SLATER STEELS CORP. v. UNITED STATES; VIRAJ GROUP v. UNITED STATES
Consol. Court No. 02-00551
Slip Op. 05-23 (CIT February 17, 2005)

FINAL RESULTS OF REDETERMINATION PURSUANT TO REMAND III

SUMMARY

The Department of Commerce ("the Department" or "Commerce") has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade ("CIT" or "Court") in Slater Steels Corp. v. United States; Viraj Group v. United States Consol. Court No. 02-00551, Slip Op. 05-23 (CIT February 17, 2005) ("Slater III"). In accordance with the Court's instructions, the Department has not collapsed Viraj Alloys Limited ("VAL") with Viraj Impoexpo Limited ("VIL") and Viraj Forgings Limited ("VFL") (collectively, "the Viraj Group companies" or "Viraj"). VAL did not export to the United States during the period of review ("POR"), February 1, 2000, though January 31, 2001. Therefore, the Department calculated an individual antidumping duty margin for VIL/VFL.

BACKGROUND

In the administrative review covering the 2000-2001 POR, the Department collapsed (i.e., treated as a single entity for antidumping duty purposes) the affiliated Viraj Group companies pursuant to 19 USC § 1677(33) and 19 CFR § 351.401(f) (2000). See Stainless Steel Bar from India; Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Administrative Review, 67 FR 10377 (March 7, 2002) ("2000-2001 Preliminary Results"); Stainless Steel Bar from India; Final Results of Antidumping Duty Administrative Review, 67 FR 45956 (July 11, 2002) and Notice of Amended Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India, 67 FR 53336 (Aug. 15, 2002) ("2000-

2001 Final Results") and the accompanying Issues and Decision Memorandum (July 5, 2002) ("2000-2001 Decision Memorandum") (collectively, "the 2000-2001 administrative review"). As a collapsed entity, the Viraj Group companies received a *de minimis* dumping margin.

Based upon the record evidence, the Department found that VAL, VIL, and VFL "meet the regulations' collapsing requirements." See 2000-2001 Decision Memorandum at Comment 1. First, the Department found that "VAL and VIL can produce subject merchandise (i.e., similar or identical products) and can continue to do so, independently or under existing leasing agreements, without substantial retooling of their production facilities." Id. Second, the Department found "a significant potential for the manipulation of price and production among VIL, VAL, and VFL." Id. Slater Steels Corporation, Carpenter Technology Corporation, Electralloy Corporation, and Crucible Specialty Metals Division of Crucible Materials Corporation, collectively, the "plaintiffs"/"defendant-intervenors," challenged this determination before the CIT, arguing that the Department misapplied its collapsing regulation to the Viraj Group companies.

The CIT determined that the Department's decision to collapse the Viraj Group companies was not supported by substantial evidence on the record. Therefore, the CIT remanded the 2000-2001 Final Results to the Department to reconsider its analysis of the collapsing issue and, if necessary, revise the dumping margin calculation accordingly. See Slater Steels Corp. v. United States, 279 F. Supp. 2d 1370 (CIT August 21, 2003) ("Slater I"). Pursuant to the CIT's order in Slater I, the Department filed its Final Results of Redetermination Pursuant to Remand ("Remand I"). In Remand I, the Department determined that its decision to collapse the Viraj Group companies was supported by substantial evidence and in accordance with the law, and therefore, the Department did not revise its dumping margin calculations.

Upon review of Remand I, the CIT again remanded the 2000-2001 Final Results to the Department for further review of its collapsing determination, specifically citing certain issues for the Department to reexamine. See Slater Steels Corp. v. United States, Court No. 02-00551, Slip Op. 04-22 (CIT March 8, 2004) ("Slater II"). In response to the CIT's instructions in Slater II, the Department released its Final Results of Redetermination Pursuant to Remand ("Remand II"). In Remand II, the Department addressed the concerns raised by the CIT in Slater II and found that the decision to collapse the Viraj Group companies was supported by substantial evidence and in accordance with the law, and therefore, the Department did not revise its dumping margin calculations.

Upon review of Remand II, the CIT again remanded the 2000-2001 Final Results to the Department with specific instructions that the Department calculate individual dumping margins. See Slater III at 15. The CIT found that the Department's decision to collapse the Viraj Group companies in the 2000-2001 administrative review was not consistent with the Department's decision not to collapse the Viraj Group companies in previous Viraj reviews. See Slater III at 15; see also Notice of Initiation of New Shipper Antidumping Administrative Review, 60 FR 58598 (November 28, 1995); Stainless Steel Bar from India: Preliminary Results of New Shipper Antidumping Duty Administrative Review, 61 FR 54774 (October 22, 1996) ("New Shipper Preliminary Results"); and Stainless Steel Bar from India: Final Results of New Shipper Antidumping Duty Administrative Review, 62 FR 4029 (January 28, 1997) ("New Shipper Final Results" (collectively, "the new shipper review"); see also Stainless Steel Bar from India;

Preliminary Results of Antidumping Duty Administrative Review and New Shipper Review and Partial Rescission of Administrative Review, 65 FR 12209 (March 8, 2000) ("1998-1999 Preliminary Results") and Stainless Steel Bar from India; Final Results of Antidumping Duty Administrative Review and New Shipper Review and Partial Rescission of Administrative Review, 65 FR 48965 (August 10, 2000) with accompanying Issues and Decision Memorandum ("1998-1999 Decision Memorandum") (collectively, "the 1998-1999 administrative review").

In order to comply with the Court's order, the Department opened the record and collected certain information.

On March 8, 2005, the Department requested that VIL and VFL report their POR sales. On April 5, 2005, the Department received timely filed questionnaire responses. In response, on April 8, 2005, Viraj reported that all POR sales were made by VIL and that VFL had no sales to report.

On April 13, 2005, the Department received a cost allegation from the plaintiffs regarding the reported third-country sales. On April 22, 2005, the Department initiated a sales-below-cost investigation.

The Department sent supplemental questionnaires in April and May 2005 and received timely responses. On June 2, 2005, the plaintiffs submitted comments on the questionnaire responses.

The Department released the Draft Redetermination Pursuant to CIT Remand III ("Draft Remand III") to the parties for comment on June 20, 2005. The Department received comments from the parties on June 29 and July 5, 2005. See "Comments" infra.

DISCUSSION

Although the Department respectfully disagrees with the Court's orders in Slater III, the Department has nonetheless complied with the Court's instructions. Specifically, the Department has not collapsed VAL with VIL and VFL.

In Slater III, the Court noted that the "Plaintiffs in this case have not objected to the potential collapse of VIL and VFL . . . . Therefore, on remand, Commerce may consider collapsing VIL and VFL in accordance with the court's opinions in Slater I and Slater II." Slater III at 15. The Department already addressed the Court's opinions with respect to collapsing VIL and VFL in Remand I and Remand II. In Slater III, however, the Court did not rule on the merits of the Department's previous analyses due to its "prior practice" ruling. See Slater III at 13 ("This conclusion obviates the need to address the merits of Commerce's [Remand II] . . .").

For this remand redetermination, the Department finds, as it did in Remand II, that VIL should be collapsed with VFL because no claim that VIL and VFL should not be collapsed was ever properly raised. Thus, the only collapsing issue properly before the CIT is whether VIL and VFL, as one entity, should also be collapsed with VAL. The plaintiffs did not exhaust their administrative remedies with respect to collapsing VIL and VFL. In fact, as the record demonstrates, the plaintiffs agreed with the Department's original finding in the 2000-2001 administrative review to collapse VIL and VFL, stating that "the evidence supports the collapsing of...VIL and VFL into one entity..." See Petitioners' April 8, 2002 case brief at 3. Therefore, upon remand, Commerce finds no further need to address this issue and has continued to collapse VIL and VFL pursuant to 19 USC § 1677(33) and 19 CFR § 351.401(f), as it did originally in the 2000-2001 Final Results.

VAL did not export during the POR. Therefore, the Department has only calculated an antidumping duty margin for VIL/VFL. We based normal value, in part, on VIL/VFL's largest third-country market, Canada, because we determine that VIL/VFL does not have a viable home market pursuant to 19 USC § 1677b(a). We have relied in large part upon the most recently submitted sales and cost databases to calculate VIL/VFL's antidumping duty margin.

To calculate U.S. prices and normal value based on comparison market prices, we relied upon VIL/VFL's sales prices of comparable products to the United States and Canada. We relied in large part on the same methodologies we used in the 2000-2001 administrative review. The plaintiffs assert that the Department should alter the model matching characteristics and "weight the grades based on their chemical content proximity." Plaintiffs' June 2, 2005, comments at 2-3. However, when Commerce reopened the record in this remand to collect data specific only to VIL/VFL, to replace the consolidated VAL/VIL/VFL database, VIL/VFL reported the model matching hierarchy in the same manner VAL/VIL/VFL did in the original 2000-2001 administrative review. See Viraj's June 29, 2001, questionnaire response at 116-177, 142; see also Viraj's April 5, 2005, questionnaire response at B-3, C-3. The Department finds that the plaintiffs' request to change the model matching hierarchy at this late point in the proceeding exceeds the Court's directive. Thus, the Department has made no such adjustment in this remand redetermination.

VIL/VFL claimed a duty drawback adjustment in the administrative review, which the Department denied. See 2000-2001 Decision Memorandum at Comment 2. VIL/VFL claimed a duty drawback adjustment for its third country sales upon remand based on the same scheme, the Duty Entitlement Passbook Program, reported in the administrative review. We continue to find that VIL/VFL has neither made the necessary links between the import duty and the rebate, nor demonstrated that there were sufficient imports to account for the drawback received on the export of manufactured product to grant a duty drawback adjustment. See Viraj's April 5, 2005, questionnaire response at Exhibits B-10, C-7; Viraj's May 20, 2005, questionnaire response at 1-2, Exhibit RS1-2; and 2000-2001 Decision Memorandum at Comment 2.

