Decisions of the United States Court of International Trade

Slip Op. 04–20

CAROLINA TOBACCO COMPANY, PLAINTIFF, v. UNITED STATES CUSTOMS SERVICE, DEFENDANT.

Court No. 03–00123

[Plaintiff challenges Defendant's determination that Plaintiff's $80,000 continuous bond is "inadequate to ensure compliance with Customs law and regulations" and must be replaced with a $3 million bond. Defendant based its determination on Customs Directive 99–3510–04. Plaintiff argues that the Directive merely calculates a bond amount based on a set formula, without an individualized assessment of the risk a particular importer poses to the collection of revenue; thus Plaintiff argues that the Directive is inconsistent with 19 C.F.R. § 113.13. Plaintiff asks the Court to enjoin Defendant from demanding that Plaintiff obtain a bond in excess of $80,000 without considering the factors set forth by 19 C.F.R. § 113.13 and also enjoin Defendant from demanding a bond in excess of an amount reasonably necessary to ensure Plaintiff's compliance with Customs laws and regulations. Defendant moves for judgment upon the agency record arguing that it acted reasonably within the broad discretion given to it under 19 U.S.C. § 1623(a) to ensure compliance with applicable law and protect the revenue. Held: The Court agrees that the regulatory framework Defendant has established to set bond requirements is reasonable in light of the discretion ceded to it by Congress; therefore Defendant's motion is granted.]

Decided: March 4, 2004

Brownstein, Rask, Sweeney, Kerr, Grim, DeSylvia & Hay, LLP (*Paul G. Dodds*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); *Chi S. Choy*, United States Bureau of Customs and Boarder Protection, of counsel, for Defendant.

OPINION

Plaintiff Carolina Tobacco Company ("Carolina") brings this action challenging the determination by the United States Customs Service, now organized as the Bureau of Customs and Border Protection, ("Customs") that it must increase the amount of its continuous bond from $80,000 to $3 million. Carolina asserts that Customs failed to consider the factors set forth in 19 C.F.R. § 113.13 and

merely followed a formula set forth in Customs Directive 99–3510–04. Customs contends that it is given discretion under 19 U.S.C. § 1623(a) to set a bond amount necessary to protect the revenue and it argues that the Regulation and Directive are a reasonable interpretation of the statute. Presently before the Court is Customs' motion for judgment upon the agency record pursuant to CIT Rule 56.1. For the reasons which follow, Customs' motion is granted.

Jurisdiction and Standard of Review

Carolina invokes the jurisdiction of this court under 28 U.S.C. § 1581(i). The scope and standard of review for actions brought under § 1581(i) are provided in 5 U.S.C. § 706. *See Defenders of Wildlife v. Hogarth*, 25 CIT ____ , ____ , 177 F. Supp. 2d 1336, 1343 (2001). "The court must 'hold unlawful and set aside agency action, findings, and conclusions found to be — (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .' " *Id.* quoting 5 U.S.C. § 706(2)(A). The scope of review in a § 1581(i) action is limited to the administrative record. *Id.*

Background

Since 1998 Carolina has been in the business of manufacturing and importing "value priced" cigarettes and has had an $80,000 continuous bond since early 1999. In its original bond application Carolina represented that for the year 1999–2000 it expected to make 5 dutiable entries valued at $500,000 and 50 duty-free entries valued at $5 million. Def.'s Br. at 8. In 2000–2001 the value of the tobacco products Carolina imported increased to $8.2 million and in 2001–2002 the value increased to $13.8 million. *Id.* at 9. Carolina never updated its bond application to reflect the increased value of its imports and the accompanying increase in its duty and tax liability. *Id.*

On September 17, 2002 Customs notified Carolina via letter that its bond amount had been "determined to be inadequate to ensure compliance with Customs laws and regulations." Administrative Record Document ("AR") 2. Customs instructed Carolina to replace its $80,000 bond with a $3 million bond within 60 days. *Id.* Although Customs' letter stated that its determination was based on 19 C.F.R. § 113.13, Carolina avers that the decision was based solely on Customs Directive 99–3510–04 (July 23, 1991), without consideration of the guidelines set forth in 19 C.F.R. § 113.13(b). Those guidelines state that:

> In determining whether the amount of a bond is sufficient, the port director . . . should at least consider:
>
> (1) The prior record of the principal in timely payment of duties, taxes, and charges with respect to the transaction(s) involving such payments;

> (2) The prior record of the principal in complying with Customs demands for redelivery, the obligation to hold unexamined merchandise intact, and other requirements relating to enforcement and administration of Customs and other laws and regulations;
>
> (3) The value and nature of the merchandise involved in the transaction(s) to be secured;
>
> (4) The degree and type of supervision that Customs will exercise over the transaction(s);
>
> (5) The prior record of the principal in honoring bond commitments, including the payment of liquidated damages; and
>
> (6) Any additional information contained in any application for a bond.

Nevertheless, Customs Directive 99–3510–04 (July 23, 1991) instructs that:

> The bond limit of liability amount shall be fixed in an amount the district director may deem necessary to accomplish the purpose for which the bond is given. . . . To assist the director in fixing the limit of liability amount, the following formula shall be used.
>
> None to $1,000,000 duties and taxes — the bond limit of liability amount shall be fixed in multiples of $10,000 nearest to 10 percent of duties, taxes and fees paid by the importer or broker acting as importer of record during the calendar year preceding the date of the application.
>
> Over $1,000,000 duties and — taxes the bond limit of liability shall be fixed in multiples of $100,000 nearest to 10 percent of duties, taxes and fees paid by an importer or broker acting as importer of record during the calendar year preceding the date of application.
>
> In either of these two categories a bond may be demanded with a limit of liability amount greater than that computed using this formula, provided sufficient evidence of high risk is onhand to support the higher amount.

The total duties, taxes and fees paid by Carolina in the previous year were $25,982,838.52, and 10% of that figure rounded to the nearest $100,000 yielded a bond amount of $3 million. Pl.'s Reply Br. at 4.

Arguments

In support of its motion for judgment on the agency record, Customs relies on 19 U.S.C. § 1623(a), which provides:

> In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce.

The Secretary of the Treasury may also "prescribe the conditions and form of such bond." 19 U.S.C. § 1623(b)(1). Customs states that 19 C.F.R. § 113.13 was issued pursuant to 19 U.S.C. § 1623. Def.'s Br. at 3. Customs also explains that "[d]uring the notice and comment period preceding the issuance of 19 C.F.R. § 113.13, [it] noted requests that it codify a consistent bond formula and explained that it would accomplish this goal by use of Directives." *Id.* at 4.

Concerning Directive 99–3510–04, Customs states that:

> The 10 percent formula represents Customs's assessment of the security necessary to accomplish the statutory goals "in most situations" — *i.e.*, law abiding importers. Indeed, 19 C.F.R. §§ 24.3 & 142.14,[1] when read together, create at least a four-week lag time between the first withdrawal of merchandise and the date Customs may take action against that importer. During that entire time period, the importer remains free to withdraw merchandise for consumption and, thus, the 10 percent formula provides the Government with security during the intervening period.

Def.'s Br. at 15–16 (citation omitted) (footnote added). Contrary to Carolina's assertion that the Directive ignores the guidelines set forth in 19 C.F.R. § 113.13, Customs asserts that "implicit in the Directive is an analysis of the regulation's factors that relate to the value and nature of the merchandise involved and the level of supervision." *Id.* at 17. Customs states that this is a "permissible interpretation of its own regulation" and "merely provides port directors with a consistent basis for risk assessment." *Id.* (citation omitted).

Carolina's central argument in opposition to Customs' motion for judgment on the agency record is that Customs failed to make an individualized assessment of the risk Carolina posed to the revenue.

> Defendant's directive here is inconsistent with the plain language of 19 C.F.R. § 113.13(b), which mandates an individualized assessment of each importer and its activity rather than application of a generalized formula. In light of the fact that

[1] 19 C.F.R. § 24.3 concerns the ordinary payment of Customs bills and § 142.14 concerns the delinquent payment of Customs bills.

> the regulation specifically spells out six factors that must be considered in setting the bond, there is no room for defendant to enact and apply a formula that says the "general rule" is 10% of the previous year's duties, taxes and fees; indeed, any "formula" approach is inherently inconsistent with the regulation mandating individualized assessment. Contrary to defendant's argument, the 10% formula is not a permissible interpretation of its own regulation that requires individual assessments, not "general rules" or "formulas."

Pl.'s Br. at 10. Because the Directive is inconsistent with the Regulation, Carolina argues that Customs' "action in applying the 10% formula without performing an individual analysis of plaintiff and its activities is arbitrary, capricious and contrary to law." *Id.* at 18.

