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March 1, 2011

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

FROM: Gary Taverman
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Polyethylene Retail Carrier Bags from Thailand for the Period of Review August 1, 2008, through July 31, 2009

Summary

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on polyethylene retail carrier bags from Thailand for the period August 1, 2008, through July 31, 2009. As a result of our analysis, we have made changes in the margin calculations. We recommend that you approve the positions described in this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from parties:

1. Conversion-Cost Reallocation
2. Affiliated-Party Inputs
3. Blue Corner Rebates
4. Zeroing
5. Duties in Cost of Production and Constructed Value
6. General and Administrative Expenses
7. Ministerial Errors and Other Issues

Background

On September 2, 2010, the Department of Commerce (the Department) published *Polyethylene Retail Carrier Bags From Thailand: Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 53953 (September 2, 2010) (*Preliminary Results*), in the *Federal Register*.

We invited parties to comment on the *Preliminary Results*. On December 10, 2010, we received case briefs from the Polyethylene Retail Carrier Bag Committee and its individual members, Hilex Poly Co., LLC, and Superbag Corporation (collectively, the petitioners), and from Thai Plastic Bags Industries Co., Ltd. (TPBI). On December 15, 2010, we received rebuttal briefs from the petitioners and from TPBI. We did not hold a hearing as the only request for a hearing was withdrawn. See the petitioners' letter dated December 20, 2010.

Abbreviations

The Act - The Tariff Act of 1930, as amended
BCR – Blue Corner Rebate
CAFC - Court of Appeals for the Federal Circuit
CIT - Court of International Trade
COGS - cost of goods sold
COM - cost of manufacturing
COP – cost of production
CONNUM - control number (a variable the Department uses in matching transactions)
Conversion costs - direct labor, variable overhead, and fixed overhead
CV – constructed value
DIFMER – difference-in-merchandise adjustment
Final Analysis Memo - Memorandum to File entitled "Polyethylene Retail Carrier Bags from Thailand - Thai Plastic Bags Industries Co., Ltd., Final Results Analysis Memorandum" dated concurrently with this memorandum
Final Cost Memo - Memorandum to Neal M. Halper entitled "Cost of Production and Constructed Value Calculation Adjustments for the Final Results - Thai Plastic Bags Industries Co., Ltd." dated concurrently with this memorandum
GAAP – generally accepted accounting principles
I&D Memo – Issues and Decision Memorandum adopted by a *Federal Register* notice of final determination of an investigation or final results of review
G&A - general and administrative
Policy Bulletin 92.2 - Import Administration Policy Bulletin Number 92.2 dated July 29, 1992
POR - period of review
Preliminary Analysis Memo - Memorandum to File entitled "Polyethylene Retail Carrier Bags from Thailand - Thai Plastic Bags Industries Co., Ltd., Preliminary Results Analysis Memorandum" dated August 26, 2010
Preliminary Cost Memorandum to Neal M. Halper entitled "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results" dated August 26, 2010
PRCBs - polyethylene retail carrier bags
PRCBs 4 - Polyethylene Retail Carrier Bags From Thailand: Final Results of Antidumping Duty Administrative Review, 74 FR 65751 (December 11, 2009)
SAA - Statement of Administrative Action, URAA, H. Doc. 316, Vol. 1, 103d Cong. (1994)
TOTCOM - total cost of manufacturing
TPBI - Thai Plastic Bags Industries Co., Ltd.
URAA – Uruguay Round Agreements Act
WIP – Work in process
WTO – World Trade Organization

Discussion of the Issues

1. Conversion-Cost Reallocation

Comment 1: TPBI argues that the Department erred in rejecting the costs TPBI reported in its questionnaire responses and replacing them with averaged costs.

TPBI contends that substantial evidence does not support the Department's determination that TPBI's reported costs are unreasonable or otherwise distorted. TPBI alleges that the Department analyzed and compared the costs for nine different sets of CONNUMs but did not explain how it selected the nine models it cited in its Preliminary Cost Memo nor did the Department say anything about how the nine CONNUMs are physically similar or what standard it used to make this decision. TPBI posits that the Department should follow its normal practice in selecting similar CONNUMs for this purpose or it should at least disclose and explain its methodology for doing so. At a minimum, TPBI avers, the Department must articulate a rational connection between the facts and its findings so that a reviewing court may determine whether the Department's findings are reasonable and otherwise in accordance with law.

TPBI claims that record evidence shows that TPBI's cost differences are attributable to physical differences in the merchandise. TPBI contends that it calculated CONNUM-specific costs based on the actual costs incurred at each factory which have technical and practical limits on their production capabilities. TPBI also contends that, because a product's physical characteristics dictate where it will be produced, the resulting cost differences for different CONNUMs are attributable to the physical differences in the products. TPBI claims that it provided a single weighted-average cost for each unique CONNUM regardless of where it was produced; while some CONNUMs are produced only at one factory, TPBI states, others are produced at both factories. As a result, TPBI argues, its CONNUM-specific cost differences are attributable to the physical characteristics of the merchandise and any such cost differences appear only in products with significant physical characteristics (*i.e.*, different CONNUMs).

TPBI also argues that the Department ignored other facts that explain observed cost differences for the nine selected CONNUM comparisons. According to TPBI, the Department did not recognize that disparities in production quantities between the compared CONNUMs are largely responsible for many of the cost differences. Aside from differences in production quantities, TPBI avers, there are a host of other variables accounting for the cost differences, including whether a particular CONNUM was produced at a more or less efficient factory, generates more or less waste, was produced "off-line" or "on-line," required more or less ink, colors, plate, or solