairment caused by use.” Accordingly, the court agrees with the Government’s classification of the sample in subheading 6204.43.40 with the applicable duty rate of 16% *ad valorem*.⁶ See Def. Supp. Br. at 28.
- ix. Exhibit 29 does not show signs of “noticeable damage or impairment caused by use.” The fading on the sample appears to be intentional and part of the design. Accordingly, the court agrees with the Government’s classification of the sample in subheading 6203.42.40 with the applicable duty rate of 16.6% *ad valorem*. See Def. Supp. Br. at 29–30.

B. Commingling of the Subject Merchandise

The court finds that the subject merchandise is “commingled” pursuant to General Note 3(f)(i).

General Note 3(f)(i) lays out three requirements for “commingled goods” — that the goods are: (1) “subject to different rates of duty”; (2) “so packed together or mingled”; and, (3) “that the quantity or value of each class of goods cannot be readily ascertained by customs officers (without physical segregation of the shipment or the contents of any entire package thereof), by . . . (A) sampling, (B) verification of packing lists or other documents filed at the time of entry, or (C) evidence showing performance of commercial settlement tests” See General Note 3(f)(i).

The court determined previously that the second and third requirements are met. See *DIS Vintage I*, 456 F. Supp. 3d at 1338.

⁶ Plaintiff did not provide analysis to support its argument that Exhibits 27–31 are “worn” under Heading 6309. See Declaration of Daniel Sabban, ECF No. 75–1.

The court now determines that the subject merchandise meets the first requirement and that the samples are “subject to different rates of duty.” As described above, sixteen samples fall under Heading 6309 and are, therefore, duty free. Nine samples fall under other subheadings of HTSUS and are subject to other duty rates — 16.6% *ad valorem*, 16% *ad valorem* and 8.2% *ad valorem*.

Accordingly, the court holds that the subject merchandise is “commingled goods.”

C. Applicable Duty Rate

As the subject merchandise is commingled, it is subject to the “highest rate of duty applicable to any part thereof.” General Note 3(f)(i); *see also* 19 C.F.R. § 152.13 (“Commingled merchandise shall be assessed with duty at the highest rate or rates applicable to any one kind of merchandise included in the commingling. . .”).

The court finds that the highest rate of duty applicable is 16.6% *ad valorem*. As described above, Exhibit 2, Exhibit 3 and Exhibit 29 fall under subheading 6203.42.40. As a result, the duty rate of 16.6% *ad valorem* applies. The other samples are classified under subheadings with lower rates of duty, therefore, 16.6% *ad valorem* is the highest rate of duty applicable.

CONCLUSION

The 2003 Oscar-nominated movie, *Seabiscuit*,⁷ creates a number of poignant moments based on the accounts offered by Laura Hillenbrand in her 2001 award-winning book, *Seabiscuit: An American Legend*. One of those moments is the first time that Seabiscuit’s eventual owner, millionaire carmaker Charles Howard (played masterfully by Jeff Bridges), meets Seabiscuit’s eventual trainer, Tom Smith (played beautifully by Chris Cooper, who took home a long-overdue Oscar for the role).

In the movie, Smith is sitting by himself in a small clearing, make-shift tent behind him, beautiful white stallion standing a few feet away. It is nighttime, and Smith is heating a tin of coffee over a fire when he hears a rustling in the bushes. Out of the darkness, out of the night, comes Howard, bent over, pushing away the thick branches of a large bush, then standing upright, his broad, tall frame lit by Smith’s fire. He is wearing a three-piece suit.

⁷ SEABISCUIT (Gary Ross/Universal Pictures, Dreamworks Pictures, Spyglass Entertainment, Larger Than Life Productions, the Kennedy/Marshall Company, Touchstone Pictures, 2003), based on LAURA HILLENBRAND, SEABISCUIT: AN AMERICAN LEGEND (2001).

Smith, eyes steady on the odd sight: “Howdy,” as much question as greeting (as in, “what the heck?”). “Wha...?” He starts, stops. “You hungry?” In the deep depths of the Depression, an offer of kindness, reminiscent of Tom Joad.

“No, no thanks. I’m fine.” Howard steps forward, hand outstretched: “Charles Howard.”

“Tom,” he says. “Smith.”

“Nice to meet you, Tom,” Howard says with a warm smile. He looks over at the stallion, looks back at Smith: “What’s in ... what’s in his bandage?”

“Oh, that’s Hawthorn root. It . . . it increases circulation.” He gestures to a stump: “You wanna sit down?”

“Oh, uh, thank you.” Howard sits. “Will he get better?”

“Already is. Little.”

Howard, serious, no smile: “Will he race?”

Smith stirs the fire: “Noooo. Not that one.”

“So . . . why are you fixing him?”

“Cause I can,” voice rising on the last word. “Ever’ horse is good for somethin’. He could be a cart horse or a lead pony. An’, he’s still nice to look at. You know, you don’t throw a whole life away just ’cause he’s banged up a little.”⁸

* * *

For the foregoing reasons, the court concludes that the subject merchandise is “commingled goods” and subject to the duty rate of 16.6% *ad valorem* because the samples with the highest duty rate applicable are classifiable in subheading 6203.42.40. Plaintiff’s Motion for Summary Judgment is, therefore, denied and defendant’s Cross Motion for Summary Judgment is granted in part. Judgment will enter accordingly.

⁸ See also Hillenbrand, *supra* note 7, at 27, 29:

For Smith, training was a long, quiet conversation. He was baffled by other people’s inability to grasp what he was doing. “It’s easy to talk to a horse if you understand his language,” he once said. “Horses stay the same from the day they are born until the day they die They are only changed by the way people treat them.” He believed with complete conviction that no animal was permanently ruined. Every horse could be improved. He lived by a single maxim. “Learn your horse. Each one is an individual, and once you penetrate his mind and heart, you can often work wonders with an otherwise intractable beast.”

Tom Smith and Charles Howard came face-to-face. The two men stood in different halves of the century. Smith was the last of the true frontiersmen; Howard was paving Smith’s West under the urgent wheels of his automobiles. Howard was driven by image; Smith remained the Lone Plainsman, forbidding and solitary. But Howard was blessed with an uncanny ability to see potential in unlikely packages, and he had a cavalryman’s eye for horsemen. He took one look at Smith and instincts rang in his head. He drove Smith to his barn and introduced his horses to their new trainer.

Dated: May 17, 2021
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

Slip Op. 21–62

TRANS TEXAS TIRE, LLC, Plaintiff, and ZHEJIANG JINGU COMPANY LIMITED, Consolidated Plaintiff, v. UNITED STATES, Defendant, and DEXSTAR WHEEL, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Consol. Court No. 19–00188

[The court sustains Commerce’s *Final Determination*, denies Plaintiffs’ motion for judgment on the agency record except as to the retroactive imposition of antidumping duties, and remands for revised instructions on the assessment of duties consistent with this opinion.]

Dated: May 18, 2021

Jordan C. Kahn, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, N.Y. and Washington, D.C., argued for plaintiff. With him on the briefs were *Ned H. Marshak*, *Alan R. Klestadt*, and *Max F. Schutzman*.

Ting-Ting Kao, White & Case LLP, of Washington, D.C. and New York, N.Y., argued for consolidated plaintiff. With her on the briefs were *Walter J. Spak* and *Jay C. Campbell*.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With her on the briefs were *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of Counsel *Brandon J. Custard*, Senior Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce. With them on the post argument submission were *Brian M. Boynton*, Acting Assistant Attorney General, and *Daniel J. Calhoun*, Assistant Chief Counsel.

Nicholas J. Birch, Schagrin Associates, of Washington, D.C., argued for defendant-intervenor. With him on the brief was *Roger B. Schagrin* and *Geert De Prest*.

OPINION

Katzmann, Judge:

Was the final scope determination by the U.S. Department of Commerce (“Commerce”) in an antidumping duties (“AD”) investigation a permissible clarification or an improper scope expansion in the application of duties to a product manufactured in China and sold at less than fair value in the American market? Was Commerce’s assessment of retroactive duties on the product permissible or in error for failure to provide adequate notice prior to its issuance of a final scope decision in the AD proceedings? This case involves Commerce’s final AD determination of on steel trailer wheels from the People’s

Republic of China. Mem. from J. Maeder to J. Kessler, re: Issues and Decision Mem. for the Final Determination in the Less Than Fair Value Investigation (Dep't Commerce July 1, 2019), P.R. 300 ("IDM"); *Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances*, 84 Fed. Reg. 32,707 (Dep't Commerce July 9, 2019), P.R. 302 ("*Final Determination*"). Plaintiffs Trans Texas Tire, LLC ("TTT"), a domestic importer, and Zhejiang Jingu Company Limited ("Jingu") a Chinese manufacturer of trailer wheels, (collectively, "Plaintiffs"), filed this suit to challenge Commerce's Order on Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People's Republic of China, 84 Fed. Reg. 45,952 (Dep't Commerce Sept. 3, 2019), P.R. 308 ("Order"); Compl. of Trans Texas Tire at 1–2, Nov. 1, 2019, ECF No. 10 ("Pl.'s Compl."); Compl. of Zhejiang Jingu, Zhejiang Jingu Co. Ltd. v. United States, No. 19-cv-00187 (CIT Nov. 1, 2019), ECF No. 13 ("Consol.-Pl.'s Compl."). The suit challenges the inclusion of steel trailer wheels coated in chrome through a Physical Vapor Deposition ("PVD") process ("PVD chrome wheels") in the final AD determination and the assessment of duties back to Commerce's preliminary determination.¹ Pl.'s Compl. at 5–6.

Initially, Commerce excluded "certain on-the-road steel wheels that are coated entirely in chrome" from its preliminary determination. *Certain Steel Wheels 12 to 16.5 Inches from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, and Preliminary Affirmative Determination of Critical Circumstances*, 84 Fed. Reg. 16,643, 16,646 (Dep't Commerce Apr. 22, 2019), P.R. 255 ("*Preliminary Determination*"). Although the parties' positions differ as to the meaning of this preliminary language, Commerce determined in the course of its investigation that its final AD scope determination included PVD chrome wheels and excluded only electroplated chrome wheels. *Final Determination* at 32,710. Plaintiffs assert that the inclusion of PVD chrome wheels in Commerce's *Final Determination* is unsupported by substantial evidence and that the retroactive assessment of duties on PVD chrome wheels is unlawful, and move for judgment on the agency record accordingly. Pl.'s Mot. for J. on the Agency R., Apr. 28, 2020, ECF No. 29 ("Pl.'s Br."); Consol.-Pl.'s Mot. for J. on the Agency R., Apr. 28, 2020, ECF No. 30 ("Consol.-Pl.'s Br."). Defendant United States ("Government") and Defendant-Intervenor Dexstar Wheel oppose this motion and ask the court to sustain Commerce's Final Determination and retroactive

¹ Commerce's calculation of AD rates was not raised before the court and is not considered here.

assessment of duties. Def.'s Resp. to Pl.'s Mot. for J. on Agency R., Aug. 10, 2020, ECF No. 35 ("Def.'s Br."); Resp. Br. of Dexstar Wheel, Aug. 10, 2020, ECF No. 34 ("Def.-Inter.'s Br.").

At the request of the petitioner — Defendant-Intervenor Dexstar Wheel ("Petitioner" or "Dexstar") — and in accordance with section 705(a)(1) of the Tariff Act of 1930, Commerce aligned the final AD determination in this case with the final determination in the companion countervailing duties case, Consol. Ct. No. 19–00189. Similarly, this court has considered the cases simultaneously and publishes both cases today. The court sustains Commerce's AD determination but concludes that retroactive assessment of duties was impermissible under the circumstances here.

BACKGROUND

I. Legal & Regulatory Framework

To facilitate fair trade and to level the playing field for American businesses that face foreign goods introduced into the domestic market, "[t]he Tariff Act of 1930, as amended, allows Commerce to impose . . . duties on imports that injure domestic industries." *Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194, 1196 (Fed. Cir. 2014). Commerce assesses ADs when it determines that "the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value" and the United States International Trade Commission ("ITC") finds that the dumping injures a domestic industry. *See* 19 U.S.C. § 1673d(a)(1). After so determining, Commerce issues an AD duty order and the plain language of the order determines its scope. *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005) (citing *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002)); *see generally* 19 U.S.C. § 1673e.

The federal regulations describe the AD duty assessment process in 19 C.F.R. § 351. The requirements for the description of the merchandise are found in 19 C.F.R. § 351.202(b)(5), and state that "[a] detailed description of the subject merchandise that defines the requested scope of the investigation, including the technical characteristics and uses of the merchandise and its current U.S. tariff classification number." The ITC uses the provided merchandise description to determine the effects of the dumped or countervailed imported goods on the domestic like product. 19 U.S.C. § 1677(4)(D); *Timken Co. v. United States*, 20 CIT 76, 80, 913 F.Supp. 580, 584 (1996).

