

*American Silicon Technologies and SKW Metals & Alloys, Inc. and Elkem Metals Company and Globe*

*Metallurgical, Inc. v. United States*

Court No. 02-1033 (CAFC July 3, 2003)

## **Silicon Metal from Brazil:**

### **Final Results of Redetermination Pursuant to Court Remand**

#### **Summary**

The Department of Commerce (“Department”) has prepared these final results pursuant to the remand order from the U.S. Court of International Trade (“CIT”) in accordance with the mandate of the United States Court of Appeals for the Federal Circuit (“CAFC”) in American Silicon Technologies and SKW Metals & Alloys, Inc. and Elkem Metals Company and Globe Metallurgical, Inc. v. United States, 334 F.3d 1033 (Fed. Cir. 2003) (“American Silicon III”). The administrative review for the period July 1, 1994 through June 30, 1995 (“POR”) was remanded on one issue: the Department’s assessment of general costs, reversing the remand order of the U.S. Court of International Trade (“CIT”), which had required the Department to calculate Companhia Brasileira Carbureto De Calco’s (“CBCC”) “interest expenses without reference to its ultimate parent.” The Department is directed to assess those costs on the basis of financial statements from CBCC’s ultimate parent, Solvay & Cie (“Solvay”). In this redetermination pursuant to court remand, the Department revises its antidumping duty calculation for CBCC to include financial expenses based on the consolidated financial statements of its ultimate parent, Solvay.

**Background**

On July 31, 1991, the Department published in the Federal Register the antidumping duty order on silicon metal from Brazil (56 FR 36135). On July 3, 1995, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on silicon metal from Brazil for the review period July 1, 1994 through June 30, 1995 (60 FR 34511). The preliminary results of this administrative review were published on September 5, 1996 (61 FR 46779), and the final results were published on January 14, 1997 (62 FR 1970) (“Final Results”). Following allegations of ministerial errors by interested parties and an order by the CIT, the Department amended the final results of the administrative review, and published amended final review results on October 17, 1997. See American Silicon Technologies v. United States, No. 97-02-00267, Slip Op. 97-113 (Ct. Int’l Trade Aug. 18, 1997) (“American Silicon I”); See also 62 FR 54087.

These amended final results were remanded to the Department by the CIT on April 9, 1999. See American Silicon Technologies v. United States, No. 97-02-00267, Slip Op. 99-34 (Ct. Int’l Trade April 9, 1999) (“American Silicon II”). The CIT instructed the Department, *inter alia*, to recalculate CBCC’s financial expenses by basing those expenses upon the consolidated financial statements of CBCC and its immediate parent, Solvay do Brasil (“Brasil”). On September 23, 1999, the Department filed its redetermination on remand. This redetermination was sustained by the CIT on August 27, 2001. See American Silicon Technologies v. United States, No. 97-02-00267, Slip Op. 01-109 (Ct. Int’l Trade August 27, 2001). CBCC timely appealed the CIT’s judgment. On July 3, 2003, the CAFC reversed and remanded the CIT’s decision. See

American Silicon III. In its decision, the CAFC upheld the Department's discretion to assess general costs based on the parent's consolidated financial statements. However, the CAFC directed the Department to further examine the entire record to determine whether the presumption of control by virtue of majority equity ownership by Solvay, the ultimate parent, over CBCC has been overcome. In doing so, Commerce was directed to further assess the relationship between Brasil and Solvay or CBCC and Solvay to ensure accurate assessment of CBCC's costs. See American Silicon III, 334 F.3d at 1039.

### **Discussion**

The CAFC sustained "as reasonable Commerce's well-established practice of basing interest expense and income on fully consolidated financial statements." See American Silicon III, 334 F.3d 1033, 1038. Moreover, the CAFC affirmed "Commerce's well-established practice of acknowledging the role of consolidated statements." Id. The CAFC further explained that it was unnecessary for Commerce to assess inter-company financial transactions in calculating finance expenses in a dumping margin since this would create "a new kind of test {which} would impose significant new administrative burdens on Commerce and invite potential manipulation . . . {which} might take the form of a controlling company selecting a financial cost ratio by directing one of its subsidiaries with a low ratio to lend to the exporter." Id.