We calculated U.S. direct selling expenses for certain bank fees (post-shipment credit expenses) based on information obtained as a result of not collapsing Viraj (i.e., collecting third country sales information). See "Comment 1" infra. We classified "clearing" expenses as movement expenses rather than CEP direct selling expenses, consistent with our determination in this respect in the 2000-2001 administrative review. See "Comment 3" infra. We calculated entered value consistent with our methodology in the 2000-2001 administrative review. See "Comment 4" infra. We corrected ministerial errors relating to the deduction of inland freight expenses and currency conversions for domestic indirect selling expenses. See "Comment 5" and "Ministerial Errors" infra.

To calculate the cost of production and constructed value, we valued the major inputs supplied by affiliated parties which we had not collapsed with VIL/VFL at the higher of the transfer price, market price, or cost of production in accordance with 19 USC § 1677b(f)(3) and 19 CFR § 351.407(b) ("the major input rule"). Specifically, we applied the major input rule to VIL's purchases of stainless steel round/bar and rod from VAL and the payments for VIL's plant and machinery, which it leased from VAL. We also applied the major input rule to VFL's purchases of ingots from VAL. To value the inputs VIL and VFL received from VAL, we relied on the transfer price. Because we collapsed VIL and VFL, we relied on the cost of production for stainless steel forged round/bar VIL received from VFL. We note that VIL's reported costs include the transfer price of inputs received by VIL and VFL from VAL and include the cost of production of inputs received by VIL from VFL.

We revised VIL's general and administrative expense rate calculation to include a loss on the sale of cars. See Cost of Production and Constructed Value Calculation Adjustments dated July 15, 2005. We accepted Viraj's deduction from financial expenses for post-shipment credit expenses based on information obtained as a result of not collapsing Viraj (i.e., from collecting third country sales information for VIL/VFL rather than home market information for VAL/VIL/VFL). See "Comment 1" infra.

We tested prices for VIL/VFL's sales to Canada to determine whether sales were made at prices below the cost of production. We found that, for certain specific products, more than 20 percent of the sales to Canada were at prices less than the cost of production, and the below-cost sales were made within an extended period of time in substantial quantities. In addition, these sales were made at prices that did not provide for the recovery of costs within a reasonable period of time. We therefore excluded these sales and used the remaining sales, if any, as the basis for determining normal value, in accordance with 19 USC § 1677b(b)(1).

As discussed above, we calculated an individual antidumping duty margin for VIL/VFL. However, the Department respectfully disagrees with the Court's decision that it should calculate individual antidumping duty margins for the Viraj Group companies. The Department has previously found and continues to be of the opinion that these companies are affiliated, can retool without a substantial restructuring of manufacturing priorities, and present a significant potential for manipulation. Thus, they should be collapsed pursuant to 19 CFR § 351.401(f).

In Slater III, the Court overturned Commerce's findings because it found collapsing to be inconsistent with Commerce's treatment of Viraj in previous reviews. The Court ruled that Commerce did not provide an "adequate explanation" for what the Court terms its change in practice. See Slater III at 15. The Department respectfully disagrees with the Court that there was a "practice" regarding collapsing the Viraj Group companies prior to the 2000-2001 administrative review. Indeed, it was not until the 2000-2001 administrative review that the Department made a clear, affirmative decision to collapse the Viraj Group companies.

Prior to the 2000-2001 administrative review, Viraj was involved in two reviews, the new shipper review and the 1998-1999 administrative review. As the Court pointed out in Slater III, the material facts concerning the products the Viraj Group companies produced were nearly the same in all three reviews. Id. at 6-7, 10. The Court, however, based its decision on its perception that Commerce had a "prior practice" with regard to collapsing the Viraj Group companies. See Slater III at 15 ("In this case, Commerce's reversal of its prior practice is inconsistent with core administrative law principles.").

The Court pointed to two events in the new shipper review which led to its conclusion. First, VIL reported, and the Department accepted, direct material costs based on the price VIL paid VAL for black bar. Id. at 7, 11. Second, the petitioners asked Commerce to consider VAL as a respondent, pinpointing VIL's reported purchases of stainless steel bars from VAL. Id. at 7. Based on these two events,[1] the Court concluded that the Department treated VAL as a supplier

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[1]The Department can find no mention of either of these two events in its published Federal Register notices. See New Shipper Preliminary Results, 61 FR at 54774-54776; see also New Shipper Final Results, 62 FR at 4029-4031.

of raw materials "independent" of VIL and that this information "indicated that Commerce at that time affirmatively chose not to collapse VAL and VIL." Id. at 11.

