

Uttam Galva Steels Limited v. United States

Court No. 16-00162, Slip Op. 18-44 (CIT April 18, 2018)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

I. SUMMARY

The Department of Commerce (Commerce) has prepared these final results of redetermination pursuant to the decision and remand order of the Court of International Trade (CIT or Court) in *Uttam Galva Steels Limited v. United States*, Court No. 16-00162, Slip Op. 18-44 (CIT April 18, 2018) (*Remand Order*). These final results of redetermination concern *Certain Corrosion-Resistant Steel Products from India: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 81 FR 35329 (June 2, 2016) (*Final Determination*) and accompanying Issues and Decision Memorandum (IDM). In its *Remand Order*, the CIT remanded the *Final Determination* for Commerce to recalculate Uttam Galva Steels Limited's (Uttam Galva) duty drawback adjustment, finding that Commerce's methodology of allocating import duties rebated or exempted over total production was inconsistent with the statute.¹

As set forth in detail below, pursuant to the CIT's *Remand Order*, Commerce has under respectful protest² amended the calculations in this final redetermination by: (1) granting the

¹ See *Remand Order* at 14, 17.

² See *Viraj Group, Ltd. v. United States*, 343 F. 3d 1371 (Fed. Cir. 2003).

amount of the per-unit duty drawback granted on export, as reported by Uttam Galva, and (2) making a circumstance-of-sales (COS) adjustment.

On July 9, 2018, we released our Draft Results of Redetermination to interested parties.³ On July 19, 2018, Uttam Galva and the petitioners⁴ provided comments.⁵ We respond to these comments below. After considering these comments and analyzing the record, for purposes of these final results of redetermination, Commerce continues to apply the duty drawback methodology employed in the Draft Results of Redetermination.

II. REMANDED ISSUE

Background and Analysis

In the *Final Determination*, we determined that Uttam Galva satisfied Commerce’s “two-pronged” test and thus made an adjustment for duty drawback.⁶ We explained, however, that our historical practice in applying the duty drawback adjustment (*i.e.*, generally accepting the claimed duty drawback adjustment reported by the respondent) would not result in the desired import-duty neutrality resulting in an equitable comparison of export price (EP) or constructed export price (CEP) and normal value (NV) in a situation where the respondent utilized a material input from both foreign and domestic sources.⁷ Therefore, we made an upward adjustment to EP and CEP based on the per unit amount of the import duty cost included in the cost of production (COP) of the subject merchandise.⁸

³ See Commerce Letter re: “Draft Remand Determination in the Less-Than-Fair Value Investigation of Certain Corrosion-Resistant Steel Products from India,” dated July 9, 2018 (Draft Results of Redetermination).

⁴ The petitioners in this proceeding are California Steel Industries and Steel Dynamics Inc. (collectively, the petitioners).

⁵ See Uttam Galva’s Letter re: “Uttam Galva Steels Limited’s Comments on the Draft Remand Redetermination in Court No. 16-00162,” dated July 19, 2018 (Uttam Galva’s Draft Comments); Petitioners’ Letter re: “Comments on Draft Remand Determination,” dated July 19, 2018 (Petitioners’ Draft Comments).

⁶ See *Final Determination* IDM at Comment 1.

⁷ *Id.*

⁸ *Id.*

In the *Remand Order*, the CIT found that Commerce’s calculation of the amount of the duty drawback adjustment was not in accordance with the law.⁹ Specifically, the Court found that the “matching principle” outlined in *Saha Thai*¹⁰ was not applicable to the facts of this investigation, and the Court further held that Commerce’s allocation of import duties rebated or exempted over total production is inconsistent with the statute because such an allocation encompasses home market sales which could not have benefitted from duty drawback because Uttam Galva received no exemptions or rebates on dutiable foreign material inputs utilized in products sold in the home market.¹¹ Moreover, the CIT found that Commerce’s methodology “overcompensated for any imbalances” and failed to adequately connect the adjustment to import duties rebated or exempted “by reason of ‘the products’ exportation to the United States.”¹² Based upon this conclusion, the Court directed Commerce to recalculate Uttam Galva’s duty drawback adjustment using a methodology consistent with the *Remand Order*.

As detailed in the *Final Determination*, in situations in which a material input is sourced from both domestic and foreign sources, accepting the claimed duty drawback adjustment reported by the respondent results in an imbalance in the comparison of EP or CEP with NV.¹³ A duty drawback adjustment to EP or CEP is based on the condition that the “goods sold in the exporter’s domestic market are subject to import duties while exported goods are not.”¹⁴ In other words, home market sale prices and COP are import duty “inclusive” while U.S. (and third country) export sale prices are import duty “exclusive.”¹⁵ Accordingly, when necessary,

⁹ See *Remand Order* at 3.

¹⁰ *Saha Thai Steel Pipe (Pub.) Co. v. United States*, 635 F.3d 1335 (Fed. Cir. 2011) (*Saha Thai*).

¹¹ See *Remand Order* at 13-14.

¹² *Id.* at 14-16.

¹³ See *Final Determination* IDM at Comment 1.

¹⁴ *Saha Thai*, 635 F.3d at 1340-41.

¹⁵ *Id.* at 1341-42.

Commerce will make the duty drawback adjustment to EP or CEP in a manner that will render this comparison import-duty neutral.

We respectfully protest the change in methodology ordered by the Court in this investigation because we do not believe the application of the full duty drawback adjustment claimed by Uttam Galva is warranted, for the reasons explained in the *Final Determination*.¹⁶ However, because we believe Commerce is required on remand to modify its methodology, we conclude that we must also make an additional adjustment to our calculations to address an imbalance in the comparison between NV and EP or CEP.

