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Heveafil Sdn. Bhd. and Filati Lastex Sdn. Bhd. v. United States
Court No. 98-00908 (CIT May 28, 2003)

FINAL RESULTS OF REDETERMINATION

PURSUANT TO COURT REMAND

SUMMARY

The Department of Commerce (Department) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (CIT) in Heveafil Sdn. Bhd. and Filati Lastex Sdn. Bhd. v. United States, Court No. 98-00908 (CIT May 28, 2003) (Heveafil). The CIT's remand was issued at the Department's request, pursuant to the U.S. Court of Appeals for the Federal Circuit's (CAFC's) opinion in Heveafil Sdn. Bhd. v. U.S., 58 Fed. Appx. 843 (Fed. Cir. 2003) (Heveafil II).

The Department issued its draft final results to Heveafil Sdn. Bhd. and Filmax Sdn. Bhd. (collectively "Heveafil") on July 15, 2003. On August 4, 2003, we received comments on these final results from Heveafil. These comments are addressed below.

In accordance with the CIT's instructions to assign a new dumping rate to Heveafil in the 1995-1996 administrative review on extruded rubber thread from Malaysia, we have assigned a final dumping rate to this company of 52.89 percent using adverse facts available (AFA).

A. Background

On March 19, 2003, the CAFC issued its ruling in Heveafil II. In that decision, the CAFC affirmed the Department's use of AFA to assign the final dumping rate to Heveafil in the administrative

proceeding of Extruded Rubber Thread From Malaysia; Final Results of Antidumping Duty Administrative Review, 63 FR 12752 (Mar. 16, 1998) (Thread Final Results). The CAFC held that the factual findings leading to Commerce's decision to use facts otherwise available and draw adverse inferences were supported by substantial evidence and the Department did not commit legal error or abuse its discretion in doing so. See Heveafil II, 58 Fed. Appx. at 847 and 849. However, the CAFC remanded to the CIT the Department's decision to use the specific dumping rate assigned as AFA, because the source of the corroboration of the dumping rate imposed on Heveafil was invalidated after the final results. See Heveafil II, 58 Fed. Appx. at 850-51.

Pursuant to the CAFC decision, on May 28, 2003, the CIT remanded this case to the Department to assign a new dumping rate to Heveafil "that is statutorily authorized and properly corroborated." Heveafil at 1.

B. Selection of the Final Dumping Margin

The issue remanded concerns the Department's selection of the appropriate facts available rate for Heveafil in Thread Final Results. In that case, we assigned a rate using AFA, based on a finding that Heveafil did not cooperate to the best of its ability. In the underlying administrative review, the Department found that Heveafil failed to cooperate by failing to preserve certain source documents for verification. See Thread Final Results, 63 FR at 12752. Because Heveafil failed to preserve this information as instructed by the Department, combined with the delays caused by Heveafil's lack of preparedness for verification, the Department found that Heveafil had not cooperated to the best of its ability and the use of AFA was warranted. See Heveafil II, 58 Fed. Appx. at 849-50; see also Thread Final Results, 63 FR at 12752.

As AFA, the Department used the highest rate calculated for any respondent in any segment of the proceeding and that rate was 54.31 percent. Moreover, the Department found that this rate had probative value because it was a calculated rate from the 1994-1995 administrative review. See Thread Final Results, 63 FR at 12753.

Subsequent to the publication of the final results, the rate on which Heveafil's AFA margin was based was invalidated in litigation and reduced to 36.14 percent. See Heveafil II, 58 Fed. Appx. at 850. Citing its recent decision in D & L Supply Co. v. United States, 113 F.3d 1220 (Fed. Cir. 1997), the CAFC found that it is unlawful for the Department to continue to use an invalidated antidumping duty margin as an AFA rate, and it remanded this issue for the selection of another valid rate. See Id. Therefore, we have reexamined our final results with respect to Heveafil and find that it is now appropriate to assign a rate of 52.89 percent as AFA.

We note that the revised AFA rate of 52.89 percent is the highest rate calculated for any respondent in any segment of this proceeding, and as such is in accordance with the decision forming the basis for the final results. Moreover, we find that this rate is particularly appropriate here because: 1) it is the rate calculated for a respondent in the same administrative review (i.e., Filati Lastex Elastofibre (Malaysia) (Filati)); 2) the rate was based entirely on verified sales and cost information submitted by Filati; and 3) this rate was upheld by the CIT as part of litigation arising from this review. See Heveafil et al. v. United States, Slip Op. 2001-23 (Feb. 28, 2001) (Heveafil I) (citing Thread Final Results, 63 FR 12752, 12761-12763)). Finally, we note that because the rate being used is a calculated rate, based on data and information submitted by another respondent during the course of the same administrative review, the rate is not "secondary information" as defined by the Department's

regulations. Hence, corroboration is not required. See 19 CFR 351.308 (c) and (d) (2003); see also SAA at 870.

C. Comments from Interested Parties

On August 4, 2003, Heveafil submitted comments on our draft redetermination. These comments are addressed below.

Comment 1: *Whether the Selected Rate Is "Secondary Information"*

Heveafil disagrees with the Department that the rate selected as AFA is not secondary information within the meaning of section 776(c) of the Act, and thus does not have to be corroborated. According to Heveafil, section 776(c) of the Act lists a variety of possible sources of information that may be used as AFA, but it does not limit secondary information to those sources. Heveafil rests its conclusion on the fact that this section of the Act states that adverse inferences "may" be derived from various sources, not that they "must" be. Heveafil argues that, to the extent that the Department's regulations narrow the definition of "secondary information" beyond the definition in the Act, they are invalid.

Heveafil also contends that the Department's interpretation of this definition is contrary to the intent of Congress. Specifically, Heveafil asserts that it is not logical for Congress to have regarded information of another company as "secondary information" if it were submitted in a different review, but regarded information from the same company as primary information if it were submitted in the same review. Heveafil asserts that the importance of the corroboration requirement has been recognized by the both the CIT and the CAFC, because both courts have held that AFA rates should bear some relationship to the respondent's actual dumping margin. See, e.g., F.lli De Cecco de Filippo

Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (De Cecco). According to Heveafil, the Department does not meet the corroboration requirement simply by using information for the same period of time, but rather has been directed by the courts to examine a particular respondent's business and sales practices, as well as its performance in past phases of the proceeding. See De Cecco, 216 F.3d at 1033; Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1340 (Fed. Cir. 2002); American Silicon Technologies v. United States, 240 F. Supp 1306, 1312 (CIT 2002); Ferro Union, Inc. v. United States, 44 F.2d 1310, 1355 (CIT 1999).

Finally, Heveafil argues that the Department's assertion that information of a different company from the same proceeding is not "secondary information" is contrary to its own past determinations. In support of this assertion, Heveafil cites Ball Bearings and Parts Thereof From France, Germany, Italy, and Singapore: Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission of Administrative Reviews, and Notice of Intent To Revoke Order In Part, 68 FR 6404, 6405 (Feb. 7, 2003) (Ball Bearings); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission of Administrative Reviews, and Notice of Intent To Revoke Orders in Part, 66 FR 8931, 8933 (Feb. 5, 2001) (AFBs 2001); and Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission of Administrative Reviews, and Notice of Intent to Revoke Orders in Part, 65 FR 18033, 18036 (Apr. 6, 2000) (AFBs 2000). Specifically, Heveafil notes that the Department defined secondary information in each of those

proceedings as information "from a prior segment of the proceeding or from another company in the same proceeding."

Department's Position:

We disagree with Heveafil that a dumping margin calculated entirely from reported and verified cost and sales information, obtained in the course of the same segment of the proceeding at issue, constitutes secondary information. Section 776(c) of the Act is unambiguous on this point. Specifically, this section of the Act states:

> When the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority or the Commission, as the case may be, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal. (emphasis added)

Moreover, while we agree that the list of sources in the Department's regulations is not exhaustive, we disagree that this fact requires the Department to interpret the regulations in a manner which is inconsistent with the plain language of the Act. Accordingly, we find that it is unnecessary to corroborate the dumping margin calculated for Filati in the 1995-1996 administrative review because this rate was based on and calculated from information obtained in the course of the same administrative review. See generally SAA at 870 (stating that information obtained from interested parties during the particular review is an independent source of data used to corroborate secondary information, such as petition information, a determination from a prior review, etc.). See also Notice of Final Determination of Sales at Less Than Fair Value: Solid Agricultural Grade Ammonium Nitrate from Ukraine, 66 FR 38632, 38634 (July 25, 2001) and Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review and

Preliminary Partial Rescission of Antidumping Duty Administrative Review, 66 FR 52100, 52103 (Oct. 12, 2001) (unchanged in the final results).

Finally, we disagree that the Department defined secondary information to include calculated rates from the same segment of the same proceeding in AFBs 2001 and Ball Bearings. In the final results of those cases, we used rates calculated from the less than fair value investigations in those proceedings, which were secondary information requiring corroboration. Furthermore, in these cases, we stated that secondary information was information obtained from the same company in the same proceeding. We did not state that it was information obtained from the same company in the same segment (i.e., the ongoing review) of the same proceeding.[1] As noted above, this latter interpretation would be contrary to the Act.

Regarding AFBs 2000, we similarly disagree that the Department characterized an AFA rate taken from the same segment of the same proceeding as secondary information. Rather, as we stated in our position to Comment 7 of the decision memorandum prepared for the final results of AFBs 2000, "As the selected rate is derived from information obtained in the course of this review, corroboration is unnecessary." See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part, 65 FR 49219 and accompanying decision memorandum at Comment 7.

[1] To help avoid confusion about the intent of the language in the above-referenced cases, we will clarify this point in future determinations in those proceedings.

Comment 2: *Whether the Selected Rate is Unduly Punitive*

Heveafil contends that the rate selected in this redetermination, 52.89 percent, is inappropriate because it is unduly punitive. Heveafil notes that this rate is almost 400 percent higher than the highest calculated margin ever assigned to Heveafil, and over 1200 percent higher than its average calculated rate. Heveafil concludes that this differential demonstrates that the selected rate does not provide a reasonable indication of Heveafil's actual performance in the review under consideration. According to Heveafil, a difference of such magnitude would not be upheld by the courts, in light of the CAFC's ruling in De Cecco that AFA rates must be "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance."

Heveafil maintains that the courts have analyzed AFA dumping rates in two steps: 1) determining the portion of the AFA rate that represents the respondent's actual dumping rate; and 2) analyzing the additional amount imposed as a "deterrent" and then rejecting these rates where the mark-up is unduly punitive. See American Silicon Technologies v. United States, Slip Op. 03-69 (CIT 2003) (American Silicon) at 4. Heveafil asserts that, applying the same analysis here, the Department conservatively should use the highest rate ever calculated for Heveafil (i.e., 10.65 percent) as the actual dumping rate during the instant proceeding, and the remainder (i.e., 42.24 percent) as the deterrence component. Heveafil argues that, because this latter component is almost four times the company's "actual" rate, it is unreasonably high and cannot be squared with the CAFC's admonition in De Cecco that the Department may not "overreach reality in seeking to maximize deterrence." According to Heveafil, this conclusion was also reached at the CIT in American Silicon, when the CIT found that a differential of only 25.27 percentage points, or 37 percent, was "so far removed from being 'a

reasonably accurate estimate of the respondent's actual rate' that it is disproportionately punitive in nature."

In any event, Heveafil contends that the rate selected is not a relevant measure of Heveafil's actual dumping rate because it was calculated using data from a company with a much smaller U.S. export volume of extruded rubber thread (i.e., Filati) and a significantly different product mix. Specifically, Heveafil notes that Filati sold thread primarily with a talc finish (while Heveafil's sales were weighted heavily towards silicon-finished products) and in diaper- and food-niche grades (while Heveafil's were not). Heveafil asserts that talc-finished products are significantly lower-priced than silicon-finished ones and cannot be sold to the same customers because they are not readily interchangeable in production machinery. Heveafil concludes that, because the majority of Filati's dumping margin was related to talc products in diaper and food grades, this margin cannot be relevant to Heveafil.