Despite any conclusion that may be drawn from the Department's actions in the new shipper review, in light of the Department's decision in the 1998-1999 administrative review, the Department believes that it did not have a "prior practice" of not collapsing the Viraj Group companies. To the contrary, Commerce's actions in the 1998-1999 administrative review were consistent with its affirmative decision to collapse the Viraj Group companies in the 2000-2001 administrative review.

In the 1998-1999 administrative review, the Department preliminarily applied total adverse facts available to Viraj because it did not report home market sales of stainless steel bar produced and sold by VAL until late in the proceeding. See 1998-1999 Preliminary Results, at 65 FR 12210. Ultimately, in the final results, the Department used neutral facts available to calculate Viraj's antidumping duty margin. See 1998-1999 Decision Memorandum at Comment 4. Specifically, the Department calculated "normal value based on the company's sales to a third country as facts available" in lieu of VAL's unusable home market sales data. Slater III at 8; see also 1998-1999 Decision Memorandum at Comment 4. In other words, the Department was missing the information necessary to calculate normal value accurately for Viraj based on home market sales. See 1998-1999 Decision Memorandum at Comment 4 (". . . while we did not resort to third-country sales in our [1998-1999 Preliminary Results], upon further review we have determined that the third-country sales information on the record is sufficient to calculate normal value."). Indeed, the only circumstances in which the Department would calculate an antidumping duty margin by comparing domestic sales of stainless steel bar produced and sold by VAL to U.S. sales of stainless steel bar produced and exported by VIL/VFL would be if VAL and VIL/VFL were collapsed and considered one entity, not if they were treated "independently."

When the 1998-1999 administrative review was reviewed by the CIT, the Court recognized that Commerce considered VAL's home market sales of black bar necessary to the dumping analysis when it upheld Commerce's use of neutral facts available in the 1998-1999 administrative review.[2] See Carpenter Technology Corp. v. United States and Viraj Impoexpo Ltd. v. United States, Consol. Court No. 00-09-00447, Slip Op. 02-77 (CIT July 30, 2002) at 7, 9 (". . . Viraj had reported all home market sales *including black bar*" [emphasis in original] and "If necessary information is missing from the administrative record, Commerce must make a determination on the basis of available information pursuant to 19 USC § 1677(e) . . ."). Further, in rebuking Viraj for not complying with Commerce's home market sales requests in a more timely fashion, the Court stated that "the fact that Commerce sought confirmation *at all* (whether all home market sales had been reported) should have acted as a red flag to Viraj regarding its reporting of home market sales" [emphasis in original]. Id. at 9. After the Department applied facts available in the 1998-1999 administrative review for VAL's missing home market sales, Viraj provided a consolidated sales and cost database for the Viraj Group companies in the 2000-2001 administrative review, no doubt mindful of the possibility of being subjected to an antidumping duty margin based on adverse facts available.

The Department believes that the action it took in the 1998-1999 administrative review signaled to Viraj that VAL and VIL/VFL would be collapsed and considered one entity and that

[2]Had Commerce's intent been not to collapse the Viraj Group companies, it would have been precluded from using VAL's home market sales that it made "independent" of VIL to calculate the antidumping duty margin.

it should report its data on that basis. In the 2000-2001 administrative review, the Department made a clear, affirmative decision to collapse the Viraj Group companies. As such, the Department does not share the Court's opinion that the history of this case provides a reliable foundation for the conclusion that Commerce "departed from its previous application of the antidumping regulations" when it collapsed the Viraj Group companies in the 2000-2001 administrative review. Remand III at 12.

The Court has remanded this issue for reconsideration to Commerce twice, in Slater I and Slater II. In Slater III, the Court did make references to the Department's collapsing analysis in Remand II. Specifically, the Court again stated that the Viraj Group companies do not have a sufficient overlap in the production of similar or identical merchandise for Commerce to collapse them. See Slater III at 13-14. In addition, the Court stated that Commerce's decision in the Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Germany, 67 FR 3159 (January 23, 2002) and accompanying Issues and Decision Memorandum at Comment 15 ("German Bar") is inconsistent with Commerce's explanation in Remand II, that a unilateral analysis[3] of potential shifts in manufacturing priorities is permissible under the collapsing regulation. However, the Court did not elaborate on its ruling because its conclusion with respect to Commerce's treatment of Viraj from previous reviews "obviates the need to address the merits of Commerce's" findings in Remand II. Slater III at 13.

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[3]The term "unilateral analysis" refers to the Department's finding that it need not always consider whether production shifts must "go both ways" in conducting the collapsing analysis. See Remand II at 11 (". . . the possibility of shifting production among companies in both directions is not a requirement for collapsing related entities.).

In Remand II, the Department explained that the "production facilities of the group companies converge with respect to bar." Remand II at 11. VAL produced black bar and VIL/VFL produced bright bar. The Department further explained that the record indicates that it would only cost VAL 2.8 percent of its relevant fixed asset value to supplement its production line to expand the overlap to include production facilities for bright bar. Id. at 30, 33-38. If VAL made this investment, it could move from producing similar merchandise to producing merchandise identical to that of VIL/VFL. The Department explained in great detail how this investment would not be substantial. Id. at 33-38. Indeed, the collapsing regulation states, in pertinent part, that two producers must "have production facilities for similar or identical products." 19 CFR § 351.401(f). The regulation does *not* say "have identical production facilities for identical products" or "have similar or identical production facilities for similar or identical products." See id.; see also Remand II at 1, 4, 10, 11, 15, 23, 26, 27, 29, 32, 42.

In German Bar, the Department determined that, for most of the products covered by the proceeding, the respondents would have to make "extensive and expensive infrastructure changes" for a "complete" or "partial retooling" in order to expand the overlap in production capabilities between the affiliated producers in question. German Bar at Comment 15 (". . . to meaningfully expand the range of sizes produced at either plant, both EWK and KEP would need to add entire production lines, not merely retool the existing operations."). While the Department stated that substantial retooling would be necessary at both German bar companies, the Department's decision in German Bar does not, as the Court suggests, preclude a unilateral approach. Indeed, if both German bar companies could not retool to produce such or similar merchandise, then it follows that each one individually was also unable to retool. Regardless, as the Department stated in Remand II, the affiliated producers in German Bar failed the collapsing test because of the limited overlap "in concert with" certain corporate impediments. Id. The Court has already ruled that Viraj had no such impediments. See Slater II at 5 ("[Remand I] contains sufficient evidence in support of the government's affirmative determination on the 'manipulation' issue").

The Department continues to believe that the record demonstrates that the Viraj Group companies acted as one integrated entity in the 2000-2001 administrative review. The companies are affiliated, can retool without a substantial restructuring of manufacturing priorities, and present a significant potential for manipulation. Viraj's operations are highly intertwined and interconnected. As such, the Viraj Group companies together, acting as one entity, control production and price of the subject merchandise and, by so doing, the decision of whether to sell at less than fair value in the United States. Accordingly, while we are complying with the Court's order, Commerce's position is that all of the Viraj Group companies should be collapsed pursuant to 19 USC § 1677(33) and 19 CFR § 351.401(f).

COMMENTS

Comment 1: Credit and Financial Expenses

Viraj's Argument

Viraj argues that the Department should not have classified its post-shipment credit expenses (interest usance export fees) as financial expenses because these expenses were reported separately in the U.S. sales database as credit expenses. Viraj argues that counting these expenses both as selling expenses and as a component of the cost of production is double counting and, thus, impermissible.

The Department included post-shipment credit expenses as financial expenses in both the 2000-2001 administrative review and the draft remand redetermination. See Draft Results at 7, citing to the 2000-2001 Decision Memorandum at Comment 3. In the 2000-2001 administrative review, the Department included these expenses as financial expenses explaining that "we are not reducing VIL's interest expenses for imputed credit expenses." See 2000-2001 Decision Memorandum at Comment 3, citing the Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Sheet and Strip in Coils from France ("French Sheet and Strip") 64 FR 30820, 30842 (June 8, 1999) at Comment 30.

Viraj argues that its expenses, however, are not imputed or theoretical, but, real expenses. Viraj asserts that the case cited by the Department in the 2000-2001 Decision Memorandum, French Sheet and Strip, does not apply to Viraj's situation because that case involved imputed expenses. Viraj asserts that the Department has allowed it to report post-shipment expenses as direct selling expenses and reduce its financial expenses accordingly in other segments of this proceeding and other cases covering different products. See Stainless Steel Wire Rod from India; Final Results of Antidumping Duty Administrative Review, 65 FR 31302 (May 17, 2000) and accompanying Issues and Decision Memorandum at Comment 5, and Stainless Steel Bar from India; Final Results, Rescission of Antidumping Duty Administrative Review in Part and Determination to Revoke in Part, 69 FR 55409 (September 14, 2004) and accompanying Issues and Decision Memorandum at Comment 6 ("2002-2003 Decision Memorandum") (collectively, "the 2002-2003 administrative review"). Further, Viraj argues that the Department has allowed other respondents to reduce financial expenses by similar expenses separately reported as selling expenses in other cases. See Certain Forged Stainless Steel Flanges From India: Final Results of

Antidumping Duty New Shipper Review, 68 FR 351 (January 3, 2003) and Notice of Final Results of Antidumping Duty Administrative Review: Certain Pasta From Italy, 65 FR 7349 (February 14, 2000).

Plaintiffs' Argument

The plaintiffs argue that the Department included the post-shipment credit expenses as financial expenses in the 2000-2001 administrative review and the draft remand redetermination. The plaintiffs assert that the Department should not reverse its original findings.