The Court held that “Commerce’s upwards adjustment to EP {for the full amount of the claimed duty drawback}, as mandated by the statute,” would create a “‘duty-neutral framework’ under which the agency (could) compare NV and EP.”¹⁷ This finding is not correct based on the facts on the record because, for the comparison to be “duty-neutral,” the amount of the import duties embedded in NV must be equal to the amount of the claimed duty drawback which is included in the EP or CEP. In fact, no such equality exists between Uttam Galva’s NVs and the calculated EP or CEP in this investigation because the per-unit amount of the import duties embedded in Uttam Galva’s COP is not the same as the per-unit amount of the claimed duty drawback included in EP or CEP. This imbalance is the result of different bases (*i.e.*, the denominator of these per-unit amounts) on which import duties are included in Uttam Galva’s COP and the amount of duty drawback exempted or rebated by the Government of India which Uttam Galva reported in its request to Commerce for a duty drawback adjustment.

In order to examine the different bases upon which the per-unit import duties are determined in Uttam Galva’s COP and upon which the per-unit duty drawback is provided upon

¹⁶ See *Final Determination* IDM at Comment 1.

¹⁷ See *Remand Order* at 13.

export, we must first examine the relationship between import duties and the raw material inputs used in production, followed by the method in which Uttam Galva reported its duty drawback on sales to the United States during the period of investigation.

Import duties are a component of Uttam Galva's COP (*i.e.*, as a cost of materials). For Uttam Galva, some quantity of its material inputs (*i.e.*, some hot rolled coils, some cold rolled coils, and some zinc) incurred import duties, while the remaining quantity of its material inputs (certain amounts of the same three products) did not incur import duties. In Uttam Galva's reported annual average cost for each material input, Uttam Galva combined the costs of inputs from both sources. That is, its reported annual average cost was the cost of foreign-sourced material inputs, which incurred import duties, as well as the cost of the domestically-sourced material inputs, which incurred no import duties. The result of this calculation was that although import duties were only incurred for a portion of Uttam Galva's overall recorded costs of cold rolled steel, hot rolled steel, and zinc inputs in this investigation, the per-unit amount of import duties paid or exempted were "diluted" through the averaging exercise across products.

Next, the annual average cost for each material input (covering both imported and domestically sourced inputs) was then allocated across all corrosion-resistant steel products (CORE) produced by Uttam Galva during the POI. Accordingly, Uttam Galva's reported COP reflected an average single cost for each material input to produce the CORE sold in the United States (subject merchandise), in India, and in third country markets.

Under the duty drawback programs, Uttam Galva recorded in its books and records the payment or exemption from payment of duties on the imported raw material inputs, as explained in the *Final Determination*.¹⁸ As explained above, those payments or exemption from payments

¹⁸ See *Final Determination* IDM at Comment 1.

were allocated across all raw material input costs (including non-dutiable domestically-sourced raw material inputs) to produce all CORE during the POI, whether sold to India, the United States, or third country markets. However, for the reasons described below, the recorded per-unit amount of import duties embedded in Uttam Galva's COP differs from the per-unit amount claimed for duty drawback in calculating EP or CEP.

With respect to the calculation of Uttam Galva's U.S. prices in this investigation, Uttam Galva claimed a duty drawback adjustment to U.S. price based on the amount of the import duties exempted or rebated for merchandise sold to the United States. However, unlike the per-unit amount of import duties embedded in its COP where the amount of import duties was allocated over all production, Uttam Galva's claimed duty drawback adjustment was based only on the amount of the import duties exempted or rebated relative to the sale quantity of subject merchandise. In other words, those exemptions and rebates were not allocated over all products which are sold in the United States, India, and third-country markets. Instead, the exemptions and rebates were reported as if the exported subject merchandise were produced exclusively with the imported material input which incurred import duties.

As a result of this differing treatment of the import duties, exemptions and rebates between NV and EP or CEP, the reported per-unit amount of the claimed duty drawback to U.S. price is different than the per-unit amount of import duties included in the NV of the foreign like product.¹⁹ We find that this disparity logically creates an imbalance in the comparison of the U.S. price with NV.

¹⁹This is true whether the adjustment to EP or CEP is based on an import duty rate or on a predetermined percentage of export value. *See* Uttam Galva's September 29, 2015, Section C Questionnaire Response at 40-41.

Thus, as explained above, including the full amount of the duty drawback adjustment for Uttam Galva does not “itself (create) the ‘duty neutral framework’ under which the agency can compare NV and EP.”²⁰ Accordingly, Commerce has therefore endeavored on remand to make an adjustment to NV to achieve duty neutrality. The purpose of the duty drawback adjustment is to ensure that dumping is not found based on a difference in import duties between EP or CEP and NV. Accordingly, the amount of the duty drawback adjustment compensates for the amount of import duties which are included in NV but which are not included in EP or CEP because of the exportation of the subject merchandise. Logically, to arrive at such a duty neutral result, the implication is that the amount of the duty drawback adjustment is equal to the difference between the amount of import duties included in NV and the amount of import duties in EP or CEP. However, for Uttam Galva in this investigation, no such equality exists.

In fact, the discrepancy between the claimed duty drawback adjustment and the amount of import duties included in its COP is significant. Specifically, the SAS output for Uttam Galva’s margin calculations shows that the amount claimed for duty drawback by Uttam Galva in its reported U.S. sales data (DTYDRAWU) differs from the amount of import duties embedded in Uttam Galva’s COP (*i.e.*, the sum of PAIDDTY and EXEMPTDTY) such that an imbalance exists in the comparison of EP with NV.²¹ For example, if Uttam Galva reported 2,000 rupees per metric ton (MT) as the amount of exempted and paid import duties reported as part of its COP, and the amount of duty drawback claimed for a U.S. sale is 5,200 rupees per MT, then the imbalance in the comparison of NV with EP would be 3,200 rupees per MT. The

²⁰ See *Remand Order* at 13.