Analysis

As Customs has argued, and as this court previously recognized in *Hera Shipping, Inc. v. Carnes*, 10 CIT 493, 496, 640 F. Supp. 266, 269 (1986), "[t]he grant of authority for requiring bonds and setting their amount is strongly stated and comprehensive." Although the guidelines set forth by 19 C.F.R. § 113.13 and the instructions contained in Customs Directive 99–3510–04 appear to contemplate different schemes for establishing an importer's bond requirement, the methodologies are not necessarily inconsistent. The Court is satisfied with Customs' explanation that, due to the lag time before it could stop an importer from withdrawing merchandise for consumption, a 10 percent bond is a necessary minimum amount of protection for the revenue. *See* Def.'s Br. at 15–16. Moreover, the Court finds reasonable Customs' explanation at oral argument of the interplay between the Directive and the Regulation, namely that the 10 percent bond is required when the importer has a favorable review under 19 C.F.R. § 113.13 and an even higher bond would be required if analysis under these guidelines indicated that the importer posed a greater risk to the revenue. *See also* Def.'s Reply Br. at 12. Nevertheless, the Court is sympathetic to Carolina's position where, despite its excellent history of making timely payments to Customs, its manner of doing business and even its ability to do business, is threatened by the higher bond requirement. Be that as it may, the regulatory framework Customs has established is not unreasonable given the discretion ceded to it by Congress in 19 U.S.C. § 1623(a).

Conclusion

For the foregoing reasons, Customs' motion for judgment upon the agency record is granted.

Slip Op. 04–21

TIMKEN US CORPORATION AND TIMKEN NADELLAGER, GmbH, PLAINTIFFS, v. UNITED STATES, DEFENDANT.

Court No. 00–09–00454

Plaintiffs, Timken US Corporation ("Timken") and Timken Nadellager, GmbH ("TNG"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging one aspect of the United States Department of Commerce's ("Commerce") determination entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom* ("*Final Results*"), 65 Fed. Reg. 49,219 (Aug. 11, 2000). Specifically, plaintiffs contend that Commerce erred by refusing to correct an error in reporting channels of distribution for TNG, an affiliated company of Timken and German producer of cylindrical roller bearings ("CRBs"). Commerce maintains that Timken failed to demonstrate that the error was clerical in nature and argues that the record supports Commerce's finding that the alleged error was either a substantive issue or an error in judgment.

Held: Plaintiffs' 56.2 motion is granted. Case remanded.

March 5, 2004

Stewart and Stewart (*Terence P. Stewart*, *Geert De Prest* and *Lane S. Hurewitz*) for Timken US Corporation and Timken Nadellager, GmbH, plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke*); of counsel: *Augusto Guerra*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

OPINION

TSOUCALAS, Senior Judge: Plaintiffs, Timken US Corporation[1] ("Timken") and Timken Nadellager, GmbH[2] ("TNG"), move pur-

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[1] This action was originally brought by The Torrington Company and Torrington Nadellager GmbH in September 2000. *See* Summons ¶1. The Torrington Company was acquired by the Timken Company on February 18, 2003, and is now known as Timken US Corporation. Timken's German affiliate is now known as Timken Nadellager, GmbH ("TNG"). *See* Disclosure of Corporate Affiliations & Fin. Interest at 1 (filed with this Court on Feb. 3, 2004). Timken appeared as a respondent in the subject reviews before Commerce and appears before this Court in the same capacity.

[2] This action challenges the final results of the tenth administrative review of antifriction bearings from Germany, which cover CRBs produced by TNG. Cylindrical roller bearings produced by TNG were also subject to the eighth and ninth administrative reviews in which Commerce determined *de minimis* dumping margins for the subject product. *See Final Results of Antidumping Duty Administrative Reviews on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom*, 64 Fed. Reg. 35,590, 35,591 (July 1, 1999); *Final Results of Antidumping Duty Administrative Reviews on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, 63 Fed. Reg. 33,320, 33,321 (June 18, 1998) (collectively "eighth and ninth administrative reviews").

suant to USCIT R. 56.2 for judgment upon the agency record challenging one aspect of the United States Department of Commerce's ("Commerce") determination entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom* ("*Final Results*"), 65 Fed. Reg. 49,219 (Aug. 11, 2000). Specifically, plaintiffs contend that Commerce erred by refusing to correct an error in reporting channels of distribution for TNG, an affiliated company of Timken and German producer of cylindrical roller bearings ("CRBs"). Commerce maintains that Timken failed to demonstrate that the error was clerical in nature and argues that the record supports Commerce's finding that the alleged error was either a substantive issue or an error in judgment.

BACKGROUND

The administrative review at issue involves the period of review covering May 1, 1998, through April 30, 1999.[3] *See Final Results*, 65 Fed. Reg. at 49,219. Commerce published the preliminary results of the subject reviews on April 6, 2000. *See Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission of Administrative Reviews, and Notice of Intent to Revoke Orders in Part on Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom ("Preliminary Results*"), 65 Fed. Reg. 18,033. Commerce published the *Final Results* at issue on August 11, 2000.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a (2000) and 28 U.S.C. § 1581(c) (2000).

STANDARD OF REVIEW

The Court will uphold Commerce's final determination in an antidumping administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *see NTN Bearing Corp. of Am. v. United States*, 24 CIT 385, 389–90, 104 F. Supp. 2d 110,

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[3] Since the administrative review at issue was initiated after December 31, 1994, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994) (effective January 1, 1995). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

115–16 (2000) (detailing Court's standard of review in antidumping proceedings).

DISCUSSION

A. Factual Background

During the tenth administrative review, Commerce instructed Timken to report the channels of distribution for TNG's home market sales. *See* App. Timken's Mem. Supp. R. 56.2 Mot. J. Upon Agency R. ("Timken's App.") Tab 4 at 1. Commerce indicated that "the information [was] necessary to make appropriate comparisons of sales at the same level of trade or to adjust normal value, if appropriate, when sales are compared at different levels of trade." Def.'s Mem. Opp'n Pls.' Mot. J. Upon Agency R. ("Def.'s Mem.") Ex. 1 at A–4 (emphasis omitted). In response to this request, Timken identified five distribution channels corresponding to customer categories for TNG's home market sales, including: (1) factory to large original equipment manufacturers ("OEMs") ("channel 1"); (2) factory to other OEMs ("channel 2"); (3) factory to distributors ("channel 3"); (4) TNG to OEM customers ("channel 4"); and (5) TNG to distributor customers ("channel 5"). *See* Timken's App. Tab 3 at A–21 — A–24. Timken also described the sales process for each channel of distribution. *See id.*

Commerce eventually "conducted a sales verification" of Timken in February 2000, and subsequently issued an analysis memorandum for the *Preliminary Results* entitled *Issues and Decision Memorandum for the Administrative Reviews of Antifriction Bearings (other than tapered roller bearings) and parts thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kindom — May 1 1998, through April 30, 1999* ("*Issues & Decision Mem.*"). *See id.* Tab 10 at 1. In its decision memorandum, "Commerce explained that for the five channels of distribution reported by [TNG] in its [home market] sales listing, [a senior import compliance specialist] examined the selling activities, the point in the channel of distribution at which the selling activities occurred, and the types of customers that purchased the foreign like product from [TNG]." Def.'s Mem. at 5. Commerce determined that three channels of distribution were for home market sales by TNG, and the remaining two channels of distribution were for "resales" by TNG's affiliated marketing entity. *See* Timken's App. Tab 4 at 3. As a result, Commerce re-designated channel 1 as HM1 (home market 1), grouped channels 4 and 5 together and re-designated them HM2 (home market 2) and also grouped channels 2 and 3 together and re-designated them HM3 (home market 3). *See id.* Essentially, Commerce grouped channels 4 and 5 and channels 2 and 3 together upon a determination that the points in which selling activities occurred within these different channels of distribution were indistinguishable. *See id.*

In determining the dumping margin, Commerce used constructed value ("CV") when no sales existed of "an identical or similar model sold in the home market or when the identical or similar model was disregarded as below cost." *Id.* at 7.[4] "Profit was calculated by multiplying the level-of-trade-specific weighted-average profit rate calculated on home market sales made in the ordinary course of trade by the cost of production. . . of the model." *Id.* Based on this analysis, Commerce calculated a dumping margin of 61.60 percent for CRBs produced by TNG. *See id.* at 1; *Final Results*, 65 Fed. Reg. at 49,221; *Preliminary Results*, 65 Fed. Reg. at 18,041.

B. Timken's Contentions

Timken states that in responding to Commerce's request for information, Timken relied on "customer names to classify its home market sales according to distribution channel." Timken's Mem. Supp. R. 56.2 Mot. J. Upon Agency R. ("Timken's Mem.") at 6. As a result, a certain number of transactions were unintentionally reported in channel 1 instead of channel 2 or channel 3. Ultimately, these transactions were grouped into HM1 instead of HM3. *See id.* at 7–13.

According to Timken, these misclassifications can be grouped into three broad fact patterns. First, Timken inadvertently reported a certain number of transactions as sales to large OEMs instead of classifying them as sales to small OEMs. *See id.* at 7. Second, Timken unintentionally reported a certain number of transactions as sales for the production of large original equipment instead of sales for use as replacement parts. *See id.* at 8. Third, Timken mistakenly reported a certain number of transactions as sales to large OEMs instead of labeling them as "units sold as samples, [that] were delivered to the customer's prototype center." *Id.* at 10 (emphasis omitted). "Although Commerce verified [Timken's] home market sales, [Timken argues that Commerce] did not pursue the classification o[f] individual transactions into their appropriate distribution channels at verification." *Id.* at 11 (citations omitted).

Timken claims that Commerce's subsequent calculation of an abnormally high CV profit rate resulted from these misclassified transactions. *See id.* at 11–12. According to Timken, these transactions only covered a minimal percentage "of all units sold in the [level of trade ("LOT")] (as a percentage of sales quantity reported in the home market sales listing)." *Id.* at 11. Timken maintains that the remaining sales in the LOT were "disregarded" because Commerce found them to have been made at prices below cost of production

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[4] Under post-URAA law, pursuant to 19 U.S.C. §§ 1677b(a)(1) and 1677(16) (1994), Commerce must first look to identical merchandise in matching the United States model to the comparable home market model. If a determination cannot be satisfactorily made using identical merchandise, Commerce must look to like merchandise—initially under the second category and, if that is not available, under the third category.

("COP"). *See id.* Timken further claims that the calculation of an abnormal CV profit rate caused Commerce to compute an inaccurate dumping margin. *See id.* at 11–12.

During the administrative review, Timken identified these mistakes and requested that Commerce either correct Timken's "inadvertent errors by reclassifying certain home market sales, or . . . in the alternative, combine all home market LOTs in the CV– profit calculation and use that rate for home market LOT." *Id.* at 12 (emphasis omitted). Timken supplied supporting documentation and claims that Commerce did not indicate that such information was inadequate, nor did Commerce request additional supporting evidence. *See id.* at 12–13.

In the *Issues & Decision Mem.*, Commerce rejected Timken's arguments that the errors should be corrected because Timken did not show that these errors were clerical in nature. *See* Timken's App. Tab 10 at 50–52. Timken contends that Commerce is mandated to correct these errors because they were unintentional and because "Commerce's goal in administrative reviews is to determine margins 'as accurately as possible.' " Timken's Mem. at 17 (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)). Timken argues that the present situation involving mis- classified channels of distribution is similar to the mis- categorized sales situation identified in *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206–09 (Fed. Cir. 1995). *See* Timken's Mem. at 17–18, 26–31. Timken points out that in *NTN*, the United States Court of Appeals for the Federal Circuit ("CAFC") held that "Commerce should correct inadvertent 'clerical' errors *made by respondents* to avoid manifestly unjust results, even if the errors are discovered subsequent to the deadline for submitting information, and even if the error is not obvious from [the] record at the time." *Id.* at 18 (citing *NTN Bearing*, 74 F.3d at 126–09) (emphasis added). Timken also points out that precedent has cautioned Commerce "not to draw distinctions between 'substantive' and 'clerical' errors in an overly narrow manner." *Id.* (citing *World Finer Foods, Inc. v. United States*, 24 CIT 541, 550 (2000)).

While Timken admits that the relevant statute, legislative history and agency regulations do not directly address the issue of inadvertent errors committed by respondents, Timken argues that each supports the proposition that unintentional errors should be corrected. *See id.* at 22–26. Timken also raises issue with Commerce's position that errors of judgment are distinguishable because such a finding is "inconsistent with the *caveat* articulated in *World Finer Foods* that '[w]here the line is difficult to draw between permissible ministerial or clerical error correction and impermissible factual or methodological changes," Commerce should classify such error as clerical. *Id.* at 27 (quoting *World Finer Foods*, 24 CIT at 550).

Finally, Timken applies the test established by Commerce in *Final Results of Antidumping Duty Administrative Reviews of Certain Fresh Cut Flowers From Columbia* ("*Columbian Flowers*"), 61 Fed. Reg. 42,833, 42,834 (Aug. 19, 1996), and cited by Commerce in the *Final Results*, to the facts of this case and argues that its errors "are analogous to the types of errors Commerce determined to be 'clerical' errors and which were corrected in [*Columbian*] *Flowers*." Timken's Mem. at 30. Accordingly, Timken maintains that Commerce improperly refused to correct the error identified by Timken in the subject review.

C. Analysis

The antidumping statute requires Commerce to calculate dumping margins as accurately as possible in each administrative review. *See Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT ____ , ____ , 178 F. Supp. 2d 1305, 1322 (2001) (citing *Rhone Poulenc*, 899 F.2d at 1191). "[A]ntidumping laws are not punitive in nature, but are designed to remedy the inequities caused by unfair trade practices." *Allied Tube & Conduit Corp. v. United States*, 24 CIT 1357, 1370, 127 F. Supp. 2d 207, 218 (2000); *see NTN*, 74 F.3d at 1208 (stating that "the antidumping laws are remedial not punitive" (citing *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103–04 (Fed. Cir. 1990))). Although antidumping laws "afford the domestic manufacturer strong protection against dumping," Commerce is still required to "make a fair and equitable valuation, which may [ultimately] reduce the antidumping margin." *Smith-Corona Group v. United States*, 713 F.2d 1568, 1576 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). These two competing purposes seem to conflict with each other. *See American Permac, Inc. v. United States*, 12 CIT 1134, 1137, 703 F. Supp. 97, 100 (1988). On the one hand, Commerce is commissioned to protect the domestic industry from unfair trade practices and on the other, Commerce is responsible for promoting free trade. *See id.* In application, however, the "two purposes of the statute complement, rather than conflict with each other." *Id.*

When applying these notions to the issue at bar, the Court recognizes that Commerce often establishes policies to ensure the consistent procedural application of antidumping laws. *See Allied Tube*, 24 CIT at 1370, 127 F. Supp. 2d at 218–19 (stating that "[f]air and equitable margins are calculated when the administering authorities are consistent in their procedural application of the law"). In the past, Commerce corrected a respondent's own clerical errors only if Commerce "could assess from information already on the record that an error ha[d] been made, that the error [was] obvious from the record, and that the correction [was] accurate." Def.'s Mem. at 26. As a re-

sult of the CAFC's holding in *NTN*,[5] however, Commerce reevaluated its policy for correcting clerical errors of respondents and developed the six-part *Columbian Flowers Test*.[6] In its *Issues & Decision Mem.*, Commerce explained that Timken failed to satisfy the first and second criteria of this test. *See* Timken's App. Tab 10 at 50–52.

The first prong of the *Columbian Flowers Test* states that Commerce accepts respondent's corrections if the error in question is demonstrated to be clerical. Clerical errors have been defined as mistakes "made by a clerk or other subordinate, upon whom devolved no duty to exercise judgment, in writing or copying the figures or in exercising his intention." *PPG Indus., Inc. v. United States*, 7 CIT 118, 124 (1984) (citations omitted). Inadvertencies, on the other hand, have been described as "an oversight or involuntary accident, or the result of inattention or carelessness." *Id.* (citing *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 68 Cust. Ct. 17, 22, 336 F. Supp. 1395, 1399 (1972), *aff'd*, 61 CCPA 90, C.A.D. 1129, 499 F.2d 1277 (1974)).

In its supporting brief, Timken argues that Commerce has applied a broader definition of "clerical errors" in past reviews. In fact, Commerce applied the *Columbian Flowers Test* and accepted the inclusion of a non-subject merchandise sale in the dumping margin as a clerical error in its *Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review and Final Determination Not to Revoke in Part for Canned Pineapple Fruit from Thailand*, 2000 WL 1880665 at Cmt. 6 (Dec. 13, 2000). Commerce also found an error in coding the date of sale for one quarter of

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[5] *NTN* involved the inadvertent use of a code for high precision bearing tolerances rather than the standard precision bearing tolerances and the listing of four sales to foreign customers as sales to domestic customers. *See NTN*, 74 F.3d at 1205. Commerce rejected the respondent's request for correction upon a finding that "the errors were not obvious from the record and that the deadline for submitting new information had expired." *Id.* The CAFC held, however, that the "requirement that the record disclose the error essentially preclude[d] correction of clerical errors made by a respondent. Where clerical personnel of a respondent transpose code numbers, the existing administrative record will not disclose that such error occurred." *Id.* at 1208. The CAFC also held that "while it may be a reasonable exercise of [an agency] to restrict the correction of its own clerical errors to those obvious from the record, the same rule applied to a respondent's errors becomes arbitrary." *Id.*

[6] In *Columbian Flowers*, Commerce stated that it would

> accept corrections of clerical errors under the following conditions: (1) [t]he error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error; (2) [Commerce] must be satisfied that the corrective documentation provided in support of the clerical error allegation is reliable; (3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error; (4) the clerical error allegation, and any corrective documentation, must be submitted to [Commerce] no later than the due date for the respondent's administrative case brief; (5) the clerical error must not entail a substantial revision of the response; and (6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification.