The plaintiffs argue that imputed credit expenses are not the same as Viraj's reported bank charges. The plaintiffs argue that the post-shipment credit expenses (interest usance export fees) are levied by the banks as actual expenses to charge Viraj for those institutions providing working capital to Viraj for exportation, whereas imputed credit expenses represent the opportunity cost of sending products to customers prior to payment.

The plaintiffs argue that Viraj is incorrect to ask the Department to follow the findings in separate proceedings because the findings are outdated and pertain to data and facts unique to separate proceedings. The plaintiffs contend that, if a separate segment should be examined, it should be the most recent segment of the proceeding, the 2002-2003 administrative review. Citing the 2002-2003 administrative review, the plaintiffs assert that the most accurate reporting would have been for Viraj to report the actual, transaction-specific export usance fees as direct selling expenses for exports to its third-country market and to the United States, reporting the correct day of payment as the date it obtained discounted payment of those institutions that charged Viraj payment penalties. See 2002-2003 Decision Memorandum at Comment 6. The petitioners argue that, since this information is not on the record, the Department should uphold its original findings and include these expenses as financial expenses.

Department Position

______The Department's regulations explain that direct selling expenses are expenses "that result from, and bear a direct relationship to, the particular sale in question." 19 CFR § 351.402(c). The Department accounts for these expenses in its pricing calculations pursuant to 19 USC § 1677b(a)(6)(C)(iii) or 19 USC § 1677a(d)(1). In situations involving discounted receivables, it is the Department's normal practice to: (1) base the date of payment for the sales transaction on the date that the respondent receives funds from the bank and (2) deduct any discounting fees incurred on the sale as a direct selling expense. We find that this practice appropriately accounts for the cost associated with extending credit to customers because it accounts for the time between shipment and receipt of funds (credit expenses) and any additional actual costs associated with the bank's providing advance payment on the sale (direct bank charges). As such, to the extent that bank charges (actual expenses) are accounted for as direct selling expenses, we remove these expenses from the cost of production (e.g., financial expenses) in order to avoid double counting.___

In the original margin calculation for the 2000-2001 administrative review, the Department included post-shipment credit expenses as financial expenses. See 2000-2001 Decision Memorandum at Comment 3. No evidence on the record of that original review supported Viraj's claim that its reported credit expenses were actual, transaction-specific, direct selling expenses and, thus, should be excluded from financial expenses. Id.

In this redetermination on remand, however, we sought additional information from VIL/VFL in order to reflect the Court's order. In particular, since VIL/VFL did not have a viable home market, we requested third country sales information. This information revealed that Viraj incurred actual, transaction-specific, direct selling expenses in the form of post-shipment credit expenses. Therefore, for our remand redetermination, we agree with Viraj that its post-shipment credit fees (interest usance export fees) should be excluded from its financial expenses. We included these expenses as actual, direct selling expenses and, thus, excluded them from financial expenses in order to avoid double counting.

When Viraj reported its third country sales upon remand, for credit expenses, it reported transaction-specific post-shipment credit fees. See Viraj's May 20, 2005, supplemental questionnaire response at 2-3. For its U.S. sales, Viraj reported credit expenses using the "rate of interest as been taken on the rate at which USD can be borrowed" since it did "not have any short-term borrowing in USD." See Viraj's April 5, 2005, questionnaire response at 23 (section C). Viraj purports in its case brief, however, to have reported the "actual interest expense paid by Viraj in rupees to Viraj's bank" for U.S. credit expenses. See Viraj's June 29, 2005, case brief at 2.

When the Department asked Viraj to provide supporting documentation for its third country credit calculation, Viraj provided several bank documents and pages from VIL/VFL's ledger accounts which record the post-shipment credit fees. See Viraj's May 20, 2005, supplemental questionnaire response at 12, 15-17, 21-24, 27-30, 33-37, 40-44, 47-52. Several entries in these ledger accounts relate to U.S. invoices. Id. at 35, 43. Thus, the record supports Viraj's contention that it incurs actual, transaction-specific, post-shipment credit expenses on

U.S. sales. However, the record does not support Viraj's contention that it reported these actual expenses in its U.S. sales database for this remand proceeding. See Viraj's April 5, 2005, questionnaire response at 23 and 72 (section C).

Since the record demonstrates that Viraj did not report its transaction-specific post-shipment credit expenses on its U.S. sales, we used the information Viraj submitted to support its third country credit calculation to calculate these expenses for its U.S. sales. Viraj incurs post-shipment credit expenses on export sales based on the same scheme, regardless of the market. See Viraj's May 20, 2005, supplemental questionnaire response at 12-52 and 62-72. These fees are based on Indian Rupee denominated interest rates. Id. The banks calculate the fees based on the number of days between Viraj's shipment of merchandise to the customer and the "date of realisation" (the date the customer pays the bank).[4] Id. If the customer does not pay the fee within the payment terms agreed upon, as indicated on the commercial invoice and reported in Viraj's sales database, Viraj incurs penalty fees calculated at higher interest rates. Id. We calculated the fees based on Viraj's reported U.S. payment terms under the scheme. For the penalty fees, we applied the average penalty interest rate for the period of time exceeding the agreed upon payment terms. See Remand Redetermination Calculation Memorandum, dated July 15, 2005 ("Calculation Memorandum"), at 2.