²¹ See Memorandum to the File from Ryan Mullen, “Final Determination Calculation for Uttam Galva Steels, Ltd. In the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from India,” Attachment II, pp. 15-42 of the SAS output, “Sample of U.S. Net Price Calculations” (May 24, 2016). See also, Memorandum to the File from Ryan Mullen, “Less than Fair Value Investigation of Certain Corrosion-Resistant Steel Products from India: Draft Redetermination Analysis Memorandum for Uttam Galva Steel Ltd.” (July 9, 2018) at Attachment 4 (Analysis Memo).

consequence of this imbalance is a direct reduction of NV by reason of the lower import duty costs vis-à-vis the claimed amount of duty drawback. Based on Uttam Galva's reported data, the aggregated extended value of the amounts reported as duty drawback on U.S. sales is more than 160 percent higher than the aggregated extended value of import duties embedded in the COP of the sold subject merchandise.²² Moreover, on a per-unit basis, the amount claimed as duty drawback on U.S. sales for a significant number of products is more than 200 percent higher than the average per-unit cost of import duties embedded in COP for the subject merchandise.²³

Accordingly, it would not be "duty neutral" for Commerce to apply the full duty drawback adjustment claimed by Uttam Galva in its calculations of EP or CEP, without also adjusting Uttam Galva's NV as well. Section 773(a) of the Tariff Act of 1930, as amended (the Act) calls for a "fair comparison" between EP or CEP and NV. The SAA further recognizes that "{t}o achieve such a fair comparison, section 773 {of the Act} provides for the selection and adjustment of normal value to avoid or adjust for differences between sales which affect price comparability."²⁴ Furthermore, section 773(a)(6)(C) of the Act authorizes Commerce to increase or decrease NV by the amount of any difference (or lack thereof) between EP or CEP and NV that is established to be wholly or partly due to, *inter alia*, other differences in the circumstances of sale (COS).²⁵

Because of the imbalance that results from a comparison between Uttam Galva's NV and the calculated EP including the claimed duty drawback adjustment, we have made a COS adjustment to Uttam Galva's NV pursuant to section 773(a)(6)(C) of the Act. Specifically, we

²² *Id.*

²³ *Id.*

²⁴ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. I (1994) (SAA) at 820.

²⁵ See section 773(a)(6)(C)(iii) of the Act.

have added to NV the difference between the amount claimed as duty drawback on U.S. sales and the amount of import duties recorded and reported by Uttam Galva in the COP.²⁶ In so doing, we have addressed the aforementioned imbalance, and ensured that the EP to NV comparison is equitable and import-duty neutral.

III. CONCLUSION

Based on the foregoing, and pursuant to the CIT's *Remand Order*, we have amended the calculations from the *Final Determination* in this final redetermination by granting the full amount of the claimed per-unit duty drawback, as reported by Uttam Galva, and by further making a COS adjustment to Uttam Galva's NV to account for the difference and resulting imbalance between the amount of the claimed duty drawback and the amount of import duty costs included in normal value.

IV. INTERESTED PARTY COMMENTS

On July 9, 2018, Commerce released the draft results of redetermination to all interested parties and invited parties to comment on the draft results of redetermination.²⁷ Uttam Galva and the petitioners submitted comments on July 19, 2018.²⁸ No other interested party submitted comments.

Issue 1: Commerce's Duty Drawback Methodology

Petitioners' Comments:

- The decision to protest the change in methodology ordered by the Court is necessary because the Court misunderstood how Commerce's methodology works.²⁹

²⁶ See Analysis Memo.

²⁷ See Draft Remand.

²⁸ See Uttam Galva's Draft Comments; Petitioners' Draft Comments.

²⁹ *Id.* at 1-2.

- The Court contended that Commerce cannot allocate duty drawback to total cost of production (COP) because total COP encompasses home market sales, and Uttam Galva Steels Limited (Uttam Galva) did not receive rebates or exemptions for foreign imported inputs in products sold in the home market. The Court did not comprehend that the home market price is inclusive of duties paid on raw material imports and a duty drawback adjustment ensures a duty neutral approach.³⁰
- Uttam Galva’s argument that it should receive double the adjustment to its export price compared to the duties incurred in the home market, does not equalize the duty burden of home market sales, which is why Commerce changed its methodology.³¹
- The decision to make a COS adjustment to NV in order to bring the NV into balance with the EP is consistent with the statute, which supports ensuring a fair comparison between NV and EP.³²
- The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade required members to ensure a fair comparison between EP and NV.³³
- Congress restructured Section 773(a) of the Act and added clarifying language regarding “fair comparisons.” The Senate Report states that “due allowance” should be made for differences in conditions and terms of sale, and any other differences which affect price comparability.³⁴

³⁰ *Id.* at 2.

³¹ *Id.* at 3.

³² *See* Petitioners’ Draft Comments at 3-4.

³³ *Id.* at 4.

³⁴ *Id.* at 5.

Uttam Galva's Comments:

- Commerce's Draft Redetermination to adjust the EP and CEP (collectively, EP) upward by the full amount of the per-unit duty drawback on exports, complies with the Remand Order.³⁵
- The Court stated that Commerce's calculation of the duty drawback failed to connect the adjustment to duties forgiven due to the exportation to the United States.³⁶
- The Court also explained that the purpose of duty drawback is to increase the EP to the level it likely would be, absent a duty drawback, and Commerce's methodology introduced an imbalance by including costs associated with manufacturing goods sold in the domestic market.³⁷
- Commerce's COS adjustment to NV is unlawful, and must be rejected, because duty drawback by definition, is an adjustment to U.S. price and not normal value.³⁸
- The Court's Remand Order does not mention or permit the alteration of any other aspect of the calculation.³⁹
- Commerce's claims of imbalance are vague and unsupported by statute or precedent and the Court rejected these claims in the remand order.⁴⁰
- The Court rejected Commerce's Final Determination methodology, which indirectly allocated duty exemptions to home market sales.⁴¹ Commerce's new methodology

³⁵ See Uttam Galva's Draft Comments at 3.