Columbian Flowers ("*Columbian Flowers Test*"), 61 Fed. Reg. at 42,834.

a customer's contracts to be clerical in *Final Results of Antidumping Duty Administrative Review of Certain Cold-rolled Carbon Steel Flat Products from the Netherlands*, 64 Fed. Reg. 11,825 (Mar. 10, 1999). However, in neither of these cases, nor in other holdings referenced by Timken, *see* Timken's Mem. at 31, does the respondent commit the same error in two prior reviews. In the present case, Timken admits that it misclassified home market sales of the same subject merchandise in the eighth and ninth administrative reviews, but argues the misclassifications did not result in any meaningful changes to the dumping margins. *See supra* text accompanying note 2. Nonetheless, this Court agrees with Commerce's determination that the error at issue was not clerical. Moreover, the Court does not accept Timken's interpretation of the law that Commerce should correct the error simply because it was inadvertent, *see* Timken's Reply Br. at 2, since such a finding would broaden the holding of *NTN.*

Commerce proffers a harsh interpretation of the facts of this case. Commerce states that

> in preparing the data for channels of distribution, as in *prior reviews*, [Timken] relied on the customer names to classify its home market sales according to distribution channel. Thereby, [Timken] exercised judgment, based upon its examination of its own documents and procedures, that sales to particular customers properly belonged in Channel 1 as sales to "large" OEMs, because of the various distribution and sales activities that were incurred with respect to the sales to these "large" OEMs. [Timken's] coding of the sales at issue as sales to "large OEMs," thus, was neither a ministerial nor clerical error, but a deliberate and intentional decision, based upon its actions in prior reviews.

Def.'s Mem. at 28–29 (emphasis in original). Commerce compares the facts of this case with those in *Hambro Auto. Corp. v. United States*, 66 CCPA 113, 117–20, C.A.D. 1231, 603 F.2d 850, 853–55 (1979), and argues that the Court should render the misclassifications an error in judgment or a mistake of law. *See* Def.'s Mem. at 29. Commerce's reliance on *Hambro* is misplaced.

Hambro concerned an importer's challenge to a denial of protests filed after the government refused the importer's request for reliquidation of certain entries. *See Hambro*, 66 CCPA at 117, 603 F.2d at 850. The alleged errors involved statutory values that were calculated by subtracting (rather than adding) cost of export divisions from home market cost figures. *See Hambro*, 66 CCPA at 188–19, 603 F.2d at 854. In *Hambro*, the "errors" were deemed a mistake of law because the importer was fully aware of its general expenses and profits, but believed the legal consequences of such values to be different than they were. *See Hambro*, 66 CCPA at 117–20, 603 F.2d at 853–55. Unlike the importer in *Hambro*, Timken did not realize

that it misclassified certain home market sales, nor was Timken cognizant of the legal consequences of its error until the dumping margins were calculated in the *Preliminary Results*. *See* Timken's Mem. at 17–36.

A complete review of the confidential material of this case reveals a situation where rigid compliance with the *Columbian Flowers Test* would render a grossly erroneous dumping margin. Timken's misclassified transactions covered only a minuscule percentage of all units sold in the LOT. *See* Timken's Mem. at 7–10 (proprietary version). The remaining sales in the LOT were disregarded in Commerce's profit calculation because they were to be sold at prices below the COP. *See id.* Ultimately, Commerce calculated an extremely high CV profit rate and a dumping margin of 61.60 percent based only upon a few misclassified sales. *See* Timken's App. Tabs 2, 4, 7 (proprietary version). Timken contends that it "had no knowledge or reason to believe" that its reliance on customer names would result in any misclassifications. Timken's Mem. at 6. Commerce argues that since Timken used the same reporting method in the eighth and ninth reviews, Timken's action in the tenth review was indeed calculated. *See* Def.'s Mem. at 28– 29. Since the classification of Timken's home market sales was never an issue addressed in the eighth and ninth administrative reviews, this Court cannot reach the conclusion that Timken intentionally misclassified transactions to attain a desired dumping margin.

The Court, alternatively, must balance the interest of protecting Commerce's authority to create and implement policy to protect the domestic industry from unfair trade practices, and its correlating obligation "to calculate the most accurate dumping margins possible." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT ___ , ___ , 159 F. Supp. 2d 714, 727 (2001), *aff'd*, 2003 U.S. App. LEXIS 466 (Fed. Cir. Jan. 10, 2003), *reh'g denied en banc*, 2003 U.S. App. LEXIS 6759, *1 (Fed. Cir. Mar. 18, 2003). Commerce directed Timken to provide a description of its channels of distribution and sales process and clarified that the information is "intended to provide [Commerce] with the information necessary to make appropriate comparisons of sales at the same level of trade or to adjust [NV,] if appropriate, when sales are compared at different levels of trade." Timken's App. Tab 10 at 50. Commerce also cautioned Timken that the information was of "critical importance." These instructions are intended to solicit accurate information that Commerce must utilize to calculate the antidumping margins. *Cf. Acciai Speciali Terni, S.p.A. v. United States*, 25 CIT ___ , ___ , 142 F. Supp. 2d 969, 982 (2001) (stating that "[i]t is respondent's obligation to supply Commerce with accurate information" (citations omitted)). Had Timken followed these instructions, perhaps this case would not be before this Court. The Court cautions Timken to pay closer attention to the manner in which it classifies and reports future home market sales transac-

tions. Commerce, with its limited resources, cannot be expected "to serve as a surrogate to guarantee the correctness of submissions." *Id.* (quoting *Yamaha Motor Co. v. United States*, 19 CIT 1349, 1359, 910 F. Supp. 679, 687 (1995)). Although the Court recognizes that the burden falls on a respondent to provide accurate information, it is unreasonable to believe that a respondent can do so in each and every review without committing occasional errors. *See Shandong*, 25 CIT at ___ , 159 F. Supp. 2d at 727 (holding that a restriction of Commerce's power to correct ministerial errors would undermine its "underlying obligation to calculate the most accurate dumping margins possible").

Upon publication of the estimated dumping margin in the *Preliminary Results*, Timken "reexamined its submission and discovered the inadvertent channel of distribution classification errors (re[garding] home market LOT 1)." Timken's Mem. at 12. Timken thereafter submitted documentation clarifying the correct channel of distribution classifications. *See id.* Commerce contends that such documentation is not reliable and, therefore, Timken's clerical error claims also fail to satisfy the second prong of the *Columbian Flowers Test*. Commerce determined that Timken's purchase orders, invoices, and notes (some handwritten) were unreliable because "certain record evidence conflict[ed] with" the supplemental information. Timken's App. Tab 10 at 52. In its supporting brief, Commerce states:

> The conflict, of course, existed between [Timken's] original description of distribution channel 1 . . . which included prototype and sample sales . . . and [Timken's] request recategorization of the prototype and sample sales at issue as sales to "other" OEMs or sales to "distributors." There was also conflict between Commerce's conclusions in its verification report and its preliminary sales analysis memorandum that [Timken's] representations of its distribution channels, including channel 1, were consistent with its response and that [Timken] had reported the customer category and channel of distribution fields accurately in its sales databases. Commerce simply found "no information on the record that specifically precludes the transactions in question from being categorized as sales to large OEMs."

Def.'s Mem. at 37 (quoting Timken's App. Tab 10 at 52). The Court, however, cannot discern what record evidence Commerce is referring to. In this case, had Timken properly classified the transactions at issue in its response to Commerce's questionnaire, it would have categorized the sales as distribution channel 2 or 3 because the customers did not buy the units for use in producing large original equipment. *See* Timken's App. Tabs 7 & 15 (proprietary version). Thus, any information submitted by Timken to correct the misclassifications would conflict with the original data supplied by Timken. In

the interest of implementing the overarching principle of the antidumping statute, that is, to determine dumping margins as accurately as possible, *see Fujian*, 25 CIT at ___ , 178 F. Supp. 2d at 1322, the Court remands this case to Commerce to further investigate the claims raised during the administrative proceeding. Any other finding would render a punitive result in contravention to *Allied Tube*, 24 CIT at 1370, 127 F. Supp. 2d at 218.

