

DATE: April 18, 2011

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Antidumping Duty Administrative Review of Polyethylene
Terephthalate Film, Sheet, and Strip from the United Arab
Emirates: Issues and Decision Memorandum for the Final Results

I. Summary

We have analyzed the comments of the interested parties in the antidumping duty administrative review of polyethylene terephthalate film (PET Film) from the United Arab Emirates (UAE). As a result, we have made changes to the margin calculation for JBF RAK LLC (JBF). No comments were received for FLEX Middle East FZE (FLEX). We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

II. Background

On December 17, 2010, the Department of Commerce (the Department) published the preliminary results of the antidumping duty administrative review of PET Film from the UAE. See Polyethylene Terephthalate Film, Sheet, and Strip From the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review, 75 FR 78968 (December 17, 2010) (Preliminary Results). This administrative review covers two producers/exporters of the subject merchandise: JBF and FLEX. The period of review is November 6, 2008, through October 31, 2009.

The Department received a timely case brief from JBF on February 28, 2011. Dupont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc. and Toray Plastic (America), Inc. (collectively Petitioners) filed a timely rebuttal brief with the Department on March 8, 2011. Based on our analysis of the comments received, the weighted average margin for JBF changed from the calculated margin in the Preliminary Results. The revised margin is published in the accompanying Federal Register notice. There has been no change to the weighted average margin calculated in the Preliminary Results for FLEX.

III. List of the Issues

Below is the complete list of issues in this review on which we received comments from interested parties.

- Comment 1: Sample Transactions
- Comment 2: Values Reported for Average Cost of Manufacturing
- Comment 3: Transactions Outside the Ordinary Course of Trade
- Comment 4: Matching Criteria
- Comment 5: Zeroing

IV. Discussion of the Issues

Comment 1: Sample Transactions

In a minor corrections letter submitted prior to verification, JBF identified a U.S. sale that it claims should have been reported as a sample sale in previous questionnaire responses. During verification, JBF stated the customer paid for production of the film and JBF paid for transportation expenses, insurance and handling (thus implying that the customer received a delivered product for an ex-factory price). JBF requests that the final results exclude this sale from the margin calculation. JBF claims that the manner in which the merchandise was shipped, and the fact that freight expenses were significantly more than those reported for other sales, demonstrates that it was a sample sale. Specifically, JBF claims it paid to ship a full container, but only packed about one quarter of the container in order to reach the customer on time.

Petitioners did not comment on this issue.

Department Position:

While the respondent is correct that the per-unit freight it paid for this sale was higher than typical, neither this fact, nor the others cited by JBF, provide a basis for excluding the sale. The customer paid for the merchandise in question. Consistent with our practice, the Department may exclude from its dumping analysis those transactions in which a respondent can demonstrate that no consideration was exchanged for the merchandise. See *NSK Ltd. v. United States*, 115 F.3d 965, 972 (Fed. Cir. 1997). However, the Department is not obligated to exclude any transaction from the U.S. sales database merely because any such transaction is labeled as a sample sale. See *NTN Bearing Corp. of Am. v. United States*, 27 C.I.T. 129, 166 (June 2003) (finding the Department's decision to include the samples designated by the company as samples in its U.S. sales databases to be reasonable). Accordingly, we are not excluding this sale from our calculation.

Comment 2: Values Reported for Average Cost of Manufacturing

JBF claims that the Department incorrectly used different U.S. and home market average cost of manufacturing figures for the same products, which resulted in an incorrect calculation of the “difference in merchandise adjustments” and the weighted-average margin. JBF argues that the Department should correct this error in the final results.

Petitioners did not comment on this issue.

Department Position:

The computer program used to calculate home market sales and cost values did not transfer the correct dataset for use in the program used to calculate the margin. As a result, different variable cost figures were assigned to identical U.S. and home market products. We have corrected this error in the program used in the final results.