³⁶ *Id.* at 4.

³⁷ *Id.* at 4-5.

³⁸ See Uttam Galva's Draft Comments at 6.

³⁹ *Id.* at 7.

⁴⁰ *Id.*

⁴¹ *Id.* at 7-8 and 15.

directly allocates duty exemptions to home market sales, further departing from the Court's opinion and statutory language.⁴²

- The adjustment to normal value nullifies the intended effect of the statutory adjustment to U.S. price and distorts the antidumping calculation. By increasing both EP and NV by similar amounts, Commerce is offsetting the upward adjustment to EP.⁴³
- Commerce's methodology double counts the duty exemptions because exempted import duties are being reflected in NV twice: through the COP adjustment, where duty exemptions earned were allocated over production, and by directly adding exported import duties to normal value.⁴⁴
- The differences between EP and NV, as noted by Commerce, are simply a function of statutory requirements combined with Commerce's regulations and calculation methodologies for sales-specific adjustments, versus single, weight-averaged control number-specific COP adjustments.⁴⁵
- An adjustment to NV is not required when input materials are sourced from both domestic and foreign suppliers, and the idea that NV and EP reflect different duty drawback amounts is speculation.⁴⁶
- There is no statutory language that supports the notion that: 1) duties embedded in NV must be equal to the duty drawback adjustment to EP;⁴⁷ 2) duties that have not been

⁴² *Id.* at 8.

⁴³ *Id.* at 8-9.

⁴⁴ *Id.* at 11 and Exhibit 2.

⁴⁵ *Id.* at 12-13.

⁴⁶ *Id.* at 14.

⁴⁷ *Id.*

collected on inputs destined for export sales, qualify as a circumstance of sale adjustment or selling expenses.⁴⁸

- Commerce rejected a proposal to make the same adjustment in an AR of Welded Carbon Steel Standard Pipe and Tube Products from Turkey because “{they} disagree...that they should make an adjustment to NV for duty drawback...the statute itself does not require the Department to make such an adjustment. To make an adjustment to NV for duty drawback where there is no evidence of such drawback on home market sales would nullify the adjustment to EP.”⁴⁹
- *Saha Thai*, which is cited by the Court, made clear that the entire amount of any drawback granted is to be reflected in an increase to EP and that NV is unaffected, “{a}n import duty exemption granted only for exported merchandise has no effect on home market sales prices, so the duty exemption should have no effect on NV.”⁵⁰

Commerce’s Position:

We agree with the petitioners that Commerce has appropriately recalculated the duty drawback adjustment to U.S. price as directed by the Court. We also agree with the petitioners that Commerce must also make an adjustment to NV in order to ensure an equitable, duty-neutral comparison of U.S. price with NV.

The Court did not dispute Commerce’s finding that Uttam Galva sourced inputs from both foreign sources, where import duties were exempted or rebated, and domestic sources, which incurred no import duties.⁵¹ Nonetheless, the Court found that Uttam Galva is entitled to

⁴⁸ *Id.* at 16.

⁴⁹ *Id.* at 17 (citing *Welded Carbon Standard Steel Pipe and Tube Products from Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2013-2014*, 80 FR 76674 (December 10, 2015), and accompanying IDM at 13-14) (*CWP from Turkey*).

⁵⁰ *Id.* at 18 (citing *Saha Thai*, 635 F.3d at 1342).

⁵¹ *See* Remand Order at 14-15.

the full amount of the per-unit duty drawback as reported by the respondent and that Commerce's methodology of limiting the amount of the duty drawback adjustment to U.S. price to the average imputed per-unit import duty in the COP was in violation of the statute.

Accordingly, Commerce: 1) revised the imputed duty and the amount of the duty drawback adjustment in the Draft Remand; and 2) described the specific calculations and how such calculations resolve the Court's concerns and comport with section 772(c)(1)(B) of the Act by including the full per-unit duty drawback amount as an adjustment to EP or CEP.

As Commerce explained in *Pneumatic Tires from India*, Commerce's duty drawback adjustment is based on a fundamental principle that exported merchandise is not subject to import duties:

The statutory language in section 772(c)(1)(B) of the Act directs the Department to account for a duty drawback by adding it to U.S. price. In determining whether a duty drawback adjustment should be granted, first we look for a reasonable link between the duties imposed and those rebated or exempted. Specifically, we require that the company meet our "two-pronged" test in order for this adjustment to be made. The first element is that the import duty and its corresponding rebate or exemption be directly linked to, and dependent upon, one another. The second element is that the company must demonstrate that there were sufficient imports of the imported material to account for the amount of import duty refunded or exempted for the export of the manufactured product. The Department found that BKT satisfied the criteria for one duty drawback program, the AAP.

A duty drawback adjustment to EP and CEP is based on the principle that the "goods sold in the exporter's domestic market are subject to import duties while exported goods are not." In other words, home market sales prices are import duty "inclusive," while U.S. (and third-country) export sales prices are import duty "exclusive." Therefore, the question of whether prices or costs are import duty exclusive or inclusive will result in an inequity in the comparison of EP or CEP with fair value or NV. As such, it is incumbent on the Department to ensure that the comparison of EP or CEP with fair value or NV is undertaken on an equitable duty neutral basis. In order to do so, when warranted, the Department must make the duty drawback adjustment to EP or CEP in a manner that will render this comparison duty neutral.