CONCLUSION

The error committed by Timken is not clerical. This case could have been avoided had Timken followed the instructions of Commerce and classified its sales transactions properly. Nonetheless, the Court must consider the overarching principle of the antidumping statute in rendering a decision on this issue. It is undisputed that Commerce's goal in administrative reviews is to determine antidumping margins "as accurately as possible." *Rhone Poulenc*, 899 F.2d at 1191. In this case, an erroneous dumping margin was calculated as a result of a few misclassified transactions reported by Timken. These errors were identified upon publication of the *Preliminary Results*, and Commerce was provided with supporting documentation. Since the Court finds the facts of this case to be distinct from prior case law, the Court remands this case to Commerce for further investigation and to make any corrections necessary to attain the most accurate antidumping margin.

Slip Op. 04–22

SLATER STEELS CORPORATION, *et al.*, PLAINTIFFS, v. UNITED STATES, DEFENDANT. VIRAJ GROUP, PLAINTIFF, v. UNITED STATES OF AMERICA, DEFENDANTS, AND SLATER STEELS CORPORATION, *etal.*, DEFENDANTS-INTERVENOR.

Consol. Ct. No. 02–00551

[Case remanded to the United States Department of Commerce.]

Decided: March 8, 2004

Collier Shannon Scott, PLLC, (*Robin H. Gilbert*), for Plaintiffs and Defendants-Intervenor Slater Steels Corp., *et al.*

Peter D. Keisler, Assistant Attorney General, United States Department of Justice, (*David M. Cohen*), Director, Commercial Litigation Branch, Civil Division, *Jeanne E. Davidson*, Deputy Director, (*Thomas B. Fatouros*), Trial Attorney; *Christine J. Sohar*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.

Miller & Chevalier Chartered, (*Peter Koenig*), for Plaintiff Viraj Group.

OPINION AND ORDER

BARZILAY, JUDGE:

I. INTRODUCTION

The United States Department of Commerce ("Commerce" or "government") timely filed the Final Results of Redetermination Pursuant to Court Remand ("*Remand Results*"), pursuant to the remand order of the court in *Slater Steels Corporation v. United States*, 27 CIT ___ , 279 F. Supp. 2d 1370 (2003) ("*Slater I*"), the familiarity with which is presumed. The sole issue in this consolidated action (as it was in *Slater I*) is Commerce's "collapsing" of three companies of the Viraj Group, an Indian competitor, pursuant to 19 C.F.R. § 351.401(f) (2000) ("collapsing regulation").

The Viraj Group companies implicated in collapsing are Viraj Alloys, Ltd. ("VAL"), Viraj Impoexpo, Ltd. ("VIL"), and Viraj Forgings, Ltd. ("VFL"). "Collapsing" involves treating a group of affiliated producers as a single entity for the calculation of dumping margins.[1]

Plaintiffs and Defendants-Intervenor Slater Steels Corporation, Carpenter Technology Corporation, Electralloy Corporation, and Crucible Specialty Metals Division of Crucible Materials Corporation (collectively "domestic industry" or "Plaintiffs") submitted comments opposing the *Remand Results*. The Viraj Group submitted comments in support. The original determination under review is *Stainless Steel Bar from India; Final Results of Antidumping Duty Administrative Review*, 67 Fed. Reg. 45,956 (July 11, 2002) ("*Final Results*"), *amended by* 67 Fed. Reg. 53,336 (Aug. 15, 2002). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000).

II. STANDARD OF REVIEW

The court "must sustain 'any determination, finding or conclusion found' by Commerce unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with the law.' " *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)). Substantial evidence is "[m]ore than a mere scintilla;" it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). "In applying this standard, the court affirms [the agency's] factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions." *Olympia Indus., Inc. v. United States*, 22 CIT 387, 389, 7 F. Supp. 2d 997, 1000 (1998) (citing

[1] This case does not involve partial collapsing.

Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1563 (Fed. Cir. 1984)). This court may not reweigh the evidence or substitute its own judgment for that of the agency. *See Granges Metallverken AB v. United States*, 13 CIT 471, 474, 716 F. Supp. 17, 21 (1989). Additionally, "absent a showing to the contrary, [the agency] is presumed to have considered all of the evidence in the record." *Nat'l Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 779, 696 F. Supp. 642, 648 (1988). The court's inquiry is essentially into the reasonableness of the agency's determinations.

III. DISCUSSION

In order to collapse companies for the purpose of calculating dumping margins, Commerce must first determine that the companies are "affiliated" under 19 U.S.C. § 1677(33) (2000). Commerce must next determine that the companies "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities," and that "there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(1).[2] This appeal pertains only to the "substantial retooling" prong of the regulation.

In *Slater I*, the court found Commerce's decision to collapse the Viraj Group companies unsupported by substantial evidence and ordered Commerce "to reconsider its analysis of the collapsing issue and, if necessary, to revise its dumping margin calculations in accordance with this opinion." *Slater I* at 1372. In addition, the court found Commerce's articulated reasons in support of its decision "inadequate." *Id.* at 1378. Focusing on Commerce's evaluation of the companies' production facilities, the court questioned whether the record indicates that the production facilities of the Viraj Group companies were complementary, rather than overlapping, and whether, therefore, "substantial retooling" would be required to bring the companies' production facilities on par with one another. *See id.* at 1376–79.

The record indicates the following production capabilities for the Viraj Group companies. VAL has the capability to produce steel billets and black bar (hot-rolled). *See Remand Results* at 8. VIL has the capability to further process the black bar into bright bar (cold-finished bar). *See id.* at 9. VIL cannot produce black bar on its own. Further, "VFL's primary production operation relates to producing stainless steel flanges." *Id.* at 10. VFL "has production facilities similar to those of VIL," but unlike VAL. *Id.* After remand, the question remains whether "substantial retooling" of their production facilities

[2] For ease of exposition, the court will refer to the first part of the collapsing regulation as the "substantial retooling" prong; and the second part, as the "manipulation" prong. The court notes that there is no statutory provision governing collapsing.

would not be required for these companies to divert production of subject merchandise from one another to take advantage of dumping margin differentials.

This case highlights the degree of confusion pertaining to the interpretation of the collapsing regulation, and the incongruity manifested in applying the regulation to the facts at hand. After due deliberation, the court finds that the *Remand Results* fall short of satisfying its order in *Slater I* because the *Remand Results* do not follow the collapsing regulation, and because Commerce did not provide the court with adequate factual support and justification in support of its decision to collapse the Viraj Group companies. The court once again remands the case to Commerce to reevaluate its collapsing decision, and specifically address and answer the questions that are raised in this opinion under separate subheadings.

A. Commerce must explain why it did not analyze the "substantial retooling" prong of the collapsing regulation separately from the "manipulation" prong in this case.

As urged by the domestic industry, *see Pls.' Comments* at 11–12, section 351.401(f)(1) has two distinct and separate parts, the "substantial retooling" and "manipulation" prongs, which are joined by the word "and." Because the regulation is conjunctive, each element has to be met. While the *Remand Results* contain sufficient evidence in support of the government's affirmative determination on the "manipulation" issue, the *Remand Results* do not provide sufficient evidence and analysis of "substantial retooling." The evidence Commerce cites in support of its decision to collapse all bear on the question of "manipulation." That evidence, however, is irrelevant in the analysis of "substantial retooling." The issue in this appeal (as it was in *Slater I*) is "substantial retooling." The *Remand Results* do not sufficiently address (and in fact distract from) the examination of the companies' production facilities, which is the proper analysis of the "substantial retooling" question.

The government attempts to bring into its "substantial retooling" analysis the "manipulation" prong of the collapsing regulation by emphasizing that "the policy rationale of the collapsing regulation is to prevent affiliated companies with the same or similar production capabilities from *manipulating price or production activities* of subject merchandise to the affiliated company with the lowest margin, and thereby circumventing the antidumping law." *Remand Results* at 5 (citing and paraphrasing *Slater I* at 1376 in a misleading manner)[3] (emphasis added). The government justifies its approach by ar-

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[3] Despite the government's attempt to paraphrase the court's language to include the "manipulation" issue, the exact quote from *Slater I* is: "The policy rationale behind collapsing is to prevent affiliated exporters with same or similar production capabilities *to channel production* of subject merchandise through the affiliate with the lowest potential dumping

guing that "the central question of the collapsing regulation" is the price or production "manipulation" issue. *Remand Results* at 6 (citing *Queen's Flowers DeColumbia v. United States*, 21 CIT 968, 979, 981 F. Supp. 617, 628 (1997)) & at 11 (citing *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27, 296, 27,346 (May 19, 1997) ("*Preamble*")).