In its original Final Results, the Department determined that Solvay's majority equity ownership of CBCC was *prima facie* evidence of control. However, the CAFC stated that the Department "ended its inquiry . . . without examining the entire record to determine whether this presumption has been overcome or whether Solvay's financial statements accurately reflect the actual costs associated with the production of the subject

merchandise.” Id. Therefore, in this remand, the Department further examined the entire record, and now determines that there is no evidence on the record that rebuts the presumption of control.

In the original Final Results, the Department cited the First Review of *Silicon Metal from Brazil*, which stated that:

Since the cost of capital is fungible, we believe that calculating interest expense based on consolidated statements is the most appropriate methodology. (See, e.g., Final Determination of Sales at Less Than Fair Value, Small Business Telephones from Korea, 54 FR 53141, 53149 (December 27, 1989), Final Results of Antidumping Duty Administrative Review, Brass Sheet and Strip from Canada, 55 FR 31418-13418-13419 (August 2, 1990), and Final Determination of Sales at Less than Fair Value, Anti Friction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, et al., 54 FR 18992, 19074 (May 3, 1989)).

Final Results, 62 FR at 1982 (Jan. 14, 1997).

The Department explained that although in previous reviews it had relied on the consolidated financial statements of Brasil, it would use the statements of Solvay since it now had its statements on the record whereas in the past it did not. See Id. This practice of relying on a parent’s consolidated financial statements was originally affirmed by the CIT in Camargo Correa Meais, S.A. v. United States, 17 Ct. Int’l Trade 897, 902 (1993) (“Camargo”). In Camargo, the CIT stated the Department’s position:

“The Department considers financing expenses to be those costs incurred for the general operations of the corporation. The Department recognizes the fungible nature of a corporation’s invested capital resources, including debt and equity, and does not allocate corporate finance expenses to individual divisions of a corporation on the basis of fixed assets or sales per division. ... Instead, {Commerce} allocates the interest expense related to the debt portion of the capitalization of the corporation, as appropriate, to the total operations of the consolidated corporation.”

See Camargo, 17 Ct. Int’l Trade at 902. In Camargo, the CIT, agreeing with the Department’s practice, further stated that “the Court will not require the ITA to

characterize interest payments as dividends, or otherwise recast the transaction,” thus affirming the Department’s practice of using consolidated financial expenses because of the fungible nature of capital including both debt and equity. See Id.

Here, consistent with the court in Camargo, the CAFC reversed the CIT’s decision, stating that “... the Court of International Trade did not allow Commerce to examine the entire record to determine financial costs.” Id. at 1034. Pursuant to the CAFC’s opinion, the Department has undertaken an analysis of the entire record, which includes the financial statements of Solvay, the ultimate consolidated parent of both Brasil and CBCC. As discussed, the Department has a longstanding practice of recognizing the fungible nature of debt and equity. The following analysis represents a full review of all available record evidence.

Evidence of the direct control exerted by Solvay over both Brasil and CBCC can be found in the consolidated financial statements of Solvay. On April 30, 1996, CBCC submitted its response to the Department’s April 8, 1996 questionnaire requesting additional information. See Response of CBCC to the Department’s April 8, 1996 Supplemental Questionnaire (April 30, 1996) (“Supplemental Response”). Exhibit 1 of this response includes the 1994 financial statement for Solvay. The 1994 financial statement lists all Solvay group companies that are fully consolidated within Solvay’s financial statements including “Solvay do Brasil S/A, Sao Paulo,” (referred to as “Brasil” in the instant document) and attributes “100%” control of Brasil to Solvay. The next entry in the list is for “CBCC – Companhia Brasileira Carbureto de Calcio, Rio de Janeiro” (referred to as “CBCC” in the instant document). This line item in turn attributes “99.9%” ownership of CBCC to Solvay. See Solvay Group Consolidated

Accounts, 1994 in Supplemental Response at 63. Therefore, an examination of this section of Solvay’s consolidated financial statement establishes that Solvay has direct control over both Brasil and CBCC through ownership of 100% and 99.9% of the voting stock in each firm, respectively.

Furthermore, since Solvay’s financial statement is consolidated to account for Brasil and CBCC’s financial activities, it would be redundant to further describe the financial position of a parent and its consolidated subsidiaries. The financial statements demonstrate that Solvay owns 99.9% of CBCC which evidences its ability to control CBCC. No further evidence is necessary because even the absence of evidence may be an indication of how Solvay chose to exercise its control over CBCC.

Therefore, the Department has determined that Solvay’s consolidated financial statements are appropriate to use for the margin calculations, in keeping not only with the Department’s longstanding policy, but also with the facts on the record. As a result, the Department has carried out its statutory duty of accurately assessing “general costs” consistent with this opinion.

### **Weighted-Average Dumping Margin**

As a result of this redetermination, the Department has recalculated the dumping margins for CBCC. The weighted-average dumping margins are as follows:

	<u>Manufacturer/Exporter</u>	<u>Weighted-Average Margin</u>
Redetermination on CAFC Remand	CBCC	0.37% (de minimis)

### **Assessment**

Upon a final and conclusive court decision affirming this remand redetermination, the Department will instruct U.S. Customs and Border Protection (“CBP”) to liquidate without regard to dumping duties for all entries from CBCC for the period of July 1, 1994 through June 30, 1995. The Department will determine, and CBP shall assess, antidumping duties on all CBCC appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated an exporter/importer (or customer)-specific assessment rate for merchandise subject to this review. We will direct CBP to assess such rates against the entered customs values for the subject merchandise on each of the importer's/customer's entries during the review period. The Department will issue appropriate assessment instructions directly to CBP within 15 days of a final and conclusive court decision.

### **Cash Deposits**

Because there have been completed final determinations in subsequent intervening reviews, the rate listed above is only effective as an assessment rate for this review period.

**Comments:**

In comments received in response to the Department's Draft Results Pursuant to Remand ("Draft Remand Results"), Petitioners contend that the Department's statement that it "is directed to assess {financial expenses incurred by CBCC} on the basis of financial statements from CBCC's ultimate parent, Solvay & Cie," is erroneous. Petitioners state that there is no such direction in either the decision of the CAFC or the remand order of the CIT.

Petitioners note that the CIT's remand order simply states that "the Department of Commerce's *Remand Results* are remanded again for a determination consistent with the appellate decision." See American Silicon Technologies v. United States, No. 97-02-00267, Slip Op. 03-109 (Ct. Int'l Trade August 25, 2003). In the appellate decision, observe Petitioners, the CAFC noted that the Department had originally calculated CBCC's financial expenses based on the consolidated financial statements of its ultimate Belgian parent, Solvay. As the CAFC explained, the Department did so because "it relied heavily upon the capability of the ultimate parent company, Solvay, to determine the capital structure of its subsidiary, CBCC." See American Silicon III, 334 F.3d at 1036-1037. The CAFC further stated that this reliance was based on the Department's finding "that the majority equity ownership of CBCC by Solvay is *prima facie* evidence of control over CBCC." Id. at 1037. Petitioners aver, however, that CAFC did not approve of the Department's original calculation and stated that "Commerce, however, ended its inquiry here without examining the entire record to determine whether this presumption has been overcome or whether Solvay's financial statements accurately reflect the actual costs associated with the production of the subject merchandise." Id.

Petitioners claim that the CAFC also found that this shortcoming of the Department's original decision to base the financial expense calculation on Solvay's financial statements was not overcome during the first remand. Petitioners state that the CAFC concluded, "Commerce was foreclosed from undertaking a complete analysis" because "the trial court limited Commerce's examination to CBCC's transactions with {its direct Brazilian parent,} Brasil" which "prevented Commerce from further assessing the relationship between Brasil and Solvay or CBCC and Solvay." *Id.* Petitioners further point out that the CAFC expressly noted that while, during the first remand, "Commerce gathered more information about the relationship between CBCC and Brasil," it did not do so "with regard to the relationship between CBCC or Brasil and Solvay." *Id.* Petitioners reason that the CAFC concluded that "the record in the {first} remand is deficient," because the Department was prevented "from undertaking a fully balanced examination that might have produced more accurate results" when it calculated CBCC's financial expenses incurred in the production of silicon metal. *Id.*

During the second remand, maintain Petitioners, the Department did not address the evidentiary deficiencies identified by the CAFC or perform the further analysis required by the CAFC. Petitioners assert that instead, the Department simply reverted back to the same record evidence, the same rationale and the same calculation of CBCC's financial expenses as it used in the original final results. Petitioners observe that the sole record evidence examined and relied upon by the Department in the Draft Remand Results is the ultimate equity ownership of CBCC by Solvay, which, as the CAFC noted, only constitutes *prima facie* evidence of control. See Draft Remand Results at 5.

Petitioners maintain that, as was the case with respect to the original final results, during the remand the Department ended its inquiry at this point and presumed control based on majority equity ownership. Petitioners therefore conclude that the Department failed again, as the CAFC stated, “to determine whether this presumption has been overcome or whether Solvay’s financial statements accurately reflect the actual costs associated with the production of the subject merchandise.” See American Silicon III, 334 F.3d at 1037.

Petitioners argue that in the circumstances of this case, the CAFC expected the Department to address the evidentiary deficiencies the court identified and to engage in further analysis to determine whether the presumption was overcome – in other words, whether Brasil, not Solvay, actually exercised control over the lending activity between Brasil and CBCC. Petitioners contend that the administrative record indicates that the only financing transactions that existed between Solvay, Brasil and CBCC during the POR were loans between Brasil and CBCC, and that this is recognized by the CAFC. See CBCC Verification Report at 28 (July 22, 1996). Petitioners additionally state that the Department has found in prior segments of this proceeding that Brasil controlled the capital structure of CBCC. Petitioners contrast this with what they claim is no evidence in the record of any intercompany financing activity between CBCC and its indirect Belgian parent, Solvay. See Final Determination of Sales at Less than Fair Value; Silicon Metal from Brazil, 56 FR 26977 at 26987 (June 12, 1991); Silicon Metal from Brazil: Final Results of Antidumping Duty Administrative Review, 59 FR 42806 at 42807 (August 19, 1994); *inter alia*.

Petitioners reason that, consistent with the CAFC’s decision, rather than relying on a presumption, the Department should have gathered and examined the evidence

necessary to determine whether it was Brasil or Solvay that actually exercised control over the intercompany financing activities between Brasil and CBCC during the POR. Petitioners believe that this fact-gathering and analysis should have included, for example, obtaining and examining evidence regarding: (1) whether there were written policies of Solvay in place during the POR governing the financing activities between Brasil and CBCC and the contents of any such written policies, and (2) what actually happened with respect to the loans between Brasil and CBCC (*i.e.*, whether Solvay directed, authorized or approved the transactions, or instead, was not involved in the decisions regarding the loans). Further, Petitioners maintain that the Department should have asked narrative questions about whether there were any written policies of Solvay on loans, specific circumstances of loan transactions, and what role, if any, Solvay played in directing, authorizing or approving those transactions. Petitioners state that the Department should also have requested complete documentation of the foregoing.

Petitioners contend that the Department did not do so, and therefore the Department's draft remand results are contrary to the CAFC's decision and not supported by substantial evidence on the record.

Respondents rebut the comments of Petitioners by arguing both that the Department's assessment of general costs based on Solvay's consolidated financial statements was proper because CAFC has sustained this well-established practice as "reasonable," and that the Department need not gather and examine additional evidence because the use of fully consolidated financial statements and the record evidence show control of the parent company, Solvay, over both CBCC and Brasil.

Specifically, Respondents cite the CAFC's observation that standard accounting principles acknowledge consolidated financial statements as a "fair representation of the financial position of a group," and that the Department followed those practices in adopting and pursuing a standard policy for assessing finance costs on the consolidated financial statements of a parent company because the cost of capital is fungible and this policy recognizes that consolidated financial statements indicate that a corporate parent controls a subsidiary. See American Silicon III 334 F.3d at 1038.

Respondents also underline the CAFC's objection to assessing intercompany financial transactions in calculating finance expenses in a dumping margin since this would create "a new kind of test that would impose significant new administrative burdens on Commerce and invite potential manipulation." Id.

With regard to whether there was a need for the Department to gather and examine additional evidence, Respondents observe that the CAFC's citation of the CIT's decision where it "sustained Commerce's normal practice of calculating financial expense ratios based on the consolidated financial statements of a parent as a permissible interpretation of applicable statutes (19 U.S.C. §§ 1677b(b)(3)(B), 1677b(e)(2)(A), and 1677b(f)(1)(A)), the Statement of Administrative Action, and its case law." Id. Respondents note that this section requires the Department to "consider all available evidence on the proper allocation of costs," but observe that because the statute provides no specific guidance as to calculation method, the Department enjoys broad discretion to devise a method for calculating "general expenses." Id.

Accordingly, Respondents note the analysis undertaken by the Department in which the financial statements of Solvay and other record evidence were analyzed and

shown to establish that Solvay has direct control over both Brasil and CBCC through ownership of 100% and 99.9% of the voting stock in each firm, respectively.

Consequently, Respondents assert that evidence of fully consolidated financial statements demonstrating that Solvay owns 99.9% of CBCC is evidence of its control over CBCC.

Respondents conclude that Solvay's consolidated financial statements are appropriate to use for determining general costs, in keeping not only with the Department's longstanding policy supported by CAFC, but also with the evidence on the record.

**Department's Position:**

The Petitioners' objection to the Department's results on remand center on Petitioners' contention that the CAFC relied upon the presumptive control of CBCC by Solvay as evidenced by CBCC's consolidation into Solvay's financial statements resulting from Solvay's 99.9 percent ownership of CBCC. Petitioners contend that such reliance does not adequately respond to the CAFC's observed shortcoming in that the Department's CIT remand analysis did not examine "the entire record to determine whether this presumption has been overcome or whether Solvay's financial statements accurately reflect the actual costs associated with the production of the subject merchandise." *Id.* From that core observation, Petitioners conclude that in its remand analysis the Department should have gathered and analyzed a great deal more information, primarily regarding actual financial dealings among CBCC, Brasil, and Solvay, as well as overall Solvay policies and oversight of such dealings.

The Department disagrees with Petitioners' characterization of the requirements contained in the CAFC's remand.

First and foremost, the Department notes that the CAFC agreed with the Department's general practice regarding the expenses at issue. The CAFC explicitly held that "this court sustains as reasonable Commerce's well established practice of basing interest expenses and income on fully consolidated financial statements." See American Silicon III, 334 F.3d at 1038.

Second, the Department did in fact review the entirety of the record in light of its general practice. The key observations available on the record regarding this issue are: (1) 99.9 percent of CBCC is owned by the Solvay Group, (2) through its 100 percent ownership of Brasil, it is Solvay, rather than Brasil, which owns the 99.9 percent share of CBCC, (3) CBCC's financial results are consolidated into Solvay, (4) the consolidation of CBCC's financial activity into Solvay's net interest expense reflects the "actual costs associated with the production of the subject merchandise," (5) the verification report from the underlying review shows that Solvay's financial results were used in the calculation of CBCC's financial expenses. See CBCC Verification Report at 3 (July 22, 1996). The French version of those statements was accepted onto the record with a notation that the English language translation would follow. Id. The Department accepted and verified these financial statements without subsequent objection from any party. No indication exists in the preliminary or final results, or in the verification report, that there were any factual discrepancies or other considerations militating against the use of Solvay's financial statements for these purposes, and (6) no other information on the record rebuts the presumption that Solvay's audited, consolidated financial statements are appropriate for use. Petitioners point to no such information.

Third, assuming *arguendo* that Petitioners were in fact correct and that the Department should not have relied on its general practice, the cure for the deficiency Petitioners offer is precisely the test which the CAFC rejected as a new standard imposing “significant new administrative burdens on Commerce and invite potential manipulation.” See American Silicon III 334 F.3d at 1038. Moreover, the kinds of information Petitioners suggest that the Department should have acquired would in essence result in the Department’s piecemeal deconstruction into its constituent parts of the auditor-approved and consolidated view of the financial condition of the Solvay group. This would result in a skewed analysis in that only certain transactions among affiliated entities would be examined, out of the context of their effects on the overall Solvay financial results.

In conclusion, we continue to rely on the analysis from our draft results and continue to find that the appropriate source of the financial information at issue in this remand for this review is Solvay’s consolidated financial statements.

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James J. Jochum  
Assistant Secretary  
for Import Administration

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Date