In applying the duty drawback adjustment, consideration must be given to what import duties are included the respondent's costs of materials or inequities may be created. The

amount of the duty drawback adjustment should be determined based on the import duty absorbed into, or imbedded in, the overall cost of producing the merchandise under consideration. In looking to the duty imbedded in the COP, we consider inputs from both foreign and domestic sources. That is, we assume for dumping purposes, that imported raw material and the domestically sourced raw material are proportionally consumed in producing the merchandise, whether sold domestically or exported. Contrary to Petitioners' contention, the Department does not assume that only domestic inputs were used to support domestic sales. The Department calculates an average COP for each product, not market-specific costs (i.e., one cost for a given product sold in the domestic market and a different cost for the same product when exported). The annual average cost for the input is the average cost of both the foreign sourced input, which incurs import duties, and the domestic sourced input on which no duties were imposed. Thus, the average import duty cost imbedded in the cost of producing the merchandise is the duty cost "reflected in NV," whether NV is based on home market prices or constructed value.⁵²

As discussed above, "Commerce's upwards adjustment to EP {for the full amount of the claimed duty drawback}, as mandated by the statute," would not create a "'duty-neutral framework' under which the agency (could) compare NV and EP."⁵³ In consideration of the fact that a duty-neutral framework is essential to Commerce's antidumping duty margin calculations, in *Saha Thai*, the Court of Appeals for the Federal Circuit (CAFC) upheld Commerce's duty-neutral principle stating:

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 NV. That is, when a duty drawback is granted only for exported inputs, the cost of the duty is reflected in NV but not in EP. The statute corrects this imbalance, which could otherwise lead to an inaccurately high dumping margin, by increasing EP to the level it likely would be absent the duty drawback.⁵⁴

⁵² *Certain New Pneumatic Off-the-Road Tires from India: Final Negative Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances*, 82 FR 4848 (Jan 17, 2017) and accompanying Issues and Decision Memorandum at Comment 7 (*Pneumatic Tires from India*) (citations removed). See also Article VI:4 of the General Agreement on Tariffs and Trade 1947 (stating that "no imported product" "shall be subject to antidumping duties" when "destined for consumption in the country of origin or exportation").

⁵³ See *Remand Order* at 13.

⁵⁴ *Saha Thai*, 635 F.3d at 1339.

Thus, the CAFC recognized the duty drawback adjustment is intended to prevent dumping margins from being created (or affected) by the rebate or exemption of import duties on inputs used in the production of subject merchandise. However, in circumstances such as these, where the dutiable input has been imported in addition to being domestically sourced, a distortion in the dumping margin is caused by calculating a per unit duty drawback adjustment using only the quantity of export sales of subject merchandise whereas the cost of production, and thereby the NV, includes the duties which are allocated to the consumption of the dutiable input for all produced merchandise. In other words, in circumstances when an input is sourced both domestically and from imports, the actual per unit “cost of the duty reflected in NV”⁵⁵ is the average duty cost included in the cost of producing the merchandise, irrespective of where it is sold, and this per-unit average duty cost may be less than the per-unit amount of duty drawback claimed for a specific export sale to the United States. In such a situation, the comparisons of EP or CEP with NV will not be duty neutral, just as when no adjustment for duty drawback is made to EP or CEP.

Indeed, the CAFC stated in *Saha Thai* that

the entire purpose of increasing EP is to account for the fact that the import duty costs are reflected in NV (home market sales prices) but not in EP (sales prices in the United States). . . . It would be illogical to increase EP to account for import duties that are purportedly reflected in NV, while simultaneously calculating NV based on a COP and CV that do not reflect those import duties.⁵⁶

Accordingly, when the per-unit amount of duty drawback which is added to EP or CEP is not also reflected in NV, the comparison of EP or CEP with NV (*i.e.*, the individual dumping margin) is inequitable and distorted.

⁵⁵ *Id.*

⁵⁶ See *Saha Thai* at 1342.

Under its normal practice, Commerce takes these distortions into account in crafting the appropriate adjustment for “the amount of import duties imposed . . . which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States.”⁵⁷ Specifically, as we did in *Pneumatic Tires from India* and in the *Final Determination*, Commerce makes an upward adjustment to EP and CEP based on the amount of the duty imposed on the input and rebated or not collected on the export of the subject merchandise by properly allocating the amount rebated or not collected to all production for the relevant period based on the cost of inputs during the POI. This ensures that the amount added to both sides of the comparison of EP or CEP with NV is equitable, *i.e.*, duty neutral, thereby meeting the purpose of the adjustment as held by the CAFC in *Saha Thai*.

As we have explained, we, therefore, respectfully protest the change in methodology ordered by the Court in this investigation because applying the full duty drawback adjustment claimed by Uttam Galva without taking into consideration the per-unit amount of import duties included in the NV injects a distortion into Commerce’s calculation of Uttam Galva’s weighted-average dumping margin. Further, we disagree that our calculations adjusting the per-unit amount of the claimed duty drawback adjustment are inconsistent with the statutory language of section 772(c)(1)(B) of the Act. However, because we believe Commerce is required on remand to modify its methodology, we have done so.

Nonetheless, because our obligation to address an imbalance in the comparison between EP or CEP and NV remains under the Act, in accordance with the principles recognized in *Saha Thai*, we have determined on remand to make an additional adjustment to our calculations to address the imbalance resulting from that change in methodology.

⁵⁷ See section 772(c)(1)(B) of the Act.