In making the "manipulation" issue the "central question" in this appeal, Commerce lists a number of factors that need to be examined with respect to the "manipulation" issue pursuant to 19 C.F.R. § 351.401(f)(2). For example, Commerce points out that the Viraj Group companies "are sufficiently intertwined and have similar production capabilities." *Id.* at 6. Commerce reiterates that "the Viraj Group is a large, integrated, multinational entity in which two individuals hold the majority of shares, either directly or, along with friends and relatives and their promoted companies." *Id.* at 11 (quoting Viraj Group's June 29 and November 26, 2001 questionnaire responses) (internal quotation marks omitted). Further, "[t]hese same two individuals are also the managing directors of all three affiliates;" "[t]he selling and production activities for bar during the period of review at VIL and VAL are controlled by these directors;" "[t]hrough personal guarantees, these same two individuals also enabled VIL and VFL to secure loans that they may not otherwise have received;" "[i]n fact, VIL received a loan for working capital which was not only guaranteed by the directors but also by VAL;" "[i]n addition, the directors made direct loans to VAL and VFL;" "VAL, VIL, and VFL's production facilities are all located in the same city" and "positioned hardly 20 meters away from each other." *Id.* at 12 (quotation marks omitted). To the extent all this information relates to 19 C.F.R. § 351.401(f)(2), which contain the "manipulation" factors to be examined, the court finds the information unhelpful for the purposes of reviewing Commerce's decision that "substantial retooling" would not be necessary.

Moreover, Commerce's recent practice in collapsing is "to refrain from collapsing firms when there are differences in production facilities that would require substantial retooling." *Certain Porcelain-on-Steel Cookware From Mexico: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 42,496, 42,497 (Aug. 7, 1997) ("*Porcelain-on-Steel*"). Commerce does not reach the "manipulation" issue when the "substantial retooling" prong of the regulation is not met. *See Certain Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 16, 974, 16,976 (April 7, 1998) ("*Steel Pipes*") ("Because we determine that the second[, "substantial retooling,"] criterion is not satisfied, it is not necessary to consider the third cri-

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margin and thereby circumvent the United States antidumping law." *Slater I* at 1376 (emphasis added). *Slater I* did not reach the "manipulation" issue. *Id.* at 1375 n.8.

terion in the collapsing analysis — identifying the potential for manipulation of price or production."). Commerce specifically rejected a "totality of circumstances" approach in favor of its current practice. *See Porcelain-on-Steel* at 42,497. Under the "totality of circumstances" approach, examining production facilities was a factor considered in collapsing, and no one factor was dispositive. *See Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Corrosion-Resistant Carbon Steel Flat Products from Japan*, 58 Fed. Reg. 37,154, 37,159 (July 9, 1993) (considering factors, such as "degree of voting control," "financial relationship," "intertwined" operations, companies' "transactions with each other," and capability "of manipulating prices or affecting production decisions, through their sales and production efforts," as well as production facilities). The current form of section 351.401(f) that solidified Commerce's new collapsing practice was adopted in 1997 and is explained in the Preamble, which seeks to clarify the "degree of confusion concerning [Commerce's] practice of collapsing." *Preamble* at 27,345. That confusion seems to have survived into Commerce's handling of the Viraj companies' case.

The Preamble is clear in its insistence on a separate analysis of "substantial retooling":

> In addition to finding a significant potential for manipulation, [Commerce] *also must find the requisite type of production facilities.* To clarify this point, we have revised paragraph (f) so that paragraph (f)(1) refers to the two basic elements, while paragraph (f)(2) contains the non-exhaustive list of factors that [Commerce] will consider in determining whether there is a significant potential for manipulation.

Preamble at 27,346 (emphasis added). Furthermore, to the extent that *Queen's Flowers*, which the government cites in support of its assertion, examined an agency determination that had predated the new regulation, the view of the *Queen's Flowers* Court on collapsing is not directly on point here. The regulation and, accordingly, the agency's practice on collapsing have changed since the *Queen's Flowers* decision.[4]

It is imperative that an agency follow its own regulations. *See Slater I* at 1378 (citation omitted). Commerce asserts that it has "discretion" to collapse the Viraj Group companies. *Remand Results* at 5 (citation omitted). However, the agency does not have discretion to violate a rule it adopted after notice and comment, fulfilling a legislative function. *See United States v. Nixon*, 418 U.S. 683, 694–96

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[4] Defendant's credibility is not enhanced by its failure to bring this fact to the court's attention.

(1974). The government reiterates that "the collapsing analysis must be made with a keen understanding of all of the facts of the case, taken as a whole, rather than any individual piece of the analysis being the ultimate determinative factor." *Remand Results* at 20 (citing its Draft Remand at 13). While this may be true, the new collapsing regulation on its face (and as explained in the Preamble) demands a separate analysis and a separate finding on the issue of "substantial retooling."

In tandem, while the agency "may depart from its earlier determinations and its own prior precedent, whatever the ground for departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's actions and so may judge the consistency of that action with the agency's mandate." *Marine Harvest (Chile) S.A. v. United States*, 26 CIT ____ , 244 F. Supp. 2d 1364, 1380 (2002) (citations and internal quotation marks omitted). In its *Remand Results* Commerce should have clearly articulated to the court its reasons for the deviation from its current practice of analyzing the "substantial retooling" prong separately, *see, e.g.*, *Steel Pipe* at 16,976, and why it chose to engage in a type of "totality of circumstances" approach in this case, which it has otherwise abandoned.

In subsequent remand, Commerce must focus on the companies' production facilities and on whether or not "substantial retooling" of facilities would be required "in order to restructure manufacturing priorities." 19 C.F.R. § 351.401(f)(1). And it must do so without reference to the factors that bear on the "manipulation" issue in support. This is what is required under the regulation, Commerce's own practice, and the Preamble.[5]

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[5] The *Remand Results'* confusion relating to the application of the separate prongs is further exposed by Commerce's discussion of the *German Bar* case. *See Remand Results* at 13–14 (discussing *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Germany*, 67 Fed. Reg. 3159 (Jan. 23, 2002) ("*German Bar*")). Plaintiffs argue that the *German Bar* case does not support Commerce's decision to collapse the Viraj Group. In *German Bar*, Commerce determined that, even though the *German Bar* companies had production facilities that could produce similar and identical merchandise in a limited range of bar diameters, they "would need to add entire production lines, not merely retool the existing operations" in order "to meaningfully expand the range of sizes produced at either plant." *Issues and Decision Mem. accompanying German Bar* cmt. 15. In other words, the production lines had "limited" overlap. *Id.* In the *Remand Results*, Commerce answers Plaintiffs' argument by observing that the *German Bar* companies were not "collapsed because of the *combination* of a 'limited overlap' in production capabilities *and* significant corporate structural impediments of the [companies'] ability to manipulate pricing and production." *Remand Results* at 13 (emphasis in the original). In *German Bar*, however, Commerce engaged in an analysis of the "manipulation" issue, only because it found *some* overlap in the facilities, while cautioning that it was "[k]eeping in mind that the potential for manipulation is constrained by this limited overlap." The record here is equivocal about whether the Viraj Group companies' facilities have *any* overlap (let alone the "broad overlap" asserted by Commerce). The *German Bar* notice was very specific that the factors outlined in section 351.401(f)(2) implicated the "manipulation" issue, not the "substantial retooling" issue — an approach not taken, but should have been taken, by the *Remand Results*. Further,

B. In applying its collapsing regulation, Commerce must explain why it need not analyze the production facilities of each company and why in this case its analysis centered on the products the companies manufacture.

1. Commerce must explain why it need not examine the production facilities of each company involved in collapsing and why it need not address the possibility of shifting production among companies in either direction.

Another question that relates to the proper interpretation of the "substantial retooling" prong of the collapsing regulation is whether Commerce must examine the production facilities of each company involved or whether it is sufficient for Commerce to examine the production facilities of only one company. The regulation reads "production facilities for similar or identical products that would not require substantial retooling of *either* facility in order to restructure manufacturing priorities." § 351.401(f)(1) (emphasis added). Plaintiffs interpret the regulation to mean that each company's production facilities need to be examined. *See Pls.' Comments* at 10 ("VAL, VIL, and VFL each lack similar production capabilities."). The court finds Plaintiffs' argument on this point persuasive.

The regulation appears to require that Commerce examine the production facilities of both (or all) companies and evaluate the possibility that production may be shifted from one company to another and *vice versa*. The first dictionary meaning of the word "either" is "each of the two." 5 OXFORD ENGLISH DICTIONARY 102 (2d ed. 1989). Moreover, when used with a plural noun, the proper word to replace "either" is "both." *Id.* These definitions seem to support Plaintiffs' position. On the other hand, a secondary definition of the word "either" is "one or other of the two." *Id.* This definition seems to support the government's position. This court will give substantial deference to the agency's reasonable interpretation of its own regulation unless it is plainly erroneous and inconsistent with the regulation. *See Mullins Coal Co. v. Director*, 484 U.S. 135, 159 (1987) (citation and internal quotation marks omitted). However, given two competing interpretations of the regulation and the record evidence in this case of very sparse of overlap of production facilities combined with the concern that collapsing the Viraj Group may lead to circumventing the United States antidumping duty law, the court requires more explanation from Commerce why its interpretation of the regulation is reasonable in this case. Specifically, Commerce must look further

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on the "manipulation" issue, the *German Bar* companies were owned by the same entity and had two common board members, whereas the Viraj Group does not have a common parent, but has common managing directors. *See Viraj Group's Reply to Pls.' Comments* at 4–5.

into the possibility that the Viraj Group affiliates may not be able to shift production from VAL to VIL (or VFL) without "substantial retooling."

Here, Commerce focused solely on the production facilities of VAL in finding that "VAL could add bright bar finishing operations [which VIL already has] for less than 10 percent of its current fixed asset value" and in finding that this percentage does not constitute "substantial retooling." *Remand Results* at 9. With respect to VIL, Commerce simply observed that "VIL has the ability to purchase black bar on the open market, rather than from VAL, and process it into bright bar using the production facilities it already has."[6] *Id.* Accordingly, Commerce concluded that "VAL and VIL have production facilities to make similar or identical products without substantial retooling of VAL's production facility in order to restructure manufacturing priorities." *Id.*

While not sufficiently addressing whether VIL's facilities would need "substantial retooling," Commerce's determination does not address the possibility that VIL might receive a lower margin than VAL.[7] *See Pls.' Comments* at 20. As it stands now, the record shows that VIL does not have the production facilities required to produce the black bar or billet VAL produces and that a substantial addition to VIL's facilities may be needed for VIL to produce black bar or billet.[8] In the event that VIL receives a lower dumping margin than VAL, the Viraj Group may not be able to divert the production of black bar to VIL without "substantial retooling" of VIL's facilities. VIL on its own cannot produce black bar or billet. To produce bright bar, VIL must purchase the input or the intermediate product, black bar, either from VAL or from a third party. In the event VIL purchases black bar or billet from VAL, that purchase may have to be examined with scrutiny because of the affiliated nature of the companies. Such examination would not be possible if the companies were collapsed. *See Slater I* at 1377 (questioning whether the use of the "major input rule" under 19 U.S.C. § 1677b(f)(3) and 19 C.F.R. § 351.407(b), rather than collapsing, may be more appropriate in this case).[9]

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[6] The court recognizes that VIL has the ability to purchase black bar on the open market. The record indicates that in the period of review either VAL supplied VIL with black bar or VIL leased VAL's facilities. The *Remand Results* do not sufficiently address the concern that any transaction between VAL and VIL (or VFL) may not be at arm's-length.

[7] Commerce only gives the example of VAL receiving a lower margin.

[8] VIL may have to add, for instance, induction and refining furnaces and argon oxygen decarburiser converters to produce black bar. *See Slater I* at 1376–77. Whether or not this constitutes "substantial retooling" is a question Commerce must decide.

[9] Furthermore, there is still the question of whether or not there was a leasing arrangement between VIL and VAL during the period of review, which would have allowed VIL to use VAL's facilities for the production of hot-rolled round bar and billet. Commerce now announces that "the leasing agreements were not a determinant factor in [Commerce's] col-

While lacking the analysis of VIL's production facilities, the *Remand Results* are also perfunctory with respect to VFL's production facilities. As recognized by Commerce, "VFL's primary production operation relates to producing stainless steel flanges, and therefore, some of its production machinery is used exclusively for producing flanges," and not bar. *Remand Results* at 10. While, as admitted by Commerce itself, *see id.*, the focus should be on the company's production facilities, rather than the question of whether or not VFL produces subject merchandise, the court's concerns relating to the insufficient analysis of VIL's capabilities are equally implicated with respect to VFL's capabilities. As Commerce says, "VFL . . . has production facilities similar to those of VIL." *Id.* In particular, "VFL also has heating and annealing capabilities" without the capability to make black bar. *Id.* Notwithstanding the new information that VFL installed facilities for and produced and sold "forged rounds/*bars*/ rods," *id.* (internal quotation marks omitted), Commerce does not point to any evidence in the record that VFL has the capability to produce black or bright bar.[10]

2. Commerce must explain why in this case it focused on the products the companies' manufacture, rather than their production facilities.

Intertwined with the question as to whether each company's production facilities need to be evaluated is the related issue of whether the collapsing regulation refers to production facilities or product lines. Commerce states that the court "has specifically allowed for differences between production lines and products." *Id.* at 11 (citing *Marine Harvest*, 244 F. Supp. 2d at 1367–68 n.8).[11] In fact, Commerce centers a significant portion of its discussion in the *Remand*

lapsing determination in this case." *Remand Results* at 16; *see also Def.'s Response* at 15 ("The alleged leasing agreement [is] not part of Commerce collapsing analysis."). Contrary to the government's surprising assertion here, in the *Final Results* Commerce specifically based its determination to collapse on its finding 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." Issues and Decision Mem. accompanying *Final Results* cmt. 1. Again because a leasing arrangement, if any, would constitute a transaction between affiliated entities, it may have to be examined with special scrutiny — which examination Commerce's decision to collapse the Viraj Group companies does not allow.

[10] Plaintiffs state: "VFL does not make any bar products but may have annealing capabilities to make one intermediate product, HRAP [(hot-rolled, annealed, pickled)] bar; its heavy forge equipment may be able to make large forged bar unlike either VAL's black bar or VIL's bright bar." *Pls.' Comments* at 26. That is, in the event Commerce finds after reconsideration that VIL and VAL should be collapsed, it has to further explain how production facilities used to make forged bar and production facilities used to make black or bright bar are overlapping.

[11] The issue implicated in *Marine Harvest* was the successor-in-interest test, not a decision to collapse. Moreover, the *Marine Harvest* companies' production relationships were different than the Viraj Group companies: they did not produce the intermediate and the finished product respectively, as do the Viraj Group companies.

Results on the fact that black bar and bright bar are both subject merchandise defined by the scope of the administrative review, *see Final Results* at 45,957, and concludes that, therefore, VAL and VIL have production facilities that would not require "substantial retooling." *See Remand Results* at 6–7.

As Plaintiffs rightly observe, *see Pls.' Comments* at 5–6, Commerce's interpretation of section 351.401(f)(1) in this manner would render a part of the "substantial retooling" prong hollow. Again, the regulation reads "production facilities for similar or identical products that would not require substantial retooling . . . in order to restructure manufacturing priorities." § 351.401(f)(1). It is insufficient for Commerce to declare that, because black and bright bar are similar products under the definition of subject merchandise, their production facilities do not require "substantial retooling."[12] In order to be able to collapse the Viraj Group, Commerce must specifically address the question that the companies' production facilities for similar products would not require "substantial retooling." *Cf. Issues and Decision Mem. accompanying German Bar* cmt. 15 ("section 351.401(f)(1) concentrates not on a firm's product line, but rather on its production facilities.").

Despite the fact they may both be subject merchandise, the record indicates that the production facilities needed for the production of black bar and bright bar may not be similar. The record shows that the black bar produced by VAL is an input in the production of bright bar (produced by VIL). VIL's function in the production of bright bar is "finishing" the product at the last stage of production. "VIL picks up where VAL leaves off." *Pls.' Comments* at 9. Further, VAL supplies VFL with billet which VFL on its own cannot produce. So far Commerce has not demonstrated that VAL, VIL, and VFL can shift production of black or bright bar (or, for that matter, any other product) from one another without "substantial retooling" of their facilities,

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[12] The subject merchandise is defined in the *Final Results* as follows:

> Imports covered by this review are shipments of stainless steel bar ("SSB"). SSB means articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons, or other convex polygons. SSB includes cold-finished SSBs that are turned or ground in straight lengths, whether produced from hot-rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process.
>
> Except as specified above, the term does not include stainless steel semi-finished products, cut length flat-rolled products (i.e., cut length rolled products which, if less than 4.75 mm in thickness, have a width measuring at least 10 times the thickness, or, if 4.75 mm or more in thickness, have a width which exceeds 150 mm and measures at least twice the thickness), wire (i.e., cold-formed products in coils, of any uniform solid cross section along their whole length, which do not conform to the definition of flat-rolled products), and angles, shapes and sections.

thereby avoiding high dumping margins and circumventing the United States antidumping law. *See Slater I* at 1376.[13]

C. Commerce must explain why an investment even if worth less than 10 percent of a company's fixed asset value does not constitute "substantial retooling" and why this figure by itself is sufficient to make Commerce's "substantial retooling" determination reasonable.

Commerce determined that "VAL could add bright bar finishing operations (*e.g.*, pickling and annealing operations) for less than 10 percent of its current fixed asset value" to be able to produce the bright bar.[14] *Remand Results* at 9. Commerce further determined that this potential investment does not constitute "substantial retooling." However, it is hardly possible to evaluate whether this number is significant when it is not presented in context and in relation to a reference point. At first glance, an investment that costs less than 10 percent of fixed value of a company's assets, to the extent that cost approaches 10 percent, seems to be a significant outlay. Commerce must explain to the court why it determines that an investment that may approach 10 percent of VAL's fixed asset value is not "substantial." Moreover, Commerce must tell the court whether any other consideration, beside the monetary value of the investment, may implicate the "substantial retooling" question, such as time that may have to be spent or other constraints on the company's finances.[15]

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[13] In *Slater I*, the court also ordered Commerce to explain its turnabout relating to the nature of the companies production facilities. *See Slater I* at 1379. In particular, in its preliminary results Commerce determined that the Viraj Group companies' production facilities are "complementary," while in the *Final Results* it determined that they are "overlapping." The corollary to the "substantial retooling" question is whether the companies' production facilities have a "broad overlap." In the *Remand Results* Commerce answered the court's concerns by maintaining that "both descriptions are true." *Remand Results* at 12. As explained above, Commerce based this assertion on the detail that black and bright bar are both subject merchandise. This assertion does not, however, resolve the question whether the production facilities of the black and bright bar are "overlapping" to a sufficient degree. So far, it appears that their production facilities are complementary, with little or no overlap.

[14] Commerce must also explain to the court whether VAL, by merely adding annealing and pickling operations, could produce the cold-rolled bright bar that VIL produces. *See Pl.'s Comments* at 18 (asserting that the addition of annealing and pickling equipment would merely enable VAL to make hot-rolled, annealed, pickled bar [HRAP] and that to produced cold-finished bar, VAL has to also add cold-turning, -polishing, -rolling, -grinding, and -drawing equipment). The government answers that the 10 percent figure encompasses these finishing equipment, and only points to the Viraj Group's June 29 questionnaire response at 90 and 73. *See Def.'s Response* at 11.

[15] The need to provide sufficient context and a reference point can be illustrated with the following examples. (These examples are for illustration only.) To wit, expending close to 10 percent of fixed asset value may be a relatively insignificant investment for a large and diversified company, while such an investment may not be feasible for a smaller company. Or a less than 10 percent investment may be insubstantial under industry norms. Moreover, if

It is well-known that a decision to collapse is "very much fact-specific in nature, requiring case-by-case analysis." *Preamble* at 27,346. However, presenting a raw number without more does not give the court the opportunity to review Commerce's decision in a meaningful way. This court may not accept Commerce's assertions on faith, but is required to evaluate whether they are reasonable inferences based on facts. *See Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984) ("substantial evidence on the record means more than a mere scintilla and such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence") (citation and internal quotation marks omitted).

To illustrate how the citation of one value out of context does not lend itself to a meaningful review, it is instructive to look at Plaintiffs' counter-argument. Plaintiffs would like the court to hold that "substantial retooling" would be required of VAL's facility to produce bright bar. *See Pls.' Comments* at 21. To advance this position, Plaintiffs argue that Commerce must not ignore "the magnitude of the absolute value of the expense of retooling for VAL," in favor of the percentage value cited by Commerce. *Id.* at 22. To that end, Plaintiffs give the court yet another number: retooling VAL's facility would "equal to over half a million dollars in assets." *Id.* More persuasively, Plaintiffs add that "VFL would have to increase its investments in plant and machinery assets by almost Rs. [(Rupees)] 175 million in order to create a production facility similar to that of VAL." *Id.* at 19. And "[t]his is prohibitive for a company that only posted a net profit in [Fiscal Year] 2000 of less than Rs. 14 million — and would qualify by any measure as a 'substantial retooling' investment." *Id.*

The question is whether any numbers cited would reasonably support the conclusion that the required investment would not be "substantial." Therefore, Commerce needs to justify its position more fully and more responsively. Instead, Commerce merely replies to Plaintiffs' comments that "[o]bviously, Commerce looks at the relative proportion of the fixed assets when conducting such an analysis because the absolute values are meaningless when considering whether adding such facilities would be substantial for a particular company." *Def.'s Response* at 11–12. This is an inadequate explanation. Commerce must explain to this court why the number it cites as the value of new potential investment (either in percentages or in absolute terms) in the *Remand Results* would not reasonably constitute "substantial retooling" within the meaning of the regulation.

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an investment would take longer to implement than the period the companies are under review, that investment may constitute "substantial retooling."

D. Commerce must explain why it finds unnecessary to address the relative merits of collapsing and the major input rule as they relate to the facts of this case.

In *Slater I*, the court suggested that the application of the "major input rule" pursuant to 19 C.F.R. § 351.407(b)[16] may have been more appropriate in this case, as opposed to collapsing the companies. *See Slater I* at 1377. Plaintiffs have repeatedly raised the same issue in their comments to the agency and the court. Instead of addressing the issue, the government merely observes that "[b]ecause [the major input] provision only applies to transactions between affiliated persons, once [Commerce] decided to collapse and treat the companies as one 'person' for the purposes of the antidumping analysis, it is not statutorily required to apply the provision." *Remand Results* at 15 (citation omitted). The government continues, "[i]n this case, [Commerce] determined that the Viraj Group companies is one entity and, therefore, the major input rule does not apply in this situation."[17] *Id.*

There is no question that, when Commerce determines to collapse the companies, the major input rule does not apply because the rule relates to the examination of transactions between affiliates and, once the affiliates are treated as one entity, there is no reason or opportunity to examine such transactions. However, the position that the major input rule does not apply here because Commerce had already determined to collapse the Viraj Group companies is a *non sequitur.* Given the court's concerns in *Slater I* regarding affiliate transactions among the Viraj Group companies, the government needs to examine the relative merits of collapsing *vis a vis* the major input rule as applied or applicable to the facts of this case. *See Slater I* at 1377. That is to say that Commerce must directly refer to the Viraj Group companies' production relationships which the record shows to be more like a supplier and a buyer, and complementary. Two of the companies (VIL and VFL) reportedly buy a major input

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[16] Section 351.407 (Calculation of constructed value and cost of production) reads:

(a) Introduction. This section sets forth certain rules that are common to the calculation of constructed value and the cost of production. (See section 773(f) of the Act.)

(b) Determination of value under the major input rule. For purposes of section 773(f)(3) of the Act[, 19 U.S.C. § 1677b(f)(3)], the Secretary normally will determine the value of a major input purchased from an affiliated person based on the higher of:

(1) The price paid by the exporter or producer to the affiliated person for the major input;

(2) The amount usually reflected in sales of the major input in the market under consideration; or

(3) The cost to the affiliated person of producing the major input.

[17] Elsewhere (in reply to Plaintiffs' comments), the government also states that "[b]ecause we have determined to continue to collapse the Viraj Group companies, we did not address the plaintiffs' suggestions with respect to 'the major input rule' in the remand redetermination." *Remand Results* at 16.

used in their production facilities from an affiliate (VAL).[18] If the production facilities of the companies are indeed complementary, collapsing the Viraj Group may lead to potential misstatements in the disclosure of the companies' cost structures and manipulation of dumping margin calculations that should (and could) not be permitted under the statute.

IV. CONCLUSION AND ORDER

For all the foregoing reasons, the court finds that the *Remand Results* fall short of satisfying the court's instructions in *Slater I*. Commerce must address and answer the points that are raised under separate subheadings in this opinion. Therefore, it is hereby

ORDERED that the case is remanded to Commerce to reevaluate its collapsing decision; it is further

ORDERED that Commerce shall have sixty (60) days, until May 7, 2004, to complete and file its review. Plaintiffs and Defendants-Intervenor shall have thirty (30) days from that filing to file comment(s), and any reply by Commerce shall be due twenty (20) days after Plaintiffs' comment(s) are filed.

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[18] Or (if this matter were ever to be resolved) VIL uses VAL's facilities under an exclusive leasing arrangement. In addition to asserting that Commerce's decision was not based on the existence of a leasing arrangement in the period of review, *see* note 9, the *Remand Results* also observe that Commerce first heard of the existence of a leasing agreement when it received the Viraj Group's Rebuttal Brief. *See Remand Results* at 15. With these remarks Commerce implies that it is now not basing its decision to collapse on the leasing agreements, even though it seemed to do so in the *Final Results*. Not only does this court find the less than ideal clarity of the record in this case disheartening, but also agrees with Plaintiffs that the record at a number of places contains an *indication* of this leasing arrangement. The court here will not pass judgment on Plaintiffs' assertion, which incidentally elicited no response from the government, that "the very fact of an affiliate [(VIL)] resorting to operational leasing of another affiliate's [(VAL's)] production/equipment facility is *per se* evidence that it does not, on its own, have that production capability." *Pls.' Comments* at 14. Commerce, however, must address the issue of these leasing arrangements and explain to the court why it changed its position regarding such arrangements in its decision to collapse the Viraj Group companies and in its continuing defense of that decision.