II. Factual Background

On August 8, 2018, Dexstar Wheel Division of Americana Development, Inc. (“Dexstar” or “Petitioner”), a domestic producer of trailer wheels, filed AD and CVD petitions on certain steel trailer wheels from the People’s Republic of China. Petitions for the Imposition of AD and CVD Duties on Behalf of Dexstar Wheel Division of Americana Development, Inc. Re: Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People’s Republic of China, P.R. 50, 5 (“Petition”). Commerce initiated its AD investigation on September 5, 2018. *Certain Steel Wheels 12 to 16.5 Inches in Diameter From the People’s Republic of China: Initiation of Less-Than-Fair Value Investigation*, 83 Fed. Reg. 45,095 (Dep’t Commerce Sept. 5, 2018), P.R. 72 (“*Initiation Notice*”). Commerce requested and received supplemental information from Dexstar before initiating the investigation into certain steel trailer wheels on August 28, 2018. *Petitioner’s Response to the Department’s August 17, 2018 Additional Questions* (Aug. 20, 2018), P.R. 65. In October 2018, the ITC found that there is a reasonable indication that the government of China’s subsidization of certain steel trailer wheels and the sale of those wheels in the U.S. at less than fair value materially injured U.S. industry. Steel Trailer Wheels from China, Inv. Nos. 701-TA-609 and 731-TA-1421 (Preliminary), USITC Pub. 4830 (Oct. 2018) (“Preliminary ITC Determination”). On April 22, 2019, Commerce published its preliminary AD determination finding that certain steel wheels from China were being sold in the United States for less-than-fair value. *Preliminary Determination*. On July 9, 2019, Commerce issued its final affirmative determination. *Final Determination*. In August of 2019, the ITC found that domestic industry was materially injured by the import of certain steel wheels from China. Steel Trailer Wheels from China, Inv. Nos. 701TA-609 and 731-TA-1421 (Final), USITC Pub. 4943 (Aug. 2019) (“Final ITC Determination”). On September 3, 2019, Commerce issued its AD order on certain steel wheels from China. Order.

A. The Scope Determination

The Petition filed on August 8, 2018 described the scope of the subject merchandise as certain “on-the-road steel wheels” and included several statements excluding steels wheels coated in chrome. Petition at I-2, I-5. The Petition did not reference specific chrome plating processes or mention electroplating or PVD processing but did state that there are no U.S. producers of chrome-coated steel wheels. *Id.* Before publication of the *Initiation Notice*, Commerce requested and received clarification from Dexstar regarding whether its Petition intended to specify a minimum chrome content or level of chrome

plating. Petitioner's Response to the Department of Commerce's August 10, 2018 General Issues Questionnaire (Aug. 15, 2018), P.R. 63 ("Dexstar Petition Response"). Dexstar confirmed:

Petitioner intended that the exclusion for chrome wheels be for wheels that are coated entirely in chrome. Petitioner is not aware of any wheels on the market that are only partially coated in chrome. As explained in the petitions, there are no U.S. producers of chrome-coated steel wheels as chrome coating requires a different manufacturing process that requires the use of highly toxic chemicals, and chrome wheels are sold at much higher prices than certain steel wheels. The scope language has been revised to read, "Also excluded from this scope are aluminum wheels and certain on-the road steel wheels that are coated entirely with chrome."

Id. at 8. Commerce published its *Initiation Notice* of the AD investigation on September 5, 2018 containing the provision that "Excluded from this scope are the following: . . . (3) certain on the road steel wheels that are coated entirely with chrome; . . ." *Initiation Notice* at 45,100.

On October 30, 2018, Tredit Tire & Wheel Co., Inc. ("Tredit"), a U.S. importer of trailer wheels, though not a party in these cases, suggested that the scope in the *Initiation Notice* was overbroad and requested that Commerce clarify the scope to exclude "[a]ll wheels with galvanized, chrome or PVD finishes." Letter from Barnes, Richardson & Colburn to U.S. Department of Commerce (Oct. 30, 2018), P.R. 134 at 3 (emphasis added). Dexstar responded that "chrome coated wheels have never been covered by the scope of these investigations." Letter from Stewart & Stewart to U.S. Department of Commerce (Nov. 15, 2019), P.R. 138 at 2 n.5. Further, Dexstar repeated its assertion that there are no U.S. producers of chrome coated steel wheels due to the highly toxic nature of the chemicals. *Id.* at 5. Dexstar confirmed that it "did not include chrome coated wheels in the scope of the petitions," and that "chrome coated wheels have never been included in the scope of the investigations." *Id.* at 5.

In the *Preliminary Determination*, Commerce continued to use the scope from its September 3, 2018 *Initiation Notice*, including the provision that "[e]xcluded from this scope are . . . certain on the road steel wheels that are coated entirely with chrome; . . ." *Preliminary Determination* at 16,646. In March 2019, Dexstar requested that Commerce confirm that the chrome exclusion did not include PVD chrome wheels. Letter from Stewart & Stewart to U.S. Department of Commerce (Mar. 22, 2019), P.R. 226 at 1–2, Pl.'s Compl. at 3. TTT responded in April 2019 and submitted evidence seeking to establish

that PVD chrome wheels are covered by the exclusion. Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt to U.S. Department of Commerce (Apr. 11, 2019), P.R. 247 at 2. On April 15, 2019 Commerce issued its preliminary scope decision memorandum. Mem. from E. Begnal to G. Taverman, re: Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People's Republic of China: Preliminary Scope Decision Memorandum (Dep't Commerce Apr. 15, 2019), P.R. 252 ("Preliminary Scope Memo"). The Preliminary Scope Memo maintained the exclusion language of "coated entirely with chrome" from the Initiation Notices. *Id.* at 2.

Commerce published a final scope decision memorandum on July 1, 2019 and its final AD determination on July 9, 2019, noting in both for the first time that, "This exclusion is limited to chrome wheels coated entirely in chrome and produced through a chromium electroplating process, and does not extend to wheels that have been finished with other processes, including but not limited to Physical Vapor Deposition (PVD)." Mem. from E. Begnal to J. Maeder, re: Certain Steel Wheels from the People's Republic of China: Final Scope Decision Memorandum for the Final Antidumping Duty and Countervailing Duty Determinations (Dep't Commerce Jul. 1, 2019), P.R. 301 at 5 ("*Final Scope Memo*"); *Final Determination* at 23,710. Commerce revised the initial scope language to incorporate Dexstar's clarification that the scope exclusion only applies to electroplated chrome steel trailer wheels and not PVD chrome wheels. Def.'s Br. at 6. Following its final determination, Commerce imposed ADs retroactively, with assessments beginning on April 22, 2019, the date of Commerce's *Preliminary Determination*. Def.'s Br. at 32.

B. Procedural History

Subsequently, on November 1, 2019, TTT initiated this case to challenge Commerce's inclusion of PVD chrome wheels in its final order and its retroactive imposition of ADs on PVD wheels as of the date of the *Preliminary Determination*. Pl.'s Compl. at 1, 5–6. On November 22, 2019, Petitioner Dexstar Wheel joined the action as a defendant intervenor. Order Granting Consent Mot. to Intervene, Nov. 22, 2019, ECF No. 15. Foreign producer Jingu then joined TTT's action as a Consolidated-Plaintiff to challenge the scope of its final order and the assessment of duties back to the preliminary determination date. Order Granting Mot. to Consolidate, Dec. 11, 2019, ECF No. 21. On April 28, 2020, TTT and Jingu each filed Rule 56.2 motions for judgment on the agency record. Pl.'s Br., Consol.-Pl.'s Br. On August 10, 2020, the Government and Dexstar Wheel (collectively, "Defendants") filed their responses to the Rule 56.2 motions. Def.'s

Br.; Def.-Inter.'s Br. On October 13, 2020, TTT and Jingu filed their reply briefs. Reply Br. of TTT, Oct. 13, 2020, EFC No. 42 ("Pl.'s Reply"); Reply Br. of Zhejiang Jingu Co., Ltd., Oct. 13, 2020, ECF No. 43 ("Consol.-Pl.'s Reply"). Prior to oral argument, the court issued questions to the parties, and the parties responded on January 21, 2021. Letter Concerning Questions for Oral Arg., Jan. 12, 2021, ECF No. 51; Dexstar's Resp. to the Court's Questions, Jan. 21, 2021, ECF No. 52 ("Def.-Inter.'s OAQ Resp."); Pl.'s Resp. to the Court's Questions, Jan. 21, 2021, EFC No. 53 ("Pl.'s OAQ Resp."); Resp. to Court's Order re Oral Arg. Questions, Jan. 21, 2021, ECF No. 54 ("Def.'s OAQ Resp."); Zhejiang Jingu's Resp. to Oral Arg. Questions, Jan. 21, 2021, ECF No. 55 ("Consol.-Pl.'s OAQ Resp."). The court held oral argument on January 25, 2021. Oral Arg., Jan. 25, 2021, ECF No. 56. The parties, except for the Government, filed supplemental briefs following oral argument. Post Arg. Submission, Jan. 29, 2021, ECF No. 56 ("Consol.-Pl.'s Suppl. Br."); Resp. to Court's Order Permitting Post-Arg. Submission, Jan. 29, 2021, ECF No. 57 ("Def.-Inter.'s Suppl. Br."); Post-Arg. Submission, Jan. 29, 2021, ECF No. 58 ("Pl.'s Suppl. Br.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c). The standard of review is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i) which provides "[t]he court should hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

When reviewing Commerce's determinations, however, the court may not "reweigh the evidence or . . . reconsider questions of fact anew." *Shandong Rongxin Imp. & Exp. Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1327, 1336 (2017) (quoting *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015)). The "possibility of drawing two inconsistent conclusions from the evidence does not preclude [Commerce's] finding from being supported by substantial evidence. *Id.* (quoting *ABB Inc. v. United States*, 190 F. Supp. 3d 1159, 1166–67 (2016)). Even where Commerce's decision is "of less than ideal clarity," the court is obligated to sustain the decision when Commerce's "path may reasonably be discerned." *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1376

(Fed. Cir. 2016) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). Commerce’s explanation must simply “reasonably tie the determination under review to the governing statutory standard and to the record evidence.” *Id.* (quoting *Bowman*, 419 U.S. at 286). This standard allows the court to fulfill its “review function” and “avoid making choices reserved to the agency,” thereby upholding the principles in *SEC v. Chenery*, 318 U.S. 80, 88 (1943). *Id.* These principles further require that the reviewing court “may not affirm on a basis containing any element of discretion — including discretion to find facts and interpret statutory ambiguities — that is the not the basis the agency used, since that would remove the discretionary judgment from the agency to the court.” *Id.* (quoting *ICC v. Brotherhood of Locomotive Eng’rs*, 482 U.S. 270, 283 (1987)).

DISCUSSION

Plaintiffs argue that Commerce (1) unlawfully expanded the scope of its investigation; and (2) improperly assessed AD duties retroactively to the preliminary determination date without adequate notice. Pl.’s Br. at 26, 37; Consol.-Pl.’s Br. at 18, 39. Defendants respond in support of Commerce’s *Final Determination* by: (1) highlighting Commerce’s extensive authority to determine the scope of an order; (2) supporting Commerce’s AD assessment back to the date of the preliminary determination after a proper clarification of scope; and (3) stating that the chrome exclusion was never intended to exclude PVD chrome wheels. Def.’s Br. at 12, 27, 30; Def.-Inter.’s Br. at 9, 16, 24. The court concludes that, while Commerce’s final scope determination was supported by substantial evidence and in accordance with law, Commerce’s retroactive assessment of ADs without adequate notice was unlawful.

I. Commerce’s Final Scope Determination Was Supported by Substantial Evidence and in Accordance with Law

Plaintiffs challenge Commerce’s final scope determination on two grounds. First, Plaintiffs allege that the Government failed to comply with statutory requirements, given that the ITC injury determination only found domestic injury with respect to steel trailer wheels not coated in chrome. Pl.’s Br. at 4–5, 36–37; Consol.-Pl.’s Br. at 6, 25–26. Second, Plaintiffs argue that Commerce’s ultimate inclusion of PVD chrome wheels constitutes an expansion of scope, not a permissible clarification, and is therefore unlawful. Pl.’s Br. at 11, 19–20; Consol.-Pl.’s Br. at 31–34.

Defendants respond by arguing that Dexstar at no point intended to include PVD chrome wheels in the scope exclusion and thus never

conveyed such intent to the ITC, and further that the ITC in fact considered PVD chrome wheels in its injury determination in the context of “coated, painted, and galvanized wheels.” Def.’s Br. at 17; Def.-Inter.’s Br. at 20. Defendants further argue that Commerce’s explicit inclusion of PVD chrome wheels in the final scope determination falls within Commerce’s discretion to clarify the scope of its investigations, given that PVD chrome wheels were never intended to be the subject of the exclusion for chrome-coated steel wheels. Def.’s Br. at 14; Def.-Inter.’s Br. at 13.

Defendants are correct. Commerce “has an inherent power to establish the parameter of [its investigations] so as to carry out its mandate to administer the law effectively and in accordance with its intent.” *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1035, 700 F. Supp. 538, 547 (1988), *aff’d* 898 F.2d 1577 (Fed. Cir. 1990). Accordingly, “Commerce retains broad discretion to define and clarify the scope” of its investigations “in a manner which reflects the intent of the petition.” *Mitsubishi Heavy Indus., Ltd. v. United States*, 21 CIT 1227, 1232, 986 F. Supp. 1428, 1432 (1997) (quoting *Minebea Co. v. United States*, 16 CIT 20, 22, 782 F. Supp. 117, 120 (1992)) (upholding a scope clarification made after notice of initiation as supported by substantial evidence). Here, Commerce has provided adequate evidence in support of its final scope determination and has not exceeded its discretion. The court therefore affirms Commerce’s determination.