Comment 3: Transactions Outside the Ordinary Course of Trade

JBF argues that there are four home market sales that should be excluded from the Department’s calculations because they are outside the ordinary course of trade (OCT). JBF notes that for these sales: (1) the sales quantity was extremely low; (2) the sale price was abnormally high; (3) the customer to whom these sales were made was not a “normal” customer, because the customer purchased much lower quantities than the average customer purchased; and (4) the profit from these sales was abnormally high. JBF contends that using these sales would produce “irrational and unrepresentative results,” and therefore should be excluded when determining normal value (NV). JBF cited Lightweight Thermal Paper From Germany: Notice of Preliminary Results of Antidumping Duty Administrative Review, 75 FR 77831 (December 14, 2010) (Thermal Paper), and Gray Portland Cement and Clinker from Mexico: Notice of Final Results of Antidumping Duty Administrative Review, 71 FR 2909 (January 18, 2006) (Mexican Cement) as examples of cases in which the Department reviewed such factors as sales volume, number of sales, price and profitability, customers, and shipping arrangements in deciding that transactions were outside the OCT.

Petitioners argue that JBF has not provided sufficient evidence that these sales were outside the OCT. Petitioners claim JBF reported several sales of similarly low quantity in its sales datasets, and that the sales prices for these transactions are not abnormally high when compared with other transactions. Petitioners contend that, given the small number of sales for these products, there is not enough information to support JBF’s claim that profits for the sales in question were aberrational.

Department Position:

The Department does not find these sales to have been made outside the OCT. We first note that only one of the cases cited by JBF, Mexican Cement, excluded sales as outside the OCT. In our analysis in Mexican Cement, we referred to a number of factors in addition to the low sales quantity, including the type of customer, the special sales program involved, and questionable demand for the merchandise in the home market. In Thermal Paper, the Department discussed only the possibility of excluding sales because of low quantities and high prices. Ultimately, we decided not to exclude the sales because there was no evidence on the record to demonstrate that

the sales could be considered extraordinary in any other aspect because they were not based on transactions involving off-quality merchandise, did not involve merchandise produced according to unusual product specifications, and did not involve merchandise sold at aberrational prices or with abnormally high profits.

The Department finds nothing striking about the sales in question that would justify their exclusion. While the quantities in the four sales are below average, they are part of a smooth distribution of quantities from low to high. These sales are among several sales that involved similarly small amounts. Accordingly, the Department does not find that the quantity involved in these four sales was aberrational compared to other sales made by JBF. The quantities involved in these sales are not extraordinary, but fall within the ordinary course of trade in the home market. Additionally, we find there were too few transactions of the CONNUM actually selected for matching to analyze accurately whether the sales prices were aberrational.¹ Profit for these sales was higher than average and higher than for all other sales; however, as with quantity, profit is smoothly distributed from low to high providing no indication of a standard or normal profit rate or even range of rates. While prices and profit are higher than the other home market sales reported, and quantities lower, the variations in prices, quantities, and profits reflect JBF's normal business practice of sales and are not “extraordinary” under 19 CFR 351.102(b)(35) or “aberrational” (to use the language of Thermal Paper). For a more detailed discussion regarding the Department’s analysis, including comparisons of business proprietary information, see Memorandum to Barbara E. Tillman, Director AD/CVD Operations, Office 6, from Mark Hoadley, Program Manager, AD/CVD Operations, Office 6, “Antidumping Duty Administrative Review of Polyethylene Terephthalate (PET) Film, Sheet and Strip from the United Arab Emirates (UAE): Final Analysis Memorandum for JBF RAK LLC,” April 18, 2011.

Importantly, JBF has not given the Department any reason to consider that these transactions differ from other sales in any respect, other than quantity, beyond its own pricing decisions and the willingness of the customers for these sales to pay higher prices. In other words, it has not demonstrated there is a reason why one would expect, *a priori*, prices and profits for these sales to be higher, such as the unusual product or sales aspects examined in Mexican Cement or Thermal Paper. JBF has not shown that these sales involve off-quality merchandise, were produced according to unusual product specifications, were sold pursuant to unusual terms of sale, or were sold to an affiliated party at a non-arm’s length price. Accordingly, the Department finds that JBF has not established that these sales are outside the OCT and, therefore, we have not excluded these sales from our analysis.

Comment 4: Matching Criteria

JBF argues that the Department incorrectly matched U.S. and home market products and should have chosen different matches based on surface treatment. Primarily, JBF’s arguments are concerned with sales of “corona” film, an electric charge applied to film that makes it more suitable for certain applications. Because corona film is not coated, JBF argues it should be matched to sales of “plain” film, when other corona products are not available. The

¹ JBF argues that four sales were outside the OCT. Only two of these sales are used for matching purposes. Given the circumstances of JBF’s sales, the other two sales are not used in any other aspect of our calculations.

Department's methodology, however, considers plain and coated films to be equally similar to corona films in terms of physical characteristics, and selected coated products as the best matches for some sales of corona film. JBF offered several other alternative matches for other U.S. products, based on various JBF claims regarding surface treatment.

Petitioners argue that JBF did not avail itself of the opportunity to address the comparability of surface treatments when it initially responded to the Department's questionnaire. The Department ranked surface treatments in order of similarity in the questionnaire. Petitioners argue that, if JBF disagreed with the order in which surface treatments were listed, it should have requested a different ranking when it filed its initial questionnaire response. Petitioners argue that JBF should not be allowed to change matching criteria now to achieve a preferred outcome. Petitioners also note that many of JBF's suggested alternative matches ignore matching criteria beyond physical characteristics, such as timing of sales.

Department Position:

We have not made JBF's suggested changes to the matching methodology. The model-matching hierarchy used in the Preliminary Results consists of four criteria (in order of importance): specification, thickness in microns, thickness code, and surface treatment. The model matching methodology used for these final results is the same as that used for the Preliminary Results, which is the same as that used in the investigation (excepting one minor difference, not relevant to this issue). When the Department has an established model-matching methodology in a proceeding, it may alter its established methodology if there is a reasonable basis for doing so. See NTN Bearing Corp. of America v. United States, 295 F.3d 1263, 1269 (CAFC 2002). With respect to changes to its model-matching methodology, the Department has applied a "compelling reasons" standard. See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 70 FR 54711 (September 16, 2005) and accompanying Issues and Decision Memorandum (IDM) at Comment 2, and Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews, 57 FR 28360 (June 24, 1992) at General Issues, Comment 1. Compelling reasons that warrant a change to the model-matching methodology may include, for example, greater accuracy in comparing foreign like product to the single most similar U.S. model, in accordance with section 771(16)(B) of the Tariff Act of 1930, as amended (the Act), or a greater number of reasonable price-to-price comparisons in accordance with section 773(a)(1) of the Act. See e.g., Stainless Steel Wire Rod from Sweden: Final Results of Antidumping Duty Administrative Review, 72 FR 17834 (April 10, 2007) and accompanying IDM at Comment 2.

JBF has not provided compelling reasons for the Department to consider changing the model match methodology from the methodology used in the Preliminary Results and the investigation. Under the Department's model matching hierarchy, we select a similar model for matching purposes according to: the list of physical characteristics, the order of the characteristics, and the ranking of choices under each characteristic. With respect to PET Film, the Department determined that four physical characteristics are needed to properly define the product: specification, micron, thickness code and surface treatment. Surface treatment, as the last listed characteristic, is the least consequential. Accordingly, only when all other characteristics are equal will U.S. products be matched to home market products with different surface treatments.

As Petitioners note, the slate of other suggested matches offered by JBF for other U.S. products are unacceptable matches for a number of reasons outside of physical characteristics, including the contemporaneousness of sales and cost of production. Specifically, all suggested alternatives by JBF were either not sold within the matching window for the U.S. sales or were sold below cost.

Also, its case brief is the first instance that JBF suggested a change in methodology, precluding the Department from the opportunity to collect additional necessary information to evaluate JBF's claims. Without such additional information, the Department has no basis to evaluate such arguments, beyond JBF's reference to one sentence in the cost verification report that mentions the apparent lack of materials or process involved in applying a corona surface to film.

Comment 5: Zeroing

JBF argues that the Department erred by applying its zeroing methodology, which is contrary to law and United States' World Trade Organization obligations. According to JBF, the Department's policy of assigning a margin value of zero to negative-margin transactions significantly distorts the actual level of dumping. JBF states that, had the Department not applied its zeroing methodology, it would have received a zero or de minimis dumping margin. JBF notes that on December 28, 2010, the Department published a Federal Register notice stating that it intended to change its antidumping methodology to eliminate the practice of zeroing. See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 FR 81533 (December 28, 2010) (Proposed Modification).