As part of its analysis, the Court stated that it believed “Commerce’s flawed methodology includes costs associated with manufacturing goods sold in the domestic market, lessens the upwards adjustment, and conceptually reintroduces an imbalance in the dumping margin calculation.”⁵⁸ The Court’s statement in the *Remand Order* seems to suggest that by not including those costs in the domestic market, the result would be balance in Uttam Galva’s dumping margin calculations, but the facts on the record do not substantiate such a conclusion. For the comparison to be “duty-neutral,” the amount of the import duties embedded in NV must be equal to the amount of the claimed duty drawback which is included in the EP or CEP. However, there is a disparity between the per-unit amount of the import duties embedded in Uttam Galva’s COP and the per-unit amount of the claimed duty drawback included in EP or CEP. This imbalance is the result of different bases (*i.e.*, the denominator of these per-unit amounts) on which import duties are included in Uttam Galva’s COP and the amount of duty drawback exempted or rebated by the Government of India which Uttam Galva reported in its request to Commerce for a duty drawback adjustment, as explained above.

Accordingly, Commerce has made a COS adjustment to NV, pursuant to section 773(a)(6)(C)(iii) of the Act, to correct this imbalance and to ensure an equitable, duty-neutral comparison of U.S. price with NV.

Section 773(a) of the Act provides that “{i}n determining. . . whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value.”⁵⁹ To make a fair comparison, Commerce evaluates case-specific circumstances to determine whether an

⁵⁸ *Remand Order* at 14.

⁵⁹ *See* Section 773(a) of the Act.

adjustment is warranted.⁶⁰ Further, the courts have long recognized that the statute generally “seek{s} to produce a fair ‘apples-to-apples’ comparison between foreign market value and United States price.”⁶¹ “{T}o achieve that end, the statutes and {Commerce’s} regulations call for adjustments to the base value of both foreign market value and United States price to permit comparison of the two prices at a similar point in the chain of commerce.”⁶² The courts are also aware that under particular circumstances the comparison may not fair, finding that “when the United States price is calculated on the basis of the exporter’s sales price, the United States price may be artificially high.”⁶³ Recognizing this underlying premise, this Court also found that “{t}he purpose of a duty drawback adjustment is to ensure a fair comparison between normal value {} and export price {}.”⁶⁴

To address a comparison which is not fair, in instances where a disparity between these exists, the Act further authorizes Commerce to make adjustments to account for “other differences in the circumstance of sale.”⁶⁵ This is consistent with the statements made in the SAA recognizing that “{t}o achieve such a fair comparison, section 773 {of the Act} provides for the selection and adjustment of normal value to avoid or adjust for differences between sales which affect price comparability.”⁶⁶

Accordingly, pursuant to this statutory framework, *Saha Thai*, and this Court’s findings, Commerce has made a COS adjustment to NV on remand. This COS adjustment is equal to the difference between Uttam Galva’s claimed duty drawback adjustment and the amount of import

⁶⁰ See *Biodiesel from Indonesia: Final Determination of Sales at Less than Fair Value*; 83 FR 8835 (March 1, 2018) and accompanying IDM at Comment 1.

⁶¹ See *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995).

⁶² *Id.*

⁶³ *Id.* at 1353.

⁶⁴ See *Remand Order* at 7 (citations omitted).

⁶⁵ See Section 773(a)(6)(C)(iii).

⁶⁶ See SAA at 820.

duties embedded in the company's costs of production.⁶⁷ This approach results in the balance between NV and EP or CEP which the CAFC in *Saha Thai* concluded was one of the purposes of the duty drawback adjustment in the first place.⁶⁸

Uttam Galva raises several arguments contending that Commerce's application of a COS adjustment in the Draft Results of Redetermination is inappropriate. Specifically, Uttam Galva argues: 1) that Commerce historically has not made COS adjustments under similar circumstances;⁶⁹ 2) the Court's order does not allow alterations to aspects of the calculation except those expressly stipulated in the order;⁷⁰ 3) Commerce allocates duty exemptions to home market sales;⁷¹ 4) Commerce's application of a COS adjustment to NV nullifies the duty drawback adjustment contrary to the statutory purposes of the duty drawback adjustment;⁷² 5) Commerce's COS adjustment results in double counting of the amount of the exempted import duties;⁷³ 6) the imbalance in the dumping margin calculations, is speculative;⁷⁴ 7) there is no statutory requirement in section 772(c) of the Act requiring that the amount of import duties embedded in NV must be equal to the amount of the claimed duty drawback or that there be duty neutrality;⁷⁵ 8) Commerce erred in labeling the duty drawback adjustment as a COS adjustment because duty drawback is not enumerated in 19 CFR 351.410(c)-(d);⁷⁶ and 9) Commerce's approach in the Draft Results of Redetermination are contrary to the CAFC's opinion in *Saha*

⁶⁷ See Analysis Memo at 1-2.

⁶⁸ See *Saha Thai*, 635 F.3d at 1339.

⁶⁹ See Uttam Galva's Draft Comments at 17.

⁷⁰ *Id.* at 7-8.

⁷¹ *Id.* at 8.

⁷² *Id.* at 8-10.

⁷³ *Id.* at 11-13.

⁷⁴ *Id.* at 14.

⁷⁵ *Id.*

⁷⁶ *Id.* at 15-17.

Thai.⁷⁷ For the reasons explained throughout this remand and below, these arguments are unavailing.

Uttam Galva's reliance on *CWP from Turkey* is misplaced. In that review, Commerce rejected the request to make a similar upward adjustment to NV or to cap the amount of the duty drawback adjustment to U.S. price.⁷⁸ However, unlike the facts in that case, Commerce is now tasked by the CIT to move away from its duty drawback adjustment practice, to apply the full duty drawback adjustment claimed by Uttam Galva, and to still ensure a fair comparison of EP or CEP with NV. For the reasons explained above, such a change as a factual matter assures that the duty drawback adjustment will result in an "unfair" comparison and an imbalance between NV and EP or CEP, in contravention of the statute and the CAFC's stated purpose of the duty drawback adjustment and need for a fair, duty neutral comparison in *Saha Thai*. Accordingly, while Commerce elected not to make the similar adjustment in *CWP from Turkey* for the reasons which were provided in that review, in this investigation Commerce must make such an adjustment, or its calculations will be violation of its statutory obligations.