Commerce provided adequate explanation for its decision in the final scope memorandum, and its clarification of the inclusion of PVD chrome wheels is therefore permissible. Commerce explained that the Petition excluded chrome wheels that are produced through a highly toxic process, not performed in the United States, and require the welding of disc and rim after chrome coating. *Final Scope Memo* at 12; Petition I–13. Neither the toxic process nor post-coating welding are required in the manufacture of PVD chrome wheels. *Final Scope Memo* at 12; Def.’s Br. at 13. In addition, Commerce cited substantive differences between PVD chrome and electroplated chrome including weight, color tint, and the higher cost of PVD chrome. *Final Scope Memo* at 15. Further, Commerce stated that PVD processing involves a powder base and a clear coat. *Id.* at 12, 14. Considering these differences, Commerce reasonably found that the Petition intended the scope to exclude only electroplated chrome wheels, and not PVD chrome wheels.

Contrary to Plaintiffs’ arguments, the statute did not require Petitioner to amend its initial petition to the ITC in light of the inclusion of PVD chrome wheels. Def.’s Br. at 27. There is no evidence that the

ITC failed to consider PVD chrome wheels in its injury determination. In fact, the preliminary injury determination expressly addressed the incorporation of coated, painted, and galvanized steel wheels. Def.'s Br. at 19; *Steel Trailer Wheels from China*, Inv. Nos. 701-TA-609 and 731-TA-1421, USITC 4830, (Sept. 28, 2018) at I-9, I-14. Commerce's final scope determination clarified that PVD chrome wheels are included within the broader category of "coated" wheels, as PVD chrome coating involves "applying a powder coat, metallic coat . . . and a clear coat to the wheel." *Final Scope Memo* at 15. Thus, although the ITC's preliminary injury determination incorporated the Petition's language regarding the exclusion of wheels "coated in chrome," Petition at I-5, there is no indication that the determination failed to consider whether PVD chrome wheels "materially injured" domestic injury as required under 19 U.S.C. § 1671(a)(2).

Nor did Commerce impermissibly deviate from its established practice by treating the inclusion of PVD chrome wheels as a clarification, not expansion, of scope and therefore not requiring amendment of the petition. It is established that Commerce can "alter the scope of the investigation until the final order." *Kyocera Solar, Inc. v. United States*, 41 CIT __, __, 253 F. Supp. 3d 1294, 1316 (2017) (citing *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (Fed. Cir. 2002)). Indeed, although Commerce attempts to limit alterations to scope during the course of an investigation, it nevertheless expressly allows parties to request permission to submit additional information regarding the scope of an investigation at any point during the proceedings. *Initiation Notice* at 45,100. Furthermore, although Commerce retains and has exercised the discretion to reject late-stage requests to alter the scope of an investigation, see, e.g., *Mem. from S. Claeys to D. Spooner, re: Issues and Decision Mem. for the Antidumping Duty Investigation of Certain Orange Juice from Brazil: Final Determination of Sales at Less Than Fair Value*, 71 Fed. Reg. 2,183 (Dep't Commerce Jan. 13, 2006), 11(citing *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 848, 342 F. Supp. 2d 1172, 1188–89 (2004)), it also has "broad discretion to define and clarify the scope of an . . . investigation in a manner which reflects the intent of the petition," *AMS Assocs. v. United States*, 36 CIT 1660, 1666, 881 F. Supp. 2d 1374, 1380 (2012), *aff'd* 737 F.3d 1338 (Fed. Cir. 2013). That Commerce chose to exercise the latter power and not the former in this case does not provide a basis for overturning its final scope determination.

The case law supports deference to Commerce's scope determinations. In *Kyocera*, the plaintiff challenged Commerce's departure from its practice of using a single country of origin test to define the scope of an investigation of a particular class or kind of merchandise. 253 F. Supp. 3d at 1305. Consolidated Plaintiff SunEdison further challenged Commerce's scope determination, arguing that by altering the country of origin rule, Commerce impermissibly brought certain sales within the scope of the final order that were not previously implicated by the investigation. *Id.* at 1315–16. On remand, Commerce explained that its apparent deviation from the country-of-assembly test applied in its earlier investigation of solar cells from Taiwan was reasonable in light of the specific harm alleged in the investigation before the court: while the former investigation addressed harm originating in the assembly of solar panels in China, the latter addressed harm originating with the construction of solar cells in Taiwan. *Id.* at 1309. Finding that Commerce adequately explained its apparent deviation from past practice, and “reasonably tailored” its determination to the specific investigations, the court upheld Commerce's scope determination. The court also rejected SunEdison's argument, finding that “Commerce has the authority . . . to modify the scope language until the final order is issued, based on the agency's findings during the course of the investigation.” *Id.* at 1315 (citing *Duferco Steel, Inc.*, 296 F.3d at 1096).

Similarly, in *Minebea Co. v. United States*, 16 CIT 20, 782 F. Supp. 117 (1992), the court addressed whether rod ends and rod end bearings were properly included in Commerce's investigation despite “scant reference to rod ends, per se” in the initial petition. 16 CIT at 23, 782 F. Supp at 120. Minebea, a producer of rod ends and rod end bearings, appealed Commerce's denial of its exclusion request, arguing that because “rod ends without rolling elements were not specifically named in the petition” they “should have been excluded.” 16 CIT at 22, 782 F. Supp at 120. The court found that Commerce reasonably interpreted the petition to intend the inclusion of rod ends and rod end bearings despite the absence of explicit language, because (1) “[t]he petition clearly included spherical plain bearings and housed bearing units”; (2) both “rod ends and rod end bearings are used in aerospace applications, an area of interest specifically mentioned in the petition”; and (3) “petitioner's submissions . . . in response to . . . requests to clarify the scope of the petition, unequivocally indicate that the petitioner intended for rod ends and rod end bearings to be included as well.” 16 CIT at 23, 782 F. Supp. at 122 (citations omitted).

As in *Kyocera* and *Minebea*, the court here defers to Commerce's broad discretion to define the scope of its investigation and its reasonable interpretation of the underlying petition. Commerce provided a reasonable explanation for its inclusion of PVD chrome wheels, and for its understanding of Petitioner's intent. Nor is there any basis for a determination that Commerce failed to comply with the statutory process underlying its investigation. The court therefore sustains Commerce's *Final Determination* as supported by substantial evidence and in accordance with law.

II. Commerce Unlawfully Assessed ADs Back to the Original Suspension of Liquidation Because Commerce Did Not Provide Adequate Notice

Plaintiffs further argue that even if the inclusion of PVD chrome was lawful in the *Final Determination*, Commerce erred by assessing antidumping duties retroactively on PVD chrome imports back to the date of its *Preliminary Determination*. Pl.'s Br. at 37; Consol.-Pl.'s Br. at 39. In support of this contention, TTT points to the court's decision in *Tai-Ao Aluminum (Taishan) Co. v. United States*, 43 CIT __, __, 391 F. Supp. 3d 1301, 1313–15 (2019) (“Tai-Ao I”), *aff'd* 983 F.3d 487 (Fed. Cir. 2020) (“Tai-Ao II”) for the principle that “Commerce is prohibited from assessing retroactive AD/CVD liability without providing sufficient notice.” Pl.'s Br. at 38. Both Plaintiffs argue that notice of the inclusion of PVD wheels was inadequate as of the initiation of the investigation, and that duties should be assessed only prospectively following the clarification of scope: i.e., from the publication of the *Final Determination*. Pl.'s Br. at 42; Consol.-Pl.'s Br. at 39.

Defendants respond by maintaining that chrome wheels were always within the scope and original intent of the Petition and arguing that ADs for PVD wheels should be assessed back to the suspension of liquidation with the February 25, 2019 publication of the *Preliminary Determination*. Def.'s Br. at 29–31; Def.-Inter.'s Br. at 24. The Government relies on the argument that Commerce followed its own regulations as provided in 19 U.S.C. §§ 1671b and 1673b and attempts to distinguish the analysis of adequate notice in the context of scope rulings and of retroactive assessment of duties to the suspension of liquidation. Def.'s Br. at 30. Defendant-Intervenor asserts that as Commerce's scope modification was a clarification, assessment of duties back to the start of suspension of liquidation — here, the issuance of the *Preliminary Determination* — was consistent with the provisions of 19 U.S.C. § 1673b(d)(2). Def.-Inter.'s Br. at 24.

At the initiation of an AD investigation, Commerce is required to provide notice of the investigation through the publication of an initiation notice in the Federal Register. 19 C.F.R. § 351.203(c)(1).

Commerce must also provide a public version of the petition to all known exporters “as soon as practicable” after the initiation. 19 C.F.R. § 351.203(c)(2). Once Commerce makes a preliminary AD determination, it must publish the affirmative or negative decision in the Federal Register and order the suspension of liquidation of the subject merchandise. 19 C.F.R. § 351.205(c)–(d); 19 U.S.C. § 1673b(e)(2). Similarly, Commerce must publish its final determinations and orders in the Federal Register. 19 C.F.R. § 351.210(b)–(c). Such publication provides legal notice of Commerce’s investigations and the potential AD liability that may result to importers. *See, e.g., Target Corp. v. United States*, 33 CIT 760, 779–80, 626 F. Supp. 2d 1285, 1301 (2009), *aff’d* 609 F. 3d 1352 (Fed. Cir. 2010) (citing 44 U.S.C. § 1507; *Fed. Corp Ins. Corp. v. Merrill*, 332 U.S. 380, 384–85 (1947)). In particular, publication of the initiation notice is intended to ensure that “any reasonably informed party should be able to determine, . . . whether particular entries in which it has an interest may be affected by the administrative review.” *Tai-Ao I*, 391 F. Supp. 3d at 1314 (quoting *Transcom, Inc. v. United States*, 182 F.3d 876, 882–83 (Fed. Cir. 1999)).

In other words, as the Federal Circuit noted, “the notice requirement is designed to avoid unfairness to importers and foreign exporters.” *Tai-Ao II*, 983 F.3d at 494. Commerce is therefore expected to make “a reasonable attempt . . . to balance respondents’ concerns for finality and the fairness of Commerce’s investigation with the statutory duty to issue an effective and administrable . . . order.” *Mitsubishi Heavy Indus., Ltd.*, 21 CIT at 1233, 986 F. Supp. at 1434. Accordingly, although Commerce has broad discretion “to define and clarify the scope of an investigation”, that discretion “is limited in part by concerns for the finality of administrative action, which cautions against including a product that was understood to be excluded at the time the investigation began.” *Allegheny Bradford Corp.*, 28 CIT at 848, 342 F. Supp. 2d at 1187–88 (quoting *Mitsubishi Heavy Indus., Ltd.*, 21 CIT at 1232, 986 F. Supp. at 1433). In this case, Commerce failed to provide adequate notice upon the initiation of the AD proceedings that PVD chrome wheels would not qualify for the exclusion for steel trailer wheels coated in chrome. Commerce’s assessment of retroactive duties on PVD chrome wheels is therefore unlawful.

Tai-Ao I, a review of scope interpretation and notice in an anti-circumvention investigation, is instructive in the treatment of retroactive duties. *Tai-Ao I*, 391 F. Supp. 3d at 1305. In *Tai-Ao I*, the court found there was substantial record evidence for Commerce’s final

scope determination but inadequate notice to plaintiffs of the applicable scope upon issuance of the initiation notice. *Id.* at 1313–15. Specifically, the court found that notice that “the Department *intends to consider whether the inquiry should apply*” to a specific product, 391 F. Supp. 3d at 1314 (emphasis in original), was inadequate to allow retroactive assessment of duties because it “does not *certainly* provide Plaintiffs notice that they are subject to the inquiry,” 391 F. Supp. 3d at 1315 (emphasis in original) (citing *Aluminum Extrusions from the People’s Republic of China: Initiation of Anti-Circumvention Inquiry*, 81 Fed. Reg. 15,039, 15,042 (Dep’t Commerce Mar. 21, 2016)). Typically, affirmative anticircumvention investigations result in assessment of duties back to the date of the initiation notice pursuant to 19 U.S.C. § 1677j(f). Due to the inadequate notice of scope as of initiation, the court in *Tai-Ao I* instead required that Commerce impose retroactive duties beginning upon the date the importers were given adequate notice — in that case, the date of the preliminary determination. 391 F. Supp. 3d at 1313–14. The Federal Circuit recently affirmed the court’s decision in *Tai-Ao II*, where the sole issue on appeal was whether adequate notice was provided by Commerce’s initiation notice. 983 F.3d at 492, 497. Although the case cites to the anti-circumvention regulations, which are not at issue in this case, the Federal Circuit nevertheless emphasized the importance of fairness to affected importers in the assessment of duties. *Id.* at 494 (“[T]he notice requirement is designed to avoid unfairness to importers and foreign exporters.”). Although the facts are not perfectly analogous to this case, *Tai Ao I* and *Tai Ao II* clearly show that adequate notice is essential where Commerce attempts to apply retroactive duties.