Finally, Heveafil asserts that the Department should take into account Heveafil's efforts to comply with its requirements throughout the review and assign Heveafil a less adverse facts available rate. According to Heveafil, this conclusion is consistent with the Department's long-standing practice of assigning less adverse facts available rates to respondents that significantly cooperate. See, e.g., Roller Chain, Other Than Bicycle From Japan: Preliminary Results and Partial Recission of Antidumping Duty Administrative Review, 63 FR 25450, 25453-54 (May 8, 1998).

Department's Position:

In Thread Final Results we stated the following:

> Section 776(b) of the Act provides that adverse inferences may be used with respect to a party that has failed to cooperate to the best of its ability. See Statement of Administrative Action accompanying the URAA, H.R. Rep. No. 316, 103rd Cong., 2d Sess. 870 (SAA). Because we were unable to verify the information submitted by Heveafil in this period of review (POR) and because the company failed to adequately prepare and provide information during the verification, we determine that Heveafil did not cooperate to the best of its ability. Thus, pursuant to section 776(b) of the Act, we are basing Heveafil's margin on adverse facts available for purposes of the final results.
>
> As adverse facts available for Heveafil, we have used the highest rate calculated for any respondent in any segment of this proceeding. This rate is 54.31 percent. For further discussion, see Comment 16 in the "Analysis of Comments Received" section of this notice.

See 63 Fed. Reg. 12752, 12752-53.

In the present remand redetermination, the CIT has directed us to select a different margin because the one initially chosen was subsequently invalidated in litigation. Therefore, in accordance with our intent as reflected in Thread Final Results, we have selected a rate of 52.89 percent because it is now the highest rate calculated for any respondent in any segment of the proceeding. Furthermore, we note that this rate is not only based on verified sales and cost data, but it has also been upheld by the CIT.

We disagree with Heveafil that the size of this margin renders it an inappropriate source of AFA. At the time that the CIT issued its ruling in this case, the CIT affirmed the Department's use of the margin originally chosen (i.e., 54.31). Therefore, we find that this issue has been settled by the CIT because the CIT affirmed the Department's use of the 54.31 percent rate, and now the Department is selecting the calculated rate of 52.89 percent, which is a difference of 1.42 percent less than originally stated.

We similarly find unpersuasive Heveafil's arguments that the Department should reconsider Heveafil's level of cooperation in selecting the appropriate AFA rate. As with the size of the margin selected, this issue was also squarely addressed by the CIT in its 2001 opinion, as well as by the CAFC in its 2003 opinion. Specifically, the CIT stated the following:

> Heveafil is correct that Commerce has assigned less adverse facts available in circumstances where it has determined that a respondent has been sufficiently "cooperative." See e.g., Roller Chain, Other Than Bicycle From Japan: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 63 Fed. Reg. 25,450, 25,453 (May 8, 1998) ("Roller Chain"). The Court is of the opinion, however, that these previous policy choices do not constrain Commerce to assign Heveafil a more advantageous dumping margin here.
>
> Most importantly, Commerce did not conclude that Heveafil offered sufficient cooperation. See Final Results, 63 Fed. Reg. at 12,763; cf. Roller Chain, 63 Fed. Reg. at 25,454. Although Heveafil may be able to offer some evidence supporting the contention that it cooperated, Commerce has provided sufficient evidence in demonstrating that Heveafil did not cooperate in verification. . . .

See Heveafil Sdn. Bhd., and Filati Lastex Sdn. Bhd. v. United States, Slip Op. 2001-22, 13-14 (Feb. 27, 2001). (footnote omitted)

The CAFC stated the following:

> We conclude that substantial evidence supports Commerce's express determination that Heveafil "did not cooperate to the best of its ability in verifying its reported cost data.". . .
>
> The failure to maintain source documents, including the 1996 Budgeting Report, and the lack of preparation and responsiveness constitute substantial evidence of Heveafil's failure to cooperate to the best of its ability. . . .
>
> While Commerce has on occasion assigned a lower antidumping duty margin to respondents who have cooperated to a significant degree, there is no established formula requiring less adverse margins when respondents have been partially cooperative. We have previously noted that "{i}n the case of uncooperative respondents, the discretion granted by the statute appears to be particularly great, allowing Commerce to select among an enumeration of secondary sources as a basis for its adverse factual inferences." Ta Chen Stainless Steel Pipe, Inc. V.