Petitioners argue that the Department should continue to use its existing methodology. Petitioners note that the Department's proposal in the Federal Register stated that changes in methodology would be applicable "in all reviews pending before the Department for which a preliminary result is issued more than 60 days after the date of publication of the Department's Final Rule and Final Modification." See Proposed Modification, 75 FR at 81535. Petitioners argue that, because the Preliminary Results preceded this notice, there is no basis for the Department to alter its methodology in the present case.

Department Position:

We have not changed our calculation of the weighted-average dumping margin as suggested by the respondent for these final results of review.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than export price (EP) or constructed export price (CEP). As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The Court of Appeals for the Federal Circuit (CAFC) has held that this is a reasonable

interpretation of the statute. See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (Timken).

Section 771(35)(B) of the Act defines “weighted-average dumping margin” as “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.” The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term “aggregate dumping margins” in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular “dumping margin” in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel out the dumping margins found on other sales.

This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the period of review: the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

The CAFC explained in Timken that denial of offsets is a “reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value.” Timken, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the Department to demonstrate “masked dumping” before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. See, e.g., Timken, 354 F.3d at 1343; see also NSK Ltd. v. United States, 510 F.3d 1375 (Fed. Cir. 2007).

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) (Final Modification). With this modification, the Department’s interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to average comparisons. The Department’s interpretation of the statute was unchanged in other contexts. Recognizing that the change in the Department’s interpretation of the statute was limited to investigations using average-to average comparisons, the CAFC upheld the Department’s interpretation as applied in an investigation using average-to average comparisons as a reasonable interpretation of ambiguous statutory language. See U.S. Steel Corp. v. U.S., 621 F.3d 1351 (Fed. Cir. 2010) Rehearing, en banc, denied by United States Steel Corp. v. United States, 2011 U.S. App. LEXIS 4499 (Fed. Cir. 2011). In addition, the CAFC recently upheld, as a reasonable interpretation of ambiguous statutory language, the Department’s continued application of zeroing in the context of an administrative review completed after the implementation of the Final Modification. See SKF USA Inc. v. United States, 630 F.3d 1365 (Fed. Cir. 2011). In that case, the Department had explained that the changed interpretation of

the ambiguous statutory language was limited to the context of investigations using average-to-average comparisons and was made pursuant to statutory authority for implementing an adverse WTO report.

Further, the Proposed Modification, cited by the respondent, does not provide a basis for changing the Department's approach for calculating weighted-average dumping margins in the instant administrative review. See Proposed Modification. The Proposed Modification is only a proposal that remains subject to review of comments from the public and statutory consultation requirements involving congressional committees, among others. See 19 U.S.C. § 3533(g)(1). It does not provide legal rights or expectations for parties in this review. The Proposed Modification further makes clear that, in terms of timing, any changes in methodology will be prospective only, and “will be applicable in . . . all {administrative} reviews pending before {Commerce} for which a preliminary results is issued more than 60 business days after the date of publication of {Commerce’s} Final Rule and Final Modification.” Proposed Modification, 75 FR at 82535. Additionally, the Proposed Modification would not apply to this administrative review because, normally, “{a} final rule or other modification . . . may not go into effect before the end of the 60-day period beginning on the date which consultations [between the Trade Representative, heads of the relevant departments or agencies, and appropriate congressional committees] under paragraph 1(E) begin . . .” 19 U.S.C. § 3533(g)(2). Completion of these final results is prior to the effective date of the final rule; as such, any change in the treatment of non-dumped sales, pursuant to the Proposed Modification, if implemented, would not apply to this review.

Accordingly, and consistent with the Department’s interpretation of the Act described above, in the event that any of the export transactions examined in this review are found to exceed NV, the amount by which the EP exceeds NV will not offset the dumping found with respect to other transactions.

V. Recommendation

We recommend adopting the above positions. If these recommendations are accepted, we will publish the final results of this review and the final dumping margins for all companies in the Federal Register.

Agree _____ Disagree _____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date