In this case, the meaning of “coated entirely with chrome” is at the center of the dispute. Both the *Initiation Notice* and *Preliminary Determination* as published excluded from the investigation “certain on-the-road steel wheels that are coated entirely with chrome.” *Initiation Notice* at 45,100; *Preliminary Determination* at 16,646. It was not until the publication of the *Final Scope Memo* and *Final Determination* that Commerce clarified that PVD chrome wheels did not fall within the limits of the exclusion. *Final Scope Memo* at 5 (“This exclusion is limited to chrome wheels coated entirely in chrome and produced through a chromium electroplating process, and does not extend to wheels that have been finished with other processes, including but not limited to Physical Vapor Deposition (PVD)”); *Final Determination* at 23,710. Nor did Dexstar use more precise language in its petition. Petition at I-5, I-4, n.6 (“Except for those coated with chrome.”) In response to Commerce’s request for further clarification

of the intended chrome content, Dexstar did not elaborate on the type of chrome coating intended by the Petition. Dexstar Petition Response at SGQ-4. Although the additional information provided in Dexstar's Petition Response regarding the manufacture of the excluded chrome wheels ultimately supported Commerce's determination that PVD chrome was not an intended part of the exclusion, none of this information was included in Commerce's *Initiation Notice* or *Preliminary Determination*. Accordingly, the question before the court is whether the stated exclusion of wheels "coated entirely with chrome" was sufficient to provide importers of PVD chrome wheels with notice of their product's inclusion.

Although Defendants seemingly argue that the standard for notice in this case should be different from that applied in scope ruling requests, Commerce is nevertheless required to provide adequate notice to any reasonably informed importer that their product is subject to duty before any retroactive assessment of duties may obtain. *Transcom*, 182 F.3d at 882–83. If, during the course of the investigation, a reasonably informed importer could not be sure of the inclusion of its products in the investigation, then the court must find that adequate notice was not given at that stage. *Tai-Ao I*, 391 F. Supp. 3d at 1313–14. Here, a reasonably informed importer was not "certainly provide[d] . . . notice" by the language of the *Initiation Notice* and *Preliminary Determination* that PVD chrome wheels, despite being coated entirely in chrome, were not properly the subject of the exclusion. *Id.* at 1315 (emphasis in original). Thus, Commerce did not provide adequate notice of AD liability until the publication of the *Final Scope Memo*, and later the *Final Determination*, which included language clarifying the limits of the exclusion and specifying the inclusion of wheels coated in PVD chrome. The court does not question, nor is it germane, whether some importers could have anticipated the limits of the exclusion. However, the court concludes that, given the language of the *Initiation Notice* and *Preliminary Determination*, reasonably informed importers were not provided clear or meaningful notice of the inclusion of PVD chrome wheels until the publication of the *Final Scope Memo*.

Ultimately, "the notice requirement is designed to avoid unfairness to importers and foreign exporters." 983 F.3d at 494. Retroactively assessing duties where importers received inadequate notice of their products' inclusion in the scope of an AD investigation would be unfair. Accordingly, duties should have been assessed from the date of the *Final Scope Memo*, when Plaintiffs first received notice that PVD chrome wheels were not subject to the exclusion, rather than the date of the *Preliminary Determination* and suspension of liquidation.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's determination that the scope of its final AD order properly includes PVD chrome wheels and excludes only electroplated chrome wheels. However, the court finds that Commerce's decision to assess duties retroactive to the date of the *Preliminary Determination* was not in accordance with law because the language in the *Initiation Notice* and *Preliminary Determination* did not provide adequate notice of the inclusion of PVD chrome wheels. The court remands to Commerce to reformulate its instructions consistent with this opinion and directs that such action be taken within 30 days of the publication of this opinion.

SO ORDERED.

Dated: May 18, 2021

New York, New York

/s/ Gary S. Katzmann
JUDGE



Slip Op. 21-63

TRANS TEXAS TIRE, LLC, Plaintiff, and ZHEJIANG JINGU COMPANY LIMITED, Consolidated Plaintiff, v. UNITED STATES, Defendant, and DEXSTAR WHEEL, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Consol. Court No. 19-00189

[The court sustains Commerce's *Final Determination*, denies Plaintiffs' motion for judgment on the agency record except as to the retroactive imposition of countervailing duties, and remands for revised instructions on the assessment of duties consistent with this opinion.]

Dated: May 18, 2021

Jordan C. Kahn, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, N.Y. and Washington, D.C., argued for plaintiff. With him on the briefs were *Ned H. Marshak*, *Alan R. Klestadt*, *Max F. Schutzman* and *Andrew T. Schutz*.

Ting-Ting Kao, White & Case LLP, of Washington, D.C. and New York, N.Y., argued for consolidated plaintiff. With her on the briefs were *Walter J. Spak* and *Jay C. Campbell*.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With her on the briefs were *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of Counsel *Brandon J. Custard*, Senior Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce. With them on the post argument submission were *Brian M. Boynton*, Acting Assistant Attorney General, and *Daniel J. Calhoun*, Assistant Chief Counsel.

Nicholas J. Birch, Schagrín Associates, of Washington, D.C., argued for defendant-intervenor. With him on the brief was *Roger B. Schagrín* and *Geert De Prest*.

OPINION

Katzmann, Judge:

Was the final scope determination by the U.S. Department of Commerce (“Commerce”) in a countervailing duties (“CVD”) investigation a permissible clarification or an improper scope expansion in the application of duties to a product manufactured in China and subsidized so as to generate sale at less than fair value in the American market? Was Commerce’s assessment of retroactive duties on the product permissible or in error for failure to provide adequate notice prior to its issuance of a final scope decision in the CVD proceedings? Was Commerce’s CVD calculation, including the higher duties imposed where the manufacturer did not cooperate with the agency’s investigation, supported by substantial evidence and in accordance with law? This case involves Commerce’s final CVD determination of on steel trailer wheels from the People’s Republic of China and its calculation of a CVD rate that applied adverse facts available (“AFA”). Mem. from J. Maeder to J. Kessler, re: Issues and Decision Mem. for the Final Determination in the Countervailing Duty Investigation (Dep’t Commerce July 1, 2019), P.R. 599 (“IDM”); *Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, and Final Affirmative Determination of Critical Circumstances*, 84 Fed. Reg. 32,723 (Dep’t Commerce July 9, 2019), P.R. 603 (“*Final Determination*”). Plaintiffs Trans Texas Tire, LLC (“TTT”), a domestic importer, and Zhejiang Jingu Company Limited (“Jingu”) a Chinese manufacturer of trailer wheels, (collectively, “Plaintiffs”), filed this suit to challenge Commerce’s Order on Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People’s Republic of China, 84 Fed. Reg. 45,952 (Dep’t Commerce Sept. 3, 2019), P.R. 608 (“*Order*”); Compl. of Trans Texas Tire at 1–2, Nov. 1, 2019, ECF No. 10 (“Pl.’s Compl.”); Compl. of Zhejiang Jingu, Zhejiang Jingu Co. Ltd. v. United States, No. 19-cv-00187 (CIT Nov. 1, 2019), ECF No. 13 (“*Consol.-Pl.’s Compl.*”). The suit challenges the inclusion of steel trailer wheels coated in chrome through a Physical Vapor Deposition (“PVD”) process (“PVD chrome wheels”) in the final CVD determination, the assessment of duties back to Commerce’s preliminary determination, and Commerce’s CVD calculation. Pl.’s Compl. at 5–7.

Initially, Commerce excluded “certain on-the-road steel wheels that are coated entirely in chrome” from its preliminary determination. *Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 84 Fed. Reg. 5,989, 5,991 (Dep’t Commerce Feb. 25,

2019), (“*Preliminary Determination*”). Although the parties’ positions differ as to the meaning of this preliminary language, Commerce determined in the course of its investigation that its final CVD scope determination included PVD chrome wheels and excluded only electroplated chrome wheels. *Final Determination*. Plaintiffs assert that the inclusion of PVD chrome wheels in Commerce’s *Final Determination* is unsupported by substantial evidence, that the retroactive assessment of duties on PVD chrome wheels is unlawful, and that Commerce’s CVD rate of 386.45 percent for supplier Xingmin Intelligent Transportation Systems (“Xingmin”) is punitive and therefore unlawful, and move for judgment on the agency record accordingly. Pl.’s Mot. for J. on the Agency R., Apr. 28, 2020, ECF No. 31 (“Pl.’s Br.”); Consol. Pl.’s Mot. for J. on the Agency R., Apr. 28, 2020, ECF No. 32 (“Consol.-Pl.’s Br.”). Defendant United States (“Government”) and Defendant-Intervenor Dexstar Wheel oppose this motion and ask the court to sustain Commerce’s Final Determination and retroactive assessment of duties. Def.’s Resp. to Pl.’s Mot. for J. on Agency R., Aug. 10, 2020, ECF No. 37 (“Def.’s Br.”); Resp. Br. of Dexstar Wheel, Aug. 10, 2020, ECF No. 36 (“Def.-Inter.’s Br.”).

At the request of the petitioner — Defendant-Intervenor Dexstar Wheel (“Petitioner” or “Dexstar”) — and in accordance with section 705(a)(1) of the Tariff Act of 1930, Commerce aligned the final CVD determination in this case with the final determination in the companion antidumping case, Consol. Ct. No. 19–00188. Similarly, this court has considered the cases simultaneously and publishes both cases today. The court sustains Commerce’s CVD determination but concludes that retroactive assessment of duties was impermissible under the circumstances here.

BACKGROUND

I. Legal & Regulatory Framework

To empower Commerce to offset economic distortions for the American market caused by countervailable subsidies provided by a foreign government and by dumping, Congress enacted the Tariff Act of 1930. *Sioux Honey Ass’n v. Hartford Fire Ins.*, 672 F.3d 1041, 1046–47 (Fed. Cir. 2012); *ATC Tires Private Ltd. v. United States*, 42 CIT ___, ___, 322 F. Supp. 3d 1365, 1366 (2018). That Act, “as amended, allows Commerce to impose . . . duties on imports that injure domestic industries.” *Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194, 1196 (Fed. Cir. 2014). Under the Tariff Act’s framework, Commerce may — either upon petition by a domestic producer or of its own initiative — begin an investigation into potential countervailable subsidies and, if appropriate, issue orders

imposing duties on the subject merchandise. *Sioux Honey*, 672 F.3d at 1046–47; *ATC Tires*, 322 F. Supp. 3d at 1366–67; 19 U.S.C. §§ 1671, 1673. A subsidy is countervailable if the following elements are satisfied: (1) a government or public authority has provided a financial contribution; (2) a benefit is thereby conferred upon the recipient of the financial contribution; and (3) the subsidy is specific to a foreign enterprise or foreign industry, or a group of such enterprises or industries. 19 U.S.C. § 1677(5). In short, Commerce assesses CVDs when it determines a foreign government is providing “a countervailable subsidy with respect to the manufacture, production, or export” of the subject merchandise and the United States International Trade Commission (“ITC”) finds that the countervailable subsidy injures a domestic industry. *See* 19 U.S.C. § 1671(a)(1). In so doing, Commerce issues a CVD order which “includes a description of the subject merchandise, in such detail as [Commerce] deems necessary.” *OMG, Inc. v. United States*, 972 F.3d 1358, 1361 (Fed. Cir. 2020) (citing 19 U.S.C. § 1671e(a)(2)).

The federal regulations describe the CVD duty assessment process in 19 C.F.R. § 351. The requirements for the description of the merchandise are found in 19 C.F.R. § 351.202(b)(5), and state that “[a] detailed description of the subject merchandise that defines the requested scope of the investigation, including the technical characteristics and uses of the merchandise and its current U.S. tariff classification number.” The ITC uses the provided merchandise description to determine the effects of the dumped or countervailed imported goods on the domestic like product. 19 U.S.C. § 1671(a)(2); *Timken Co. v. United States*, 20 CIT 76, 80, 913 F.Supp. 580, 584 (1996).

II. Factual Background

On August 8, 2018, Dexstar Wheel Division of Americana Development, Inc. (“Dexstar” or “Petitioner”), a domestic producer of trailer wheels, filed AD and CVD petitions seeking the imposition of AD and CVD duties on certain steel trailer wheels from the People’s Republic of China. Petitions for the Imposition of AD and CVD Duties on Behalf of Dexstar Wheel Division of Americana Development, Inc. Re: Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People’s Republic of China, P.R. 47, 49 (“Petition”). Commerce initiated its CVD investigation on September 5, 2018. *Certain Steel Wheels 12 to 16.5 Inches in Diameter From the People’s Republic of China: Initiation of Countervailing Duty Investigation*, 83 Fed. Reg. 45,100 (Dep’t Commerce Sept. 5, 2018), P.R. 162 (“Initiation Notice”). Commerce requested and received supplemental information from Dexstar before initiating the investigation into certain steel trailer wheels on

August 28, 2018. *Petitioner's Response to the Department's August 17, 2018 Additional Questions* (Aug. 20, 2018), P.R. 156. In October 2018, the ITC found that there is a reasonable indication that the government of China's subsidization of certain steel trailer wheels and the sale of those wheels in the U.S. at less than fair value materially injured U.S. industry. Steel Trailer Wheels from China, Inv. Nos. 701-TA-609 and 731-TA-1421 (Preliminary), USITC Pub. 4830 (Oct. 2018) ("Preliminary ITC Determination"). On February 25, 2019, Commerce published its preliminary CVD determination finding that countervailable subsidies were provided to producers and exporters of certain steel wheels from China. *Preliminary Determination*. On July 9, 2019, Commerce issued its final affirmative determination. *Final Determination*. In August of 2019, the ITC found that domestic industry was materially injured by the import of certain steel wheels from China. Steel Trailer Wheels from China, Inv. Nos. 701-TA-609 and 731-TA-1421 (Final), USITC Pub. 4943 (Aug. 2019) ("Final ITC Determination"). On September 3, 2019, Commerce issued its CVD order on certain steel wheels from China. Order.

A. The Scope Determination

The Petition filed on August 8, 2018 described the scope of the subject merchandise as certain "on-the-road steel wheels" and included several statements excluding steels wheels coated in chrome. Petition at I-2, I-5. The Petition did not reference specific chrome plating processes or mention electroplating or PVD processing but did state that there are no U.S. producers of chrome-coated steel wheels. *Id.* Before publication of the *Initiation Notice*, Commerce requested and received clarification from Dexstar regarding whether its Petition intended to specify a minimum chrome content or level of chrome plating. *Petitioner's Response to the Department of Commerce's August 10, 2018 General Issues Questionnaire*, (Aug. 15, 2018), P.R. 60 ("Dexstar Petition Response"). Dexstar confirmed:

Petitioner intended that the exclusion for chrome wheels be for wheels that are coated entirely in chrome. Petitioner is not aware of any wheels on the market that are only partially coated in chrome. As explained in the petitions, there are no U.S. producers of chrome-coated steel wheels as chrome coating requires a different manufacturing process that requires the use of highly toxic chemicals, and chrome wheels are sold at much higher prices than certain steel wheels. The scope language has been revised to read, "Also excluded from this scope are aluminum wheels and certain on-the road steel wheels that are coated entirely with chrome."

Id. at 8. Commerce published its *Initiation Notice* of the CVD investigation on September 3, 2018 containing the provision that “Excluded from this scope are the following: . . . (3) certain on the road steel wheels that are coated entirely with chrome;” *Initiation Notice* at 45,104.

On October 30, 2018, Tredit Tire & Wheel Co., Inc. (“Tredit”), a U.S. importer of trailer wheels, though not a party in these cases, suggested that the scope in the *Initiation Notice* was overbroad and requested that Commerce clarify the scope to exclude “[a]ll wheels with galvanized, chrome or PVD finishes.” Letter from Barnes, Richardson & Colburn to U.S. Department of Commerce (Oct. 30, 2018), P.R. 208 at 8 (emphasis added). Dexstar responded that “chrome coated wheels have never been covered by the scope of these investigations.” Letter from Stewart & Stewart to U.S. Department of Commerce (Nov. 15, 2019), P.R. 322 at 2 n.5. Further, Dexstar repeated its assertion that there are no U.S. producers of chrome coated steel wheels due to the highly toxic nature of the chemicals. *Id.* at 8. Dexstar confirmed that it “did not include chrome coated wheels in the scope of the petitions,” and that “chrome coated wheels have never been included in the scope of the investigations.” *Id.* at 8.

In the *Preliminary Determination*, Commerce continued to use the scope from its September 3, 2018 *Initiation Notice*, including the provision that “[e]xcluded from this scope are the . . . certain on the road steel wheels that are coated entirely with chrome;” *Preliminary Determination* at 5,991. The *Preliminary Determination* published a rate of 58.30 percent for Jingu, 293.27 percent for Xingmin, and 58.30 percent for All-Others. *Preliminary Determination* at 5,990. In March 2019, Dexstar requested that Commerce confirm that the chrome exclusion did not include PVD chrome wheels. Letter from Stewart & Stewart to U.S. Department of Commerce (Mar. 22, 2019), P.R. 522 at 2; Pl.’s Compl. at 4. TTT responded in April 2019 and submitted evidence seeking to establish that PVD chrome wheels are covered by the exclusion and challenging Commerce’s calculation of its preliminary 293.27 percent AFA CVD rate for Chinese manufacturer Xingmin as both punitive and containing inflated subsidy-specific values. Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt to U.S. Department of Commerce (Apr. 11, 2019), P.R. 558 at 2. On April 15, 2019 Commerce issued its preliminary scope decision memorandum. Mem. from J. Maeder to G. Taverman, re: Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People’s Republic of China (Dep’t Com-

merce Feb. 14, 2019), P.R. 457 (“PDM”). The PDM maintained the exclusion language of “coated entirely with chrome” from the Initiation Notices. *Id.* at 6.

Commerce published a final scope decision memorandum on July 1, 2019 and its final CVD determination on July 9, 2019, noting in both for the first time that, “This exclusion is limited to chrome wheels coated entirely in chrome and produced through a chromium electroplating process, and does not extend to wheels that have been finished with other processes, including but not limited to Physical Vapor Deposition (PVD).” Mem. from E. Begnal to J. Maeder, re: Certain Steel Wheels from the People’s Republic of China: Final Scope Decision Memorandum for the Final Antidumping Duty and Countervailing Duty Determinations (Dep’t Commerce Jul. 1, 2019), P.R. 602 at 5 (“*Final Scope Memo*”); Final Determination at 32,725. Commerce revised the initial scope language to incorporate Dexstar’s clarification that the scope exclusion only applies to electroplated chrome steel trailer wheels and not PVD chrome wheels. Def.’s Br. at 7–8. Following its final determinations, Commerce imposed CVDs of 386.45 percent for Xingmin (TTT’s manufacturer), 388.31 percent for Jingu, and 387.38 percent for all others with assessments beginning on February 25, 2019, the date of Commerce’s *Preliminary Determination*. *Final Determination* at 32,724; Def.’s Br. at 5.

B. Procedural History

Subsequently, on November 1, 2019, TTT initiated this case to challenge Commerce’s inclusion of PVD chrome wheels in its final order, its retroactive imposition of ADs on PVD wheels as of the date of the *Preliminary Determination*, and its calculation of the CVD rate. Pl.’s Compl. at 5–7. On November 22, 2019, Petitioner Dexstar Wheel joined the action as a defendant intervenor. Order Granting Consent Mot. to Intervene, Nov. 22, 2019, ECF No. 15. Foreign producer Jingu then joined TTT’s action as a Consolidated-Plaintiff to challenge the scope of its final order and the assessment of duties back to the preliminary determination date. Order Granting Mot. to Consolidate, Dec. 11, 2019, ECF No. 21. On April 28, 2020, TTT and Jingu each filed Rule 56.2 motions for judgment on the agency record. Pl.’s Br.; Consol.-Pl.’s Br. On August 10, 2020, the Government and Dexstar Wheel (collectively, “Defendants”) filed their responses to the Rule 56.2 motions. Def.’s Br.; Def.-Inter.’s Br. On October 20, 2020, TTT and Jingu filed their reply briefs. Reply Br. of TTT, Oct. 20, 2020, EFC No. 46 (“Pl.’s Reply”); Reply Br. of Zhejiang Jingu Co., Ltd., Oct. 20, 2020, ECF No. 47 (“Consol.-Pl.’s Reply”). Prior to oral argument, the court issued questions to the parties, and the parties responded on

January 21, 2021. Letter Concerning Questions for Oral Arg., Jan. 12, 2021, ECF No. 57; Dexstar’s Resp. to the Court’s Questions, Jan. 21, 2021, ECF No. 58 (“Def.-Inter.’s OAQ Resp.”); TTT’s Resp. to the Court’s Questions, Jan. 21, 2021, ECF No. 59 (“Pl.’s OAQ Resp.”); Resp. to Court’s Order re Oral Arg. Questions, Jan. 21, 2021, ECF No. 60 (“Def.’s OAQ Resp.”); Zhejiang Jingu’s Resp. to Oral Arg. Questions, Jan. 21, 2021, ECF No. 61 (“Consol.-Pl.’s OAQ Resp.”). The court held oral argument on January 25, 2021. Oral Arg., Jan. 25, 2021, ECF No. 62. The parties filed supplemental briefs following oral argument. Resp. to Court’s Order Permitting Post-Arg. Submission, Jan. 28, 2021, ECF No. 63 (“Def.’s Suppl. Br.”); Post Arg. Submission, Jan. 29, 2021, ECF No. 64 (“Consol.-Pl.’s Suppl. Br.”); Resp. to Court’s Order Permitting Post-Arg. Submission, Jan. 29, 2021, ECF No. 65 (“Def.-Inter.’s Suppl. Br.”); Post-Arg. Submission, Jan. 29, 2021, ECF No. 66 (“Pl.’s Suppl. Br.”).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c). The standard of review is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i) which provides “[t]he court should hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” Substantial evidence is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

When reviewing Commerce’s determinations, however, the court may not “reweigh the evidence or . . . reconsider questions of fact anew.” *Shandong Rongxin Imp. & Exp. Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1327, 1336 (2017) (quoting *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015)). The “possibility of drawing two inconsistent conclusions from the evidence does not preclude [Commerce’s] finding from being supported by substantial evidence. *Id.* (quoting *ABB Inc. v. United States*, 190 F. Supp. 3d 1159, 1166–67 (2016)). Even where Commerce’s decision is “of less than ideal clarity,” the court is obligated to sustain the decision when Commerce’s “path may reasonably be discerned.” *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). Commerce’s explanation must simply “reasonably tie the determination under review to the governing statutory standard and to the record evidence.” *Id.* (quot-

ing *Bowman*, 419 U.S. at 286). This standard allows the court to fulfill its “review function” and “to avoid making choices reserved to the agency,” thereby upholding the principles in *SEC v. Chenery*, 318 U.S. 80, 88 (1943). *Id.* These principles further require that the reviewing court “may not affirm on a basis containing any element of discretion — including discretion to find facts and interpret statutory ambiguities — that is the not the basis the agency used, since that would remove the discretionary judgment from the agency to the court.” *Id.* (quoting *ICC v. Brotherhood of Locomotive Eng’rs*, 482 U.S. 270, 283 (1987)).

DISCUSSION

Plaintiffs argue that Commerce (1) unlawfully expanded the scope of its investigation; and (2) improperly assessed CVDs retroactively to the preliminary determination date without adequate notice. Pl.’s Br. at 20–27; Consol.-Pl.’s Br. at 22–23, 43. TTT argues in addition that Commerce assigned an AFA rate to Xingmin that was punitive as a whole and unsupported by substantial evidence, therefore not in accordance with law. Pl.’s Compl. at 7; Pl.’s Br. at 27–44. Defendants respond in support of Commerce’s *Final Determination* by: (1) highlighting Commerce’s extensive authority to determine the scope of an order; (2) supporting Commerce’s CVD assessment back to the date of the preliminary determination after a proper clarification of scope; and (3) stating that the chrome exclusion was never intended to exclude PVD chrome wheels. Def.’s Br. at 16, 29, 30; Def.-Inter.’s Br. at 18, 24, 26–29. The court concludes that, while Commerce’s final scope determination was supported by substantial evidence and in accordance with law, Commerce’s retroactive assessment of CVDs without adequate notice was unlawful. Finally, the court concludes that Commerce’s CVD calculation was supported by substantial evidence and in accordance with law.

I. Commerce’s Final Scope Determination Was Supported by Substantial Evidence and in Accordance with Law

Plaintiffs challenge Commerce’s final scope determination on two grounds. First, Plaintiffs allege that the Government failed to comply with statutory requirements, given that the ITC injury determination only found domestic injury with respect to steel trailer wheels not coated in chrome. Pl.’s Br. at 4–5, 12–13; Consol.-Pl.’s Br. at 25–26. Second, Plaintiffs argue that Commerce’s ultimate inclusion of PVD chrome wheels constitutes an expansion of scope, not a permissible clarification, and is therefore unlawful. Pl.’s Br. at 20, 23; Consol.-Pl.’s Br. at 30–31.

Defendants respond by arguing that Dexstar at no point intended to include PVD chrome wheels in the scope exclusion and thus never conveyed such intent to the ITC, and further that the ITC in fact considered PVD chrome wheels in its injury determination in the context of “coated, painted, and galvanized wheels.” Def.’s Br. at 19–22; *see also* Def.-Inter.’s Br. at 5, 22. Defendants further argue that Commerce’s explicit inclusion of PVD chrome wheels in the final scope determination falls within Commerce’s discretion to clarify the scope of its investigations, given that PVD chrome wheels were never intended to be the subject of the exclusion for chrome-coated steel wheels. Def.’s Br. at 19; Def.-Inter.’s Br. at 15.

Defendants are correct. Commerce “has an inherent power to establish the parameters of [its investigations] so as to carry out its mandate to administer the law effectively and in accordance with its intent.” *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1035, 700 F. Supp. 538, 547 (1988), *aff’d* 898 F.2d 1577 (Fed. Cir. 1990). Accordingly, “Commerce retains broad discretion to define and clarify the scope” of its investigations “in a manner which reflects the intent of the petition.” *Mitsubishi Heavy Indus., Ltd. v. United States*, 21 CIT 1227, 1232, 986 F. Supp. 1428, 1432 (1997) (quoting *Minebea Co. v. United States*, 16 CIT 20, 22, 782 F. Supp. 117, 120 (1992)) (upholding a scope clarification made after notice of initiation as supported by substantial evidence). Here, Commerce has provided adequate evidence in support of its final scope determination and has not exceeded its discretion. The court therefore affirms Commerce’s determination.

Commerce provided adequate explanation for its decision in the final scope memorandum, and its clarification of the inclusion of PVD chrome wheels is therefore permissible. Commerce explained that the Petition excluded chrome wheels that are produced through a highly toxic process, not performed in the United States, and require the welding of disc and rim after chrome coating. *Final Scope Memo* at 12; Petition I–13. Neither the toxic process nor post-coating welding are required in the manufacture of PVD chrome wheels. *Final Scope Memo* at 12; Def.’s Br. at 15. In addition, Commerce cited substantive differences between PVD chrome and electroplated chrome including weight, color tint, and the higher cost of PVD chrome. *Final Scope Memo* at 15. Further, Commerce stated that PVD processing involves a powder base and a clear coat. *Id.* at 12, 14. Considering these differences, Commerce reasonably found that the Petition intended the scope to exclude only electroplated chrome wheels, and not PVD chrome wheels.

Contrary to Plaintiffs' arguments, the statute did not require Petitioner to amend its initial petition to the ITC in light of the inclusion of PVD chrome wheels. Def.'s Br. at 25. There is no evidence that the ITC failed to consider PVD chrome wheels in its injury determination. In fact, the preliminary injury determination expressly addressed the incorporation of coated, painted, and galvanized steel wheels. Def.'s Br. at 19; *Steel Trailer Wheels from China*, Inv. Nos. 701-TA-609 and 731-TA-1421, USITC 4830 (Sept. 28, 2018) at I-9, I-14. Commerce's final scope determination clarified that PVD chrome wheels are included within the broader category of "coated" wheels, as PVD chrome coating involves "applying a powder coat, metallic coat . . . and a clear coat to the wheel." *Final Scope Memo* at 15. Thus, although the ITC's preliminary injury determination incorporated the Petition's language regarding the exclusion of wheels "coated in chrome," Petition at I-5, there is no indication that the determination failed to consider whether PVD chrome wheels "materially injured" domestic injury as required under 19 U.S.C. § 1671(a)(2).

Nor did Commerce impermissibly deviate from its established practice by treating the inclusion of PVD chrome wheels as a clarification, not expansion, of scope and therefore not requiring amendment of the petition. It is established that Commerce can "alter the scope of the investigation until the final order." *Kyocera Solar, Inc. v. United States*, 41 CIT __, __, 253 F. Supp. 3d 1294, 1316 (2017) (citing *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (Fed. Cir. 2002)). Indeed, although Commerce attempts to limit alterations to scope during the course of an investigation, it nevertheless expressly allows parties to request permission to submit additional information regarding the scope of an investigation at any point during the proceedings. *Initiation Notice* at 45,101. Furthermore, although Commerce retains and has exercised the discretion to reject late-stage requests to alter the scope of an investigation, see, e.g., *Mem. from S. Claeys to D. Spooner, re: Issues and Decision Mem. for the Antidumping Duty Investigation of Certain Orange Juice from Brazil: Final Determination of Sales at Less Than Fair Value*, 71 Fed. Reg. 2,183 (Dep't Commerce Jan. 13, 2006), 11 (citing *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 848, 342 F. Supp. 2d 1172, 1188-89 (2004)), it also has "broad discretion to define and clarify the scope of an . . . investigation in a manner which reflects the intent of the petition," *AMS Assocs. v. United States*, 36 CIT 1660, 1666, 881 F.

Supp. 2d 1374, 1380 (2012), *aff'd* 737 F.3d 1338 (Fed. Cir. 2013). That Commerce chose to exercise the latter power and not the former in this case does not provide a basis for overturning its final scope determination.

The case law supports deference to Commerce's scope determinations. In *Kyocera*, the plaintiff challenged Commerce's departure from its practice of using a single country of origin test to define the scope of an investigation of a particular class or kind of merchandise. 253 F. Supp. 3d at 1305. Consolidated Plaintiff SunEdison further challenged Commerce's scope determination, arguing that by altering the country of origin rule, Commerce impermissibly brought certain sales within the scope of the final CVD order that were not previously implicated by the investigation. *Id.* at 1315–16. On remand, Commerce explained that its apparent deviation from the country-of-assembly test applied in its earlier investigation of solar cells from Taiwan was reasonable in light of the specific harm alleged in the investigation before the court: while the former investigation addressed harm originating in the assembly of solar panels in China, the latter addressed harm originating with the construction of solar cells in Taiwan. *Id.* at 1309. Finding that Commerce adequately explained its apparent deviation from past practice, and “reasonably tailored” its determination to the specific investigations, the court upheld Commerce's scope determination. The court also rejected SunEdison's argument, finding that “Commerce has the authority . . . to modify the scope language until the final order is issued, based on the agency's findings during the course of the investigation.” *Id.* at 1315 (citing *Duferco Steel, Inc.*, 296 F.3d at 1096).

Similarly, in *Minebea Co. v. United States*, 16 CIT 20, 782 F. Supp. 117 (1992), the court addressed whether rod ends and rod end bearings were properly included in Commerce's investigation despite “scant reference to rod ends, per se” in the initial petition. 16 CIT at 23, 782 F. Supp at 120. Minebea, a producer of rod ends and rod end bearings, appealed Commerce's denial of its exclusion request, arguing that because “rod ends without rolling elements were not specifically named in the petition” they “should have been excluded.” 16 CIT at 22, 782 F. Supp. at 120. The court found that Commerce reasonably interpreted the petition to intend the inclusion of rod ends and rod end bearings despite the absence of explicit language, because (1) “[t]he petition clearly included spherical plain bearings and housed bearing units”; (2) both “rod ends and rod end bearings are used in aerospace applications, an area of interest specifically mentioned in the petition”; and (3) “petitioner's submissions . . . in response to . . . requests to clarify the scope of the petition, unequivocally indicate

that the petitioner intended for rod ends and rod end bearings to be included as well.” 16 CIT at 23, 782 F. Supp. at 122 (citations omitted).

As in *Kyocera* and *Minebea*, the court here defers to Commerce’s broad discretion to define the scope of its investigation and its reasonable interpretation of the underlying petition. Commerce provided a reasonable explanation for its inclusion of PVD chrome wheels, and for its understanding of Petitioner’s intent. Nor is there any basis for a determination that Commerce failed to comply with the statutory process underlying its investigation. The court therefore sustains Commerce’s *Final Determination* as supported by substantial evidence and in accordance with law.

II. Commerce Unlawfully Assessed CVDs Back to the Original Suspension of Liquidation Because Commerce Did Not Provide Adequate Notice

Plaintiffs further argue that even if the inclusion of PVD chrome was lawful in the *Final Determination*, Commerce erred by assessing countervailing duties retroactively on PVD chrome imports back to the date of its *Preliminary Determination*. Pl.’s Br. at 26; Consol.-Pl.’s Br. at 39. In support of this contention, TTT points to the court’s decision in *Tai-Ao Aluminum (Taishan) Co. v. United States*, 43 CIT __, __, 391 F. Supp. 3d 1301, 1313–15 (2019) (“Tai-Ao I”), *aff’d* 983 F.3d 487 (Fed. Cir. 2020) (“Tai-Ao II”) for the principle that “Commerce is prohibited from assessing retroactive AD/CVD liability without providing sufficient notice.” Pl.’s Br. at 26. Both Plaintiffs argue that notice of the inclusion of PVD wheels was inadequate as of the initiation of the investigation, and that duties should be assessed only prospectively following the clarification of scope: i.e., from the publication of the *Final Determination*. Pl.’s Br. at 27; Consol.-Pl.’s Br. at 39.

Defendants respond by maintaining that chrome wheels were always within the scope and original intent of the Petition and arguing that CVDs for PVD wheels should be assessed back to the suspension of liquidation with the February 25, 2019 publication of the *Preliminary Determination*. Def.’s Br. at 31–34; Def.-Inter.’s Br. at 26. The Government relies on the argument that Commerce followed its own regulations as provided in 19 U.S.C. §§ 1671b and 1673b and attempts to distinguish the analysis of adequate notice in the context of scope rulings and of retroactive assessment of duties to the suspension of liquidation. Def.’s Br. at 31. Defendant-Intervenor asserts that as Commerce’s scope modification was a clarification, assessment of duties back to the start of suspension of liquidation — here, the

issuance of the *Preliminary Determination* — was consistent with the provisions of 19 U.S.C. § 1673b(d)(2). Def.-Inter.’s Br. at 27.

At the initiation of a CVD investigation, Commerce is required to provide notice of the investigation through the publication of an initiation notice in the Federal Register. 19 C.F.R. § 351.203(c)(1). Commerce must also provide a public version of the petition to all known exporters “as soon as practicable” after the initiation. 19 C.F.R. § 351.203(c)(2). Once Commerce makes a preliminary CVD determination, it must publish the affirmative or negative decision in the Federal Register and order the suspension of liquidation of the subject merchandise. 19 C.F.R. § 351.205(c)–(d); 19 U.S.C. § 1673b(e)(2). Similarly, Commerce must publish its final determinations and orders in the Federal Register. 19 C.F.R. § 351.210(b)–(c). Such publication provides legal notice of Commerce’s investigations and the potential CVD liability that may result to importers. *See, e.g., Target Corp. v. United States*, 33 CIT 760, 779–80, 626 F. Supp. 2d 1285, 1301 (2009), *aff’d* 609 F. 3d 1352 (Fed. Cir. 2010) (citing 44 U.S.C. § 1507; *Fed. Corp Ins. Corp. v. Merrill*, 332 U.S. 380, 384–85 (1947)). In particular, publication of the initiation notice is intended to ensure that “any reasonably informed party should be able to determine, . . . whether particular entries in which it has an interest may be affected by the administrative review.” *Tai-Ao I*, 391 F. Supp. 3d at 1314 (quoting *Transcom, Inc. v. United States*, 182 F.3d 876, 882–83 (Fed. Cir. 1999)).

In other words, as the Federal Circuit noted, “the notice requirement is designed to avoid unfairness to importers and foreign exporters.” *Tai-Ao II*, 983 F.3d at 494. Commerce is therefore expected to make “a reasonable attempt . . . to balance respondents’ concerns for finality and the fairness of Commerce’s investigation with the statutory duty to issue an effective and administrable . . . order.” *Mitsubishi Heavy Indus., Ltd.*, 21 CIT at 1233, 986 F. Supp. at 1434. Accordingly, although Commerce has broad discretion “to define and clarify the scope of an investigation”, that discretion “is limited in part by concerns for the finality of administrative action, which cautions against including a product that was understood to be excluded at the time the investigation began.” *Allegheny Bradford Corp.*, 28 CIT at 848, 342 F. Supp. 2d at 1187–88 (quoting *Mitsubishi Heavy Indus., Ltd.*, 21 CIT at 1232, 986 F. Supp. at 1433). In this case, Commerce failed to provide adequate notice upon the initiation of the CVD proceedings that PVD chrome wheels would not qualify for the exclusion for steel trailer wheels coated in chrome. Commerce’s assessment of retroactive duties on PVD chrome wheels is therefore unlawful.

Tai-Ao I, a review of scope interpretation and notice in an anti-circumvention investigation, is instructive in the treatment of retroactive duties. *Tai-Ao I*, 391 F. Supp. 3d at 1305. In *Tai-Ao I*, the court found there was substantial record evidence for Commerce’s final scope determination but inadequate notice to plaintiffs of the applicable scope upon issuance of the initiation notice. *Id.* at 1313–15. Specifically, the court found that notice that “the Department *intends to consider whether the inquiry should apply*” to a specific product, 391 F. Supp. 3d at 1314 (emphasis in original), was inadequate to allow retroactive assessment of duties because it “does not *certainly* provide Plaintiffs notice that they are subject to the inquiry,” 391 F. Supp. 3d at 1315 (emphasis in original) (citing *Aluminum Extrusions from the People’s Republic of China: Initiation of Anti-Circumvention Inquiry*, 81 Fed. Reg. 15,039, 15,042 (Dep’t Commerce Mar. 21, 2016)). Typically, affirmative anti-circumvention investigations result in assessment of duties back to the date of the initiation notice pursuant to 19 U.S.C. § 1677j(f). Due to the inadequate notice of scope as of initiation, the court in *Tai-Ao I* instead required that Commerce impose retroactive duties beginning upon the date the importers were given adequate notice — in that case, the date of the preliminary determination. 391 F. Supp. 3d at 1313–14. The Federal Circuit recently affirmed the court’s decision in *Tai-Ao II*, where the sole issue on appeal was whether adequate notice was provided by Commerce’s initiation notice. 983 F.3d at 492, 497. Although the case cites to the anti-circumvention regulations, which are not at issue in this case, the Federal Circuit nevertheless emphasized the importance of fairness to affected importers in the assessment of duties. *Id.* at 494 (“[T]he notice requirement is designed to avoid unfairness to importers and foreign exporters.”). Although the facts are not perfectly analogous to this case, *Tai Ao I* and *Tai Ao II* clearly show that adequate notice is essential where Commerce attempts to apply retroactive duties.

In this case, the meaning of “coated entirely with chrome” is at the center of the dispute. Both the *Initiation Notice* and *Preliminary Determination* as published excluded from the investigation “certain on-the-road steel wheels that are coated entirely with chrome.” *Initiation Notice* at 45,100; *Preliminary Determination* at 5,991. It was not until the publication of the *Final Scope Memo* and *Final Determination* that Commerce clarified that PVD chrome wheels did not fall within the limits of the exclusion. *Final Scope Memo* at 5 (“This exclusion is limited to chrome wheels coated entirely in chrome and produced through a chromium electroplating process, and does not extend to wheels that have been finished with other processes, in-

cluding but not limited to Physical Vapor Deposition (PVD)"); *Final Determination* at 32,725. Nor did Dexstar use more precise language in its petition. Petition at 1–4, n.6 (“Except for those coated with chrome.”) In response to Commerce’s request for further clarification of the intended chrome content, Dexstar did not elaborate on the type of chrome coating intended by the Petition. Dexstar Petition Response at SGQ-4. Although the additional information provided in Dexstar’s Petition Response regarding the manufacture of the excluded chrome wheels ultimately supported Commerce’s determination that PVD chrome was not an intended part of the exclusion, none of this information was included in Commerce’s *Initiation Notice* or *Preliminary Determination*. Accordingly, the question before the court is whether the stated exclusion of wheels “coated entirely with chrome” was sufficient to provide importers of PVD chrome wheels with notice of their product’s inclusion.

Although Defendants seemingly argue that the standard for notice in this case should be different from that applied in scope ruling requests, Commerce is nevertheless required to provide adequate notice to any reasonably informed importer that their product is subject to duty before any retroactive assessment of duties may obtain. *Transcom*, 182 F.3d at 882–83. If, during the course of the investigation, a reasonably informed importer could not be sure of the inclusion of its products in the investigation, then the court must find that adequate notice was not given at that stage. *Tai-Ao I*, 391 F. Supp. 3d at 1313–14. Here, a reasonably informed importer was not “certainly provide[d] . . . notice” by the language of the *Initiation Notice* and *Preliminary Determination* that PVD chrome wheels, despite being coated entirely in chrome, were not properly the subject of the exclusion. *Id.* at 1315 (emphasis in original). Thus, Commerce did not provide adequate notice of CVD liability until the publication of the *Final Scope Memo*, and later the *Final Determination*, which included language clarifying the limits of the exclusion and specifying the inclusion of wheels coated in PVD chrome. The court does not question, nor is it germane, whether some importers could have anticipated the limits of the exclusion. However, the court concludes that, given the language of the *Initiation Notice* and *Preliminary Determination*, reasonably informed importers were not provided clear or meaningful notice of the inclusion of PVD chrome wheels until the publication of the *Final Scope Memo*.

Ultimately, “the notice requirement is designed to avoid unfairness to importers and foreign exporters.” 983 F.3d at 494. Retroactively assessing duties where importers received inadequate notice of their

products' inclusion in the scope of a CVD investigation would be unfair. Accordingly, duties should have been assessed from the date of the *Final Scope Memo*, when Plaintiffs first received notice that PVD chrome wheels were not subject to the exclusion, rather than the date of the *Preliminary Determination* and suspension of liquidation.

III. Commerce's CVD Calculation Was Supported by Substantial Evidence and in Accordance with Law

Finally, TTT argues that Commerce's assessment of a 386.45% CVD rate for supplier Xingmin was unlawful as a whole and was improperly calculated by aggregating program-specific rates. Pl.'s Br. at 28. TTT brings this challenge as a domestic importer of wheels produced by Xingmin. Pl.'s Br. at 44. While TTT does not dispute that Xingmin did not cooperate in the CVD investigation, and is therefore properly subject to AFA, TTT argues that the actual rate imposed was unjustifiably and punitively high and therefore unlawful. Pl.'s Br. at 28.

Defendants respond that Commerce properly set the CVD rates imposed on Xingmin. Def.'s Br. at 34–35; Def.-Inter.'s Br. at 29. Noting that it is undisputed that Xingmin was properly subject to AFA, Defendants argue that Commerce justifiably selected and aggregated the highest subsidy rates in imposing AFA because Commerce followed the CVD hierarchy codified in 19 U.S.C. § 1677e(d) and supported its decision by substantial evidence. Def.'s Br. at 38; Def.-Inter.'s Br. at 33, 35.

The subject of a countervailable subsidy investigation should provide the information requested to assist the Government in its investigation and eventual determination. 19 U.S.C. § 1677m. When the subject does not provide information requested by the deadline, provides unverifiable information, or “significantly impedes a proceeding,” Commerce may use “facts otherwise available” to make its determination. 19 U.S.C. § 1677e(a). If Commerce determines that the subject “has failed to cooperate by not acting to the best of its ability to comply with a request for information,” it may use an adverse inference to select facts and has “discretion to apply the highest rate.” 19 U.S.C. §§ 1677e(b)(1); 1677e(d)(2). This situation is described as application of adverse facts available (“AFA”).

AFA's purpose is to provide an “incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins.” *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1297 (Fed. Cir. 2019) (quoting *BMW of N. Am. LLC v. United States*, 41 CIT __, __, 208 F. Supp. 3d 1388, 1396 (2017)). Commerce has broad authority to apply AFA and courts have upheld rates aimed at deterrence when Commerce has considered the overall facts and circumstances of each case. *Id.* at 1301. Although Commerce has broad authority to select an AFA rate,

that authority is not without limits. *Id.* . When Commerce uses facts otherwise available from secondary sources it must corroborate “to the extent practicable” the “information from independent sources that are reasonably at their disposal.” 19 U.S.C.A. § 1677e(c)(1).

To select an AFA rate, Commerce may use any information from the petition, final determination, a previous review under 19 U.S.C. §§ 1675 or 1675b, or “any other information placed on the record.” 19 U.S.C. § 1677e(b)(2); *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1355 (Fed. Cir. 2015). The Federal Circuit has stated that “[i]n the case of uncooperative respondents, the discretion granted by the statute [§ 1677e(b)] appears to be particularly great, allowing Commerce to select among an enumeration of secondary sources as a basis for its adverse factual inferences.” *Flli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). When Commerce uses secondary sources, it should corroborate the information with independent sources “to the extent practicable.” 19 U.S.C. § 1677e(c)(1). The Federal Circuit found that Commerce has the expert knowledge and is in the best position to select the sources and facts it will rely on to support an adverse inference for an uncooperative respondent. *Flli De Cecco Di Filippo Fara S. Martino S.p.A.*, 216 F.3d at 1032. Nevertheless, the courts’ deference to Commerce is not unbounded. Commerce must examine the record and provide an adequate explanation for its findings such that the record demonstrates a rational connection between the facts accepted and the determination made. In order to sustain its decision, the court notes that “reasons for the choices made among various potentially acceptable alternatives usually need to be explained.” *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 1174, 1177, 704 F. Supp. 1068, 1071 (1988); *cf.*, *Trust Chem Co. v. United States*, 36 CIT 310, 318, 819 F. Supp. 2d 1373, 1381 (2012) (citation omitted) (“As long as Commerce reasonably explains its choice between imperfect alternatives, the court will not reject the agency’s determination.”).

Accordingly, the court considers whether Commerce adequately explained its CVD calculation such that it is supported by substantial evidence and in accordance with law. In particular, the court assesses whether Commerce considered the particular facts and circumstances of the case. *See e.g.* *BMW of N. Am.*, 926 F.3d at 1297; *Dongtai Peak Honey Indus. Co.*, 777 F.3d at 1355; *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Jindal Poly Films, Ltd. of India v. United States*, 43 CIT __, __, 365 F. Supp. 3d 1379, 1383 (2019). Here, the court concludes that Commerce indeed

considered the overall facts and circumstances and adequately explained its decision in both the PDM and IDM.

Pursuant to Section 705(a)(2) of the Tariff Act of 1930 (“the Act”) Commerce found critical circumstances existed because Xingmin’s alleged countervailable subsidies were inconsistent with the World Trade Organization (“WTO”) Subsidies and Countervailing Measures (“SCM”) Agreement; and Xingmin entered “massive imports of the subject merchandise” over a relatively short period of time. IDM at 4. This finding allows Commerce to assess retroactive duties pursuant to 19 C.F.R. 351.206. *Id.* at 5.

Given that Xingmin withdrew from participation in the CVD investigation and was therefore assigned an AFA rate, Commerce permissibly found that the appropriate CVD rate was “the highest rate envisioned under the appropriate step of the hierarchy pursuant to section 776(d)(1) of the Act for all programs included in the AFA rate.” IDM at 10. First, the PDM and IDM each contain Commerce’s reasonable explanation for the twenty-five percent income tax component of the final assigned rate and indicate that it reflects the “standard income tax rate for corporations in China in effect during the POI.” *Id.* at 11; *see also* PDM at 28–29. Second, in the IDM, Commerce also accounted for the inclusion in AFA of the benefit Xingmin obtained from the “Provision of International Ocean Shipping Services for Less than Adequate Remuneration” program. IDM at 11. Finally, Commerce adequately explained its methodology and calculations for the overall CVD rate in both the PDM and IDM. In particular, Commerce indicated that it applied the calculated program-specific above-zero rates determined for the cooperating respondents for twelve programs. IDM at 31–33; PDM at 28. Commerce then highlighted thirty-five more programs meriting the application of an above-de minimus subsidy rate for the same or comparable programs in a CVD investigation or administrative review. IDM at 31–38, PDM at 29. Commerce noted that, as all three mandatory respondents withdrew from the investigation, Commerce was unable to verify the previously submitted respondent data and corroboration of secondary source data was rendered extremely difficult. IDM at 2. Accordingly, as Commerce is neither required to “prove that the selected facts available are the best alternative information” nor to calculate an alternative rate had the interested party cooperated, IDM at 12, Commerce instead relied upon the available record information as well as the information submitted regarding Chinese subsidy programs in other cases for which the “non-responsive companies could receive a benefit” to assess its final calculated subsidy rates. *Id.* at 12.

Commerce’s explanation of its CVD calculation and its corroboration “to the extent practicable” of the information from secondary sources in the PDM and IDM meet the requirements to consider the total facts and circumstances as required by *BMW of N. Am.*, 926 F.3d at 1301 and 19 U.S.C.A. § 1677e(c). These explanations provide substantial record evidence in support of Xingmin’s 386.45% CVD rate. Commerce retains broad discretion under 19 U.S.C. § 1677e(d) to apply countervailable subsidy rates in cases of AFA, including the highest rate available. *Rebar Trade Action Coal. v. United States*, 43 CIT __, __, 389 F. Supp. 3d 1371, 1379 (2019). The court therefore concludes that Commerce reasonably explained its assigned CVD rate and the final rate is therefore supported by substantial evidence and in accordance with law.

CONCLUSION

For the foregoing reasons, the court sustains Commerce’s determination that the scope of its final CVD order properly includes PVD chrome wheels and excludes only electroplated chrome wheels. The court also concludes that Commerce’s assessment of an AFA rate with respect to Xingmin is supported by substantial evidence and in accordance with law. However, the court finds that Commerce’s decision to assess duties retroactive to the date of the *Preliminary Determination* was not in accordance with law because the language in the *Initiation Notice* and *Preliminary Determination* did not provide adequate notice of the inclusion of PVD chrome wheels. The court remands to Commerce to reformulate its instructions consistent with this opinion and directs that such action be taken within 30 days of the publication of this opinion.

SO ORDERED.

Dated: May 18, 2021

New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 21–65

ICDAS CELIK ENERJI TERSANE VE ULASIM SANAYI, A.S., Plaintiff, HABAS SINAI VE TIBBI GAZLAR ISTIHSAL ENDUSTRISI A.S., Consolidated-Plaintiff, v. THE UNITED STATES, Defendant, and NUCOR CORPORATION, CHARTER STEEL and KEYSTONE CONSOLIDATED INDUSTRIES, Inc., Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Consol. Court No. 18–00143

[The court affirms Commerce's *Second Remand Results*.]

Dated: May 20, 2021

Matthew M. Nolan and Leah N. Scarpelli, Arent Fox LLP, of Washington, DC, for plaintiff.

David L. Simon, Law Office of David L. Simon, of Washington, DC, for consolidated-plaintiff.

Kara M. Westercamp, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant *United States*. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Nikki Kalbing*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Maureen E. Thorson, *Derick G. Holt*, and *Jeffrey O. Frank*, Wiley Rein LLP, of Washington, DC, for defendant-intervenor *Nucor Corporation*.

R. Alan Luberda, Kelley Drye & Warren, LLP, of Washington, DC, for defendant-intervenors *Charter Steel and Keystone Consolidated Industries, Inc.*

OPINION

Katzmann, Judge:

The court again returns to an antidumping (“AD”) investigation by the United States Department of Commerce (“Commerce”) on imports of carbon and alloy steel wire rod (“wire rod”) imported into the United States from Turkey. Before the court is Commerce’s *Final Results of Redetermination Pursuant to Second Court Remand* (Dep’t Commerce Dec. 14, 2020), ECF No. 67 (“*Second Remand Results*”), which the court ordered in *Icdas Celik Enerji Tersane Ve Ulasim Sanayi, A.S., v. United States*, 44 CIT __, 475 F. Supp. 3d 1293 (2020) (“*Icdas II*”), so that Commerce could recalculate its duty drawback adjustment in accordance with the court’s instructions. Plaintiff *Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S.* (“*Icdas*”) and Consolidated-Plaintiff *Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi A.Ş.* (“*Habaş*”) (collectively, “*Plaintiffs*”) do not challenge the *Second Remand Results*. Pl. *Icdas*’s Cmts. on Second Remand Redetermination at 2–3, Jan. 13, 2021, ECF No. 70 (“*Pl.’s Br.*”); Cmts. of Consol.-Pl. *Habaş* in Opp’n to *Nucor Corp.*’s Cmts. on Final Results of Second Redetermination at 2, Feb. 12, 2021, ECF No. 73 (“*Consol.-Pl.’s Br.*”). Defendant the United States (“*Government*”) requests that the court affirm Commerce’s *Second Remand Results*. Def.’s Resp. to Cmts. on the Second Remand Redetermination at 2, Feb. 12, 2021, ECF No. 74 (“*Def.’s Br.*”). Defendant-Intervenor *Nucor Corporation* (“*Nucor*”) opposes the *Second Remand Results* and challenges Commerce’s selected methodology. *Nucor Corp.*’s Cmts. on Final Results of Second Redetermination, Jan. 13, 2021, ECF No. 69 (“*Def.-Inter.’s Br.*”). The court affirms Commerce’s duty drawback methodology and enters judgment for the Government.