Further, we disagree that Commerce was restricted from reconsidering the resulting imbalance from the ordered modification to its calculations and adjusting its margin calculations accordingly. The Court did not limit Commerce's ability to revisit its calculations to consider its statutory obligations, nor did it limit Commerce's ability to adjust those calculations to bring them into compliance with both the *Remand Order*, *Saha Thai*, the statute, and the regulations. As this Court has held in various remand proceedings, "{u}nless specifically directed by the

⁷⁷ *Id.* at 18-20.

⁷⁸ See *Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2013-2014*, 80 FR 76674 (December 10, 2015), and Accompanying IDM at Comment 1.

{C}ourt, Commerce has broad discretion to fully consider the issues remanded”⁷⁹ in the context of the application of the trade remedy laws. In addition, the CAFC and this Court have both sustained agency remand redeterminations which addressed both directed remand issues, as well as other issues which arose as a result of the remand order, in order to comply with both the Court’s order, as well as the agency’s statute, regulation, and practice.⁸⁰ Thus, Commerce’s revised calculations on remand are in full compliance with the Court’s *Remand Order*.

With respect to Uttam Galva’s arguments about *Saha Thai*, we disagree that this remand impermissibly goes beyond the CAFC’s holding and analysis in that opinion. In *Saha Thai*, the CAFC held that the comparison of U.S. price with NV was not “fair” under section 773(a) of the Act because of the adjustment made to U.S. price to account for duty drawback in the respondent’s antidumping calculations.⁸¹ Consequently, the Court upheld Commerce’s addition of an imputed import duty such that NV reflected import duties in balance with the adjustment for duty drawback. This adjustment to *Saha Thai*’s COP for the purpose of rebalancing the U.S. price to NV comparison.⁸²

As the CAFC stated in *Saha Thai*, where the respondent claimed a duty drawback adjustment for an exemption drawback program where no import duties were recorded in the respondent’s books and record: “EP, COP, and CV should be increased together, or not at all.”⁸³ In that situation, where no duties were embedded in the respondent’s NV and respondent claimed a duty drawback adjustment, the court stated that either the same per-unit amount of import

⁷⁹ See, e.g., *ABB, Inc. v. United States*, 273 F. Supp. 3d 1186, 1199 n.14 (CIT 2017) (citations omitted).

⁸⁰ See e.g. *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1375 (Fed. Cir. 2012) (finding that “Commerce’s reexamination of the AFA rate used in calculating the appellant’s separate rate necessarily involved reconsideration of underlying variables, i.e., normal value and U.S. price.”); *Elkton Sparkler Co. v. United States*, 17 CIT 344, 346 (1993) (“hold{ing} that Commerce did not exceed the scope of the remand order by investigating the factors of production of caddies in the remand proceeding.”).

⁸¹ See *Saha Thai*, 635 F.3d at 1342-1344.

⁸² *Id.* at 1344.

⁸³ *Id.* at 1343.

duties must be include in NV in order to balance the comparison of NV with EP which included the duty drawback adjustment; or neither the NV nor the EP should be increased “at all”, in which there would be neither an increase to NV for import duties or an adjustment to EP for duty drawback. The court’s direction could not be clearer, the per-unit amount of import duties and the per-unit amount of claimed duty drawback must be balanced, equitable and equal.

As explained above, on remand once Commerce applied the full duty drawback adjustment claimed by Uttam Galva and removed Commerce’s upward adjustment, as ordered by the Court, Commerce appropriately balanced the comparison of U.S. price with NV using an adjustment to NV based on a difference in the circumstances of sale. The need for this adjustment is a direct result of the sale to the United States, where Uttam Galva became eligible for a duty drawback benefit from the Government of India and which was not available for its sales in the Indian home market. That COS adjustment rectifies the imbalance caused by the per-unit amount of the import duties embedded in Uttam Galva’s COP differing from the per-unit amount of the claimed duty drawback included in EP or CEP, thereby addressing the imbalance which the CAFC acknowledged Commerce has the statutory authority to address in *Saha Thai*. The application of the COS adjustment is therefore fully in compliance with the CAFC’s holding in *Saha Thai*.

As explained above, Commerce’s COS adjustment is consistent with both the language, history, and purpose of the COS adjustment provision. Section 773(a)(6)(C)(iii) provides that Commerce may make adjustments to “other differences in the circumstances of sale.”⁸⁴ Uttam Galva argues that duty drawback is not a selling expense or an assumed expense as specifically listed in 19 CFR 351.410(c)-(d). However, this argument misunderstands that Commerce is not

⁸⁴ See 773(a)(6)(C)(iii) of the Act.

making a duty drawback adjustment to NV; rather, Commerce is making a duty drawback adjustment to U.S. price as provided for under section 772(c)(1)(B) of the Act. In order to account for the recognized imbalance in the comparison of U.S. price with NV, an adjustment has been made to NV to rebalance the dumping margin comparisons. Thus, this adjustment appropriately rebalances the dumping margin comparisons by adding to NV the difference between the amount claimed as duty drawback on U.S. sales and the amount of import duties recorded and reported by Uttam Galva in the COP.

Furthermore, the *Preamble* to the proposed regulations articulate that section 19 CFR 351.410 “clarifie(d) aspects” of Commerce’s “practices with respect to adjustments for differences in circumstances of sale under section 773(a)(6)(C)(iii) of the Act and the SAA, at 828,” but in no way suggested that the particular situations addressed in that regulation were the only circumstances in which Commerce could, or would, apply a COS adjustment.⁸⁵ In addition, 19 CFR 351.410(a) itself states that Commerce “may make adjustments to account for certain differences in the circumstances of sales in the United States and foreign markets,” and that the regulation was only intended to clarify “certain terms used in the statute regarding circumstances of sale adjustments” Thus, there is no support for Uttam Galva’s suggestion that the regulation prohibits Commerce from making the COS adjustment it has applied on remand in this case.