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[4] Viraj explained in its narrative response that it reported its payment date as the "date we received payment in our bank account." See Viraj's April 5, 2002, questionnaire response at 9 (section B and C). However, the bank documents, ledger accounts, and credit calculations submitted by Viraj indicate that Viraj reported the "date of realisation" as the payment date. See Viraj's May 20, 2005, supplemental questionnaire response at 12-52 and 62-72.

Comment 2: U.S. Indirect Selling Expenses

Plaintiffs' Argument

The plaintiffs argue that the Department should deduct U.S. indirect selling expenses incurred by Viraj's U.S. affiliate, Viraj USA, Inc. ("VUI"), from the starting price in the calculation of constructed export price ("CEP"). The plaintiffs assert that, even though Viraj reported no U.S. indirect selling expenses for VUI in its remand redetermination questionnaire responses and sales databases, Viraj reported a U.S. indirect selling expense ratio in an exhibit of its supplemental questionnaire response in the 2000-2001 administrative review.

Citing Lasko Metal Products, Inc. v. United States, 43 F.3d 1442, 1443 (Fed. Cir. 1994), the plaintiffs argue that the Department's first and foremost obligation is to calculate an accurate antidumping duty margin. The plaintiffs argue that Sanyo Elec. Co. v. United States, 86 F. Supp. 2d 1232, 1239 (CIT 1999) stands for the proposition that the Department cannot and should not ignore the true expenses incurred by VUI. Furthermore, relying on NTN Bearing Corp. v. United States, 74 F.3d 1204, 1208 (Fed. Cir. 1995), the plaintiffs argue that, in considering the error made by one party (in this case, the Department's decision to collapse all Viraj Group companies, which was held by the Court to be in error), it would be paradoxical to ignore the errors made by another party (in this case, what they claim is Viraj's error in not reporting indirect selling expenses). Thus, the plaintiffs assert that the Department should use the ratio submitted in the 2000-2001 administrative review supplemental questionnaire response to calculate U.S. indirect selling expenses for Viraj's CEP sales.

Viraj's Argument

Viraj argues that the Department did not account for U.S. indirect selling expenses in the 2000-2001 administrative review and that the plaintiffs did not object at that time. Thus, Viraj asserts that the plaintiffs' request exceeds the Court's directive.

Viraj asserts that its affiliated U.S. seller, VUI, incurs both direct and indirect selling expenses. Viraj claims that, should the Department make a deduction from starting price for indirect selling expenses incurred on CEP sales, the Department should not include expenses (i.e., direct expenses) accounted for elsewhere in the calculation of CEP. Viraj provides a revised indirect selling expenses ratio calculation.

Department Position

The Court explicitly directed Commerce not to collapse Viraj. See Slater III at 15. Thus, upon remand, Commerce will only make revisions to its margin calculations flowing from its decision, pursuant to the Court's order, with respect to collapsing and from the information obtained from this decision. We agree with Viraj that the plaintiffs' request exceeds the Court's directive.

CEP selling expenses are solely related to U.S. sales, no matter which Viraj entity produced and exported the subject merchandise. Neither the Court's order with respect to collapsing nor anything which flows from that order involves U.S. CEP selling expenses. Indeed, during the proceeding underlying Slater III, no party objected to Commerce's treatment of Viraj's U.S. CEP selling expenses.

The plaintiffs had ample opportunity to object to the Department's calculation of CEP. In the preliminary results of the 2000-2001 administrative review, the Department explained that "interested parties may submit case briefs within 30 days of the publication of this notice." 2001-2002 Preliminary Results at 10377, 10380. The plaintiffs made no claim to adjust CEP for indirect selling expenses in their case briefs. See 2001-2002 Decision Memorandum. Similarly, and perhaps because they had not exhausted their administrative remedies, the plaintiffs did not challenge the calculation of CEP in Court. Now, upon remand, the plaintiffs seek a second opportunity to raise this issue. If parties challenge Commerce's determination on one issue and fail to raise a second issue, but upon remand are rewarded for their failure to raise that second issue, the administrative process, and the principles of exhaustion of administrative remedies are undermined.

In this case, the Department finds that the plaintiffs' request exceeds the Court's directive upon remand. Moreover, the plaintiffs earlier had ample opportunity to request an adjustment to CEP for indirect selling expenses; by raising this issue for the first time during this third remand, they have failed to exhaust their administrative remedies. None of the cases cited by the plaintiffs involved the scope of a remand directive, and the general principles in those cases do not override the Court's specific directive here. Moreover, clerical errors are not at issue here, as in NTN Bearing Corp. v. United States, 74 F.3d 1204, 1208 (Fed. Cir. 1995).

For the aforementioned reasons, the Department did not make the plaintiffs' requested adjustment to CEP.

Comment 3: Treatment of Certain Selling Expenses

Viraj's Argument

Viraj makes several claims concerning the Department's treatment of selling expenses. First, Viraj asserts that only selling expenses incurred in the United States should be deducted from the starting price when calculating CEP, not expenses incurred in India (i.e., credit expenses and bank charges). Second, Viraj asserts that the Department triple counted credit expenses and double counted certain "clearing" expenses in the margin calculations.

Plaintiffs' Argument

The plaintiffs disagree with Viraj. First, the plaintiffs assert that the designation of selling expenses in terms of economic activity is germane only for indirect, not direct, selling expenses. Second, the plaintiffs assert that the Department did not double or triple count "clearing" and credit expenses.

Department Position

We disagree with Viraj. First, we treated CEP selling expenses in the same manner as we did in the 2000-2001 administrative review. See Amended Final Calculations margin program log at lines 446, 567-568. Further, we disagree with Viraj that only expenses incurred in the United States should be deducted from the starting price to calculate CEP. The statue states, in pertinent part, that the price used to establish CEP shall be reduced by "expenses that result from, and bear a direct relationship to, the sale. . .[and]. . .any selling expenses that the seller pays on behalf of the purchaser." 19 USC § 1677a(d)(1). The Department's regulations state that Commerce "will make adjustments associated with commercial activities in the United States that relate to the sale to the unaffiliated purchaser, no matter *where* or when paid" [emphasis added]. 19 CFR § 351.402(b). Therefore, we deducted bank fees from the starting price to calculate CEP in our remand redetermination calculations.

Second, because we have revised our treatment of Viraj's post-shipment credit expenses, Viraj's comments with respect to double or triple counting credit expenses are rendered moot.

See "Comment 1" supra. Further, we disagree with Viraj that we double counted "clearing" expenses in our draft remand results. However, upon re-examining the record, we find that we incorrectly classified these expenses as selling expenses. In the 2000-2001 administrative review, the Department correctly treated these expenses as movement expenses. See Amended Final Calculations margin program log at line 439, 566-568 and Final Results Calculation Memorandum at 2. Viraj incurred these expenses in relation to customs clearing and entry. See Viraj's April 5, 2005, questionnaire response at 20 (section C) and C048-C050. Therefore, we included "clearing" expenses as movement expenses in our final remand redetermination calculations. See Calculation Memorandum at 2.

Comment 4: Entered Value

Plaintiffs' Argument

The plaintiffs assert that Viraj's reported entered values are unreliable. Accordingly, the plaintiffs argue that the Department should either (1) calculate a *bona fide* entry value to calculate an *ad valorem* assessment rate or (2) apply a per-unit assessment rate which would eliminate the mis-valuation of Viraj's reported entered values.

Viraj's Argument

Viraj contends that the plaintiffs' argument is unclear and that the Department used net price as entered value in calculating assessment rates.

Department Position

We agree with the plaintiffs. While Viraj is correct that the Department used net price to calculate its antidumping duty margin, Viraj is incorrect when it implies that the Department used net price for entered value with regard to the importer-specific assessment. For our remand redetermination calculations, we calculated entered values using the same calculation we used in the 2000-2001 administrative review, which is consistent with the calculation request made by the plaintiffs. See Calculation Memorandum at 2; see also Amended Final Calculations margin program log at line 472; Allegations of Ministerial Errors in the Final Results, dated August 8, 2002, at 3; and Final Results Calculation Memorandum at Attachment 7 (margin program log) at lines 470. As discussed in more detail in our proprietary Calculation Memorandum, Viraj's reported entered values are unreliable. See Calculation Memorandum at 2.

Comment 5: Domestic Inland Freight

Plaintiffs' Argument

The plaintiffs assert that the Department did not deduct Viraj's domestic inland freight charges from the starting price to calculate EP and CEP.

Viraj's Argument

Viraj did not comment.

Department Position

We agree with the plaintiffs and have deducted domestic inland freight charges from the starting price to calculate EP and CEP in these final remand results. See Calculation Memorandum at 3.

Ministerial Errors

Upon re-examining the draft remand redetermination calculations, the Department discovered that it made currency conversion errors with respect to domestic indirect selling expenses. For the remand redetermination calculations, the Department has corrected these errors. See Calculation Memorandum at 3.

RESULTS OF REDETERMINATION

The Department has calculated an antidumping duty margin for Viraj Impoexpo Limited/Viraj Forgings Limited. The weighted-average margin is 0.84 percent. See Calculation Memorandum at 1. Upon a final and conclusive decision affirming this remand redetermination, the Department will publish notice of its amended final results in the Federal Register and instruct U.S. Customs and Border Protection to assess duties in accordance with this redetermination.

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Susan Kuhbach
Acting Assistant Secretary
for Import Administration

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Date