BACKGROUND

The court set out the relevant legal and factual background of the proceedings in further detail in its previous opinions, *Icdas Celik Enerji Tersane Ve Ulasim Sanayi, A.S., v. United States*, 44 CIT ___, 429 F. Supp. 3d 1353, 1357–60 (2020) (“*Icdas I*”), and *Icdas II*, 475 F. Supp. 3d at 1296–1300. Information relevant to the instant opinion is set forth below.

On March 28, 2017, Commerce initiated an AD investigation into wire rod from Turkey based on petitions from domestic producers alleging that imports of wire rod were being entered into the United States to the detriment of the domestic industry. *See Carbon and Alloy Steel Wire Rod From Belarus, Italy, the Republic of Korea, the Russian Federation, South Africa, Spain, the Republic of Turkey, Ukraine, United Arab Emirates, and United Kingdom: Initiation of Less-Than-Fair-Value Investigations*, 82 Fed. Reg. 19,207, 19,207 (Dep’t Commerce Apr. 26, 2017), P.R. 8. After the requisite investigation, Commerce agreed with petitioners and calculated AD margins for *Icdas* and Habaş of 7.94 percent and 4.93 percent, respectively, and an “All Others” rate of 6.34 percent. *See Carbon and Alloy Steel Wire Rod from Italy, the Republic of Korea, Spain, the Republic of Turkey, and the United Kingdom*, 83 Fed. Reg. 23,417 (Dep’t Commerce May 21, 2018), P.R. 1289; *Carbon and Alloy Steel Wire Rod from Turkey: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 83 Fed. Reg. 13,249, 13,250 (Dep’t Commerce Mar. 28, 2018), P.R. 1285. In its investigation, Commerce determined that *Icdas* and Habaş satisfied the criteria of 19 U.S.C. § 1677a(c)(1)(B) and qualified for a duty drawback adjustment¹ on rebates of duties paid on goods that were subsequently exported, pursuant to Turkey’s Inward Processing Regime. *See* Mem. from J. Maeder to G. Taverman, re: Decision Mem. for the Prelim. Determination and Negative Determination of Critical Circumstances at 10 (Dep’t Commerce Oct. 24, 2017), P.R. 951. In calculating the duty drawback adjustment, Commerce employed a “duty neutral” methodology, which allocated duty drawback over “all production for the relevant period” *Id.* at 11; Mem. from J. Maeder to G. Taverman, re: Issues and Decision Mem. for the Final

¹ A duty drawback adjustment “involves duties paid or owed on imports (e.g., raw materials) to the home-market county that produces the goods for export to the United States (the country of exportation).” *Uttam Galva Steels Ltd. v. United States*, No. 2020–1461, 2021 WL 1940244, at *1 (Fed. Cir. May 14, 2021) (citing *Saha Thai Steel Pipe (Pub.) Co. v. United States*, 635 F. 3d 1335, 1340–41 (Fed. Cir. 2011) (“*Saha Thai*”). As the seminal duty drawback decision, *Saha Thai* was central to the discussion and analysis in *Icdas I*, 429 F. Supp. 3d at 1361–62, and *Icdas II*, 475 F. Supp. 3d at 1298, 1303–04.

Affirmative Determination and Negative Determination of Critical Circumstances at 9 (Dep't Commerce Mar. 19, 2018), P.R. 1273.

Plaintiffs challenged Commerce's duty neutral methodology before the court. Icdas's Summons, June 19, 2018, ECF No. 1; Icdas's Compl., July 19, 2018, ECF No. 8; Habaş's Summons, *Habaş v. United States*, No. 18–145 (CIT filed June 19, 2018), ECF No. 1; Habaş's Compl., Habaş, No. 18–145, ECF No. 6 (CIT filed July 12, 2018); Joint Mot. to Consol. Cases, Sept. 20, 2018, ECF No. 23; Ct. Order Granting Mot., Sept. 26, 2018, ECF No. 26. The court agreed with Plaintiffs, holding that the duty neutral methodology was contrary to the plain language of 19 U.S.C. § 1677a(c). *Icdas I*, 429 F. Supp. 3d at 1360–65. The court remanded the duty drawback methodology “with instructions to recalculate the duty drawback adjustment . . .” *Id.* at 1365. Upon this first remand order, Commerce added the full amount of exempted duties to export price as directed by the court. *Final Results of Redetermination Pursuant to Court Remand* at 12–13 (Dep't Commerce Apr. 27, 2020), ECF No. 55. However, Commerce made two circumstances of sale adjustments (“COS adjustments”) to normal value such that normal value was increased by the same amount as the duty drawback adjustment. *Id.* at 15–16. Commerce calculated new dumping margins of 8.72 percent and 3.22 percent for Icdas and Habaş, respectively, and an All Others rate of 4.78 percent. *Id.* at 44. The court again rejected Commerce's nullification of the duty drawback adjustment through the COS adjustments and remanded to Commerce to recalculate normal value without performing a COS adjustment. *Icdas II*, 475 F. Supp. 3d at 1299–1305.

Commerce filed its *Second Remand Results* with the court on December 14, 2020. *Second Remand Results*. Upon the court's second remand order, Commerce, under protest, “granted [Habaş] and [Icdas] a duty drawback adjustment without making a circumstances of sale adjustment to normal value.” *Id.* at 2. The altered methodology resulted in Commerce calculating a zero percent AD rate for Habaş and a 4.44 percent dumping margin for Icdas. *Id.* at 7–8. Further, Icdas's rate was also assigned as the All Others rate for other producers and exporters of wire rod from Turkey. *Id.* Plaintiffs, the Government, and Nucor then filed comments and replies regarding the *Second Remand Results* with the court as directed. Pl.'s Br.; Consol.-Pl.'s Br.; Def.'s Br.; Def.-Inter.'s Br.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i). The standard of review in

this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): “[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” The court also reviews the determinations pursuant to remand “for compliance with the court’s remand order.” See *Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1342, 1346 (2015) (citations omitted).

DISCUSSION

In its previous opinion, the court remanded Commerce’s determination for a second time because “Commerce’s [first] remand methodology contravenes the plain language of the statute and did not comply with” *Icdas I. Icdas II*, 475 F. Supp. 3d at 1298. The court ordered that “Commerce shall, consistent with this opinion, recalculate normal value without making a circumstance of sale adjustment related to the duty drawback adjustment made to export price (or constructed export price).” *Id.* at 1305. Pursuant to the court’s second remand order, Commerce “recalculated each respondent’s normal value without making a circumstance of sale adjustment related to the duty drawback adjustment made to U.S. price” and “added, pursuant to . . . *Saha Thai Steel Pipe (Pub.) Co. v. United States*, 635 F. 3d 1335 (Fed. Cir. 2011) (“*Saha Thai*”), the amount of the duty exempted divided by the total production quantity to arrive at the annual average per-unit import duty burden to add to the [cost of production].” *Second Remand Results* at 3.

Plaintiffs do not contest the methodology used by Commerce in the *Second Remand Results*, contending that it complies with the statute and caselaw. See Pl.’s Br. at 2–3; Consol.-Pl.’s Br. at 2. The Government argues that the *Second Remand Results* comply with the court’s instructions and are supported by substantial evidence and in accordance with law. Def.’s Br. at 4. The court concludes that, by recalculating normal value to exclude the COS adjustments related to the duty drawback adjustment to U.S. price, Commerce complied with its remand order in *Icdas II* and acted in accordance with the statute.²

² This methodology has been previously upheld by the court for similar reasons. See *Ereğli Demir ve Çelik Fabrikaları T.A.Ş. v. United States*, 42 CIT __, 308 F. Supp. 3d 1297 (2018); *id.*, 42 CIT __, 357 F. Supp. 3d 1325 (2018); *id.*, 43 CIT __, 415 F. Supp. 3d 1216 (2019); *id.*, 44 CIT __, __, 435 F. Supp. 3d 1378, 1380–81 (“*Ereğli IV*”) (2020), *appeals docketed*, Nos. 2020–1999; 20202003 (Fed. Cir. July 16, 2020); *Habaş Sinai ve Tibbi Gazlar İstihsal Endüstrisi, A.S. v. United States*, 43 CIT __, 361 F. Supp. 3d 1314 (2019); *id.*, 43 CIT __, 415 F. Supp. 3d 1195 (2019), *id.*, 44 CIT __, __, 439 F. Supp. 3d 1342, 1349–50 (2020) (“*Habaş III*”); *id.*, 44 CIT __, 470 F. Supp. 3d 1363 (2020), *appeals docketed*, Nos. 2021–1066 (Fed. Cir. Oct. 19, 2020); 2021–1209 (Fed. Cir. Nov. 12, 2020); *Tosçelik Profil ve Sac Endüstrisi A.S. v. United States*, 42 CIT __, 321 F. Supp. 3d 1270 (2018); *id.*, 43 CIT __, 375 F. Supp. 3d 1312 (2019); *id.*, 43 CIT __, 415 F. Supp. 3d 1395 (2019), *id.*, 44 CIT __, __, 457 F. Supp. 3d 1382, 1383 (“*Tosçelik IV*”) (2020). Various appeals from these decisions are pending at the Federal Circuit. See *id.*

Because the court concludes that the *Second Remand Results* comply with its remand order, the court sustains them.

Nucor in its comments on the remand results, as it argued below, claims that Commerce’s duty drawback methodology in the *Second Remand Results* distorts the normal value to export price comparison by disproportionately accounting for duties on the export price. Def.-Inter.’s Br. at 5–6. Nucor instead contends that Commerce should have selected another duty-neutral methodology — specifically, “adjust[ing] the cost-side drawback methodology approved in *Saha Thai* to ensure that, consistent with the principles espoused there, per-unit costs are duty-reflective to the same degree as per-unit [export price].” *Id.* at 7. Nucor’s additional arguments largely repeat arguments regarding the duty neutral methodology already addressed by the court in its previous opinions. *See* Def.-Inter.’s Br. at 5–10; *Icdas I*, 429 F. Supp. 3d at 1363–65; *Icdas II*, 475 F. Supp. 3d at 1301–04. In its *Second Remand Results*, Commerce rejected Nucor’s proposed methodology, stating “there is no statutory or regulatory basis for making such a cost-side adjustment.” *Second Remand Results* at 6.

Both the Government and Habaş argue against Nucor’s proposed methodology. First, the Government responds that “Nucor cites no authority [that] would permit Commerce to artificially allocate the exempted duty only to those home market sales used for dumping matches or artificially increase the actual drawn back duty burden on each home market sale to equal that included in the United States price.” Def.’s Br. at 7. The Government also noted that “Commerce explained[] to make such an adjustment would undermine the purpose of the cost of production provisions to ensure that sales are not made below the cost of production.” *Id.* at 7 (citing *Second Remand Results* at 6–8). Habaş contends that, like the COS adjustment methodology rejected by the court in *Icdas II*, Nucor’s proposed methodology over-allocates exempted duties to normal value. Consol.-Pl.’s Br. at 5.

The court finds Nucor’s challenge to the *Second Remand Results* unavailing. While Nucor argues that the Federal Circuit’s decision in *Saha Thai* allows such a methodology, Def.-Inter.’s Br. at 7, Nucor has not identified any basis that would require Commerce to employ such a methodology. Rather, the Federal Circuit in *Saha Thai* stated that the statute is “ambiguous as to whether ‘costs’ may include ‘implied’ costs in addition to ‘actual costs’” and, thus, deferred to Commerce’s permissible construction of the statute. 635 F.3d at 1342. Because Nucor provides no basis for the court to disturb Commerce’s selection of methodology, which the court noted is in accordance with law, the court defers to Commerce’s selection of methodology. *Chevron, U.S.A.*,

Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); see also *Habaş III*, 439 F. Supp. 3d at 1349 (rejecting the same proposed methodology for failure “to demonstrate to the court that Commerce’s finding was not in accordance with law”).

In sum, the court concludes that Commerce implemented a duty drawback methodology and calculation of AD margins as set forth in its *Second Remand Results* are in accordance with law and supported by substantial evidence.

CONCLUSION

For the reasons stated, the court affirms Commerce’s *Second Remand Results* and enters judgment in favor of Defendant.

SO ORDERED.

Dated: May 20, 2021

New York, New York

/s/ Gary S. Katzmann

GARY S. KATZMANN, JUDGE

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