With respect to Uttam Galva’s claim that the imbalance resulting from this modification to our calculations is “speculative,” we find this claim curious. Commerce very clearly explained above and in the Draft Results of Redetermination that based on Uttam Galva’s reported data, the aggregated extended value of the amounts reported as duty drawback on U.S.

⁸⁵ See *Antidumping Duties; Countervailing Duties; Proposed Rule*, 61 FR 7346-7347 (Feb. 27, 1996) (*Preamble*).

sales would be significantly higher than the aggregated extended value of import duties embedded in the COP of the sold subject merchandise.⁸⁶ Thus, without the COS adjustment, the comparison of EP or CEP with NV would not be duty neutral. Furthermore, Commerce also very clearly explained above and in the Draft Results of Redetermination that without the COS adjustment, on a per-unit basis, the amount claimed by Uttam Galva as duty drawback on U.S. sales for a significant number of products would be also significantly higher than the average per-unit cost of import duties embedded in COP for the subject merchandise.⁸⁷ We do not understand how Uttam Galva can claim that such differences, supported by its own records, could be considered “speculative.” The CAFC in *Saha Thai* recognized the potential for such an imbalance, and the record evidence supports such an imbalance exists in this investigation. Accordingly, Uttam Galva is incorrect that such an imbalance is merely speculative and not actual.

Lastly, as detailed above, Commerce disagrees that there is any “double counting” in its calculations on remand. The COS adjustment accounts for the imbalance between U.S. price and NV, without double counting. Commerce’s approach in the Draft Results of Redetermination comports with Court’s opinion regarding section 772(c)(1)(B) of the Act by including the full per-unit duty drawback adjustment in EP or CEP. For an equitable comparison of EP or CEP with NV to be made based solely on the application of the duty drawback adjustment, such an approach necessarily assumes that an equal per-unit amount of import duties is embedded in the NV. However, it may be the situation, as in this investigation, where the per-unit amount of duty drawback added to EP or CEP is not equal to the per-unit amount of import duties embedded in NV, such that a further adjustment must be made for to account for the *difference* between these

⁸⁶ Analysis Memo at Attachment 4 (providing the specific numbers in comparison).

⁸⁷ *Id.*

two amounts and thereby ensure a fair comparison. Therefore, a COS adjustment has been made to NV because of the *difference* between the duty drawback adjustment and the amount of import duties already embedded in NV. This does not double count the amount of import duties already in NV because that amount is not included in the COS adjustment. Further, the COS adjustment is not a duty drawback adjustment to NV because it reflects the amount of import duties which are missing from NV given the assumption imposed by the per-unit amount of duty drawback included in EP or CEP. Incorporating such a COS adjustment ensures an equitable, duty-neutral comparison of U.S. price with NV.

As applied in *Saha Thai*, the adjustment made to NV was equal to the per-unit duty drawback adjustment because the NV did “not reflect those import duties.”⁸⁸ That is not the situation in this investigation.⁸⁹ Although Uttam Galva attempts to illustrate that Commerce has added duty exemptions that were already fully accounted for,⁹⁰ the company misapprehends that the import duties are reflected both in NV and in the adjustment for duty drawback to ensure a fair comparison. In addition, home market sales do not earn a duty drawback, but rather incur import duty costs on imported inputs. Similar to the example offered by the Court,⁹¹ the NV includes the amount for paid duties but not for exempted duties,⁹² thus, the exempted duties are added to the COP to reflect that imputed cost consistent with *Saha Thai*. Thus, the exempted import duties have not been double counted in the COP. Further, the COS adjustment is

⁸⁸ See *Saha Thai*, 635 F.3d. at 1342.

⁸⁹ In *Saha Thai*, Commerce added to COP an amount of the exempted import duties that were claimed as duty drawback and which were not reflected in the NV. In this investigation, Commerce has made a COS adjustment to NV rather than added to COP an amount for import duties not reflected in NV.

⁹⁰ See Uttam Galva’s Draft Comments at Exhibit 2.

⁹¹ See Remand Order at 11-12.

⁹² See Memorandum to the File, “Verification of the Cost Response of Uttam Galva Steels Limited in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Flat Products from India,” dated March 23, 2016 (Cost Verification Report) at 16-17.

calculated as the difference between the per-unit amount of duty drawback⁹³ and the per-unit amount of import duties, both paid and exempted, which are included in the COP. Thus, the exempted duties have not been double counted in the NV. Therefore, Uttam Galva's claim is meritless.

Accordingly, Commerce continues to conclude that it has appropriately recalculated the duty drawback adjustment and made a COS adjustment in accordance with the statute and the Court's Remand Order.

FINAL RESULTS OF REDETERMINATION

Pursuant to the Court's remand order, Commerce has revised its duty drawback methodology with respect to Uttam Galva. As a result, Uttam Galva's weighted-average dumping margin has changed from 3.05 percent in the *Final Determination* to 3.11 percent.

8/16/2018

X



Signed by: GARY TAVERMAN

Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

⁹³ Commerce notes that the duty drawback adjustment calculated in the Remand Order's example (*i.e.*, variable *u*) is incorrect. Duty drawback should be allocated over only export sale units and not include domestic sale units, as recognized by the Court. Accordingly, the duty drawback adjustment in the example should be \$1.00/unit ($= (g+h)/m$) which is not in balance with the amount of import duties included in normal value (*i.e.*, \$0.50/unit).