> United States, 298 F.3d 1330, 1338-39 (Fed. Cir. 2002). In light of the broad discretion granted to Commerce to select among various sources for the appropriate adverse facts antidumping duty margin, we decline Heveafil's invitation to hold that in light of Heveafil's efforts to cooperate in the verification investigation, Commerce was barred from selecting a dumping margin greater than the largest margin imposed on Heveafil in any previous review.

Heveafil II, 58 Fed. Appx. at 849-850.

Finally, we disagree with Heveafil that Filati's export volume and product mix are so different from Heveafil's own that any margin calculated for Filati cannot be relevant to Heveafil. Regardless of Filati's export volume relative to Heveafil's, we find that its calculated rate reflects the business practice occurring in the rubber thread industry. Moreover, there is no evidence on the record of this review which indicates that Filati's calculated rate was based on an uncharacteristic business practice. Again, the CIT addressed this point in its 2001 opinion when it stated

> the Court, . . . , does not agree with Heveafil that the size of a particular respondent or the size of its U.S. sales, alone, are dispositive as to the probative nature of a selected dumping margin.

See Heveafil Sdn. Bhd., and Filati Lastex Sdn. Bhd. v. United States, Slip Op. 2001-22, at 15 & fn.6 (Feb. 27, 2001).

Morever, while Filati may have sold mainly extruded rubber thread with talc finish and Heveafil mostly thread of silicon finish, this fact alone does not support a finding that the margin for Filati cannot be applied to Heveafil. Thread with each type of finish is standard in the rubber thread industry, and both types (and grades) are widely sold. Indeed, Heveafil itself sold a significant quantity of talc-finish thread, and it also sold both diaper- and food-grade products to U.S. customers. See Heveafil's August 4, 2003, submission at page 4. Moreover, there is no evidence on the record to show that either type of finish, in and of itself, yields thread of

substandard quality, nor has Heveafil demonstrated that there is anything unusual about the sales of either.[2] Rather, Heveafil merely posits that, because the product mix of the two companies differs, the margins must differ as well.

To support its argument, Heveafil provides certain statistics related to Filati's product mix. When this data is examined closely, however, it is evident that these statistics do not support Heveafil's conclusion. Specifically, these statistics show that Filati made [ ] sales of silicon products, and that the dumping margin on [ ] of these was far above the calculated rate of 52.89 percent.[3] We find that this fact pattern weakens Heveafil's claim, rather than strengthening it, because the very sales that Heveafil argues are representative of its own selling practices are those that are some of the most unfairly traded. Therefore, if anything, the margin calculated for Filati could well be conservative vis-a-vis Heveafil.

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[2] We find that Heveafil's argument that talc products are lower-priced vis-a-vis silicon products to be meaningless in this case. In order to perform its dumping analysis, the Department compares U.S. price to normal value. Products with lower U.S. prices may be more fairly traded than products with higher ones, because the normal values may also be lower.

[3] Specifically, the dumping margins for the sales in question are [ ] percent, determined by dividing the total "emargin" for each sale by the total value of each. Aggregating these margins, we find that the weighted-average dumping margin on Filati's sales of silicon-coated thread is [ ] percent, also well above the selected rate. Finally, we recognize that the [ ] of these three sales is of second quality merchandise; however, if this sale were removed from the analysis, we would continue to find that the dumping margin on the remaining [ ] is [ ] percent, still almost [ ]the selected rate.

For the foregoing reasons, we find that the Filati margin calculated in the 1995-1996 administrative review is an appropriate source of AFA for Heveafil in this case. Accordingly, we have assigned this rate to Heveafil as AFA for purposes of this final redetermination.

D. Conclusion

The Department hereby complies with the remand order as directed by the CIT in Heveafil and assigns a final dumping margin of 52.89 percent to Heveafil. Upon a final and conclusive court decision, we will publish an amended final results of review to that effect.

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James J. Jochum
Assistant Secretary
for Import Administration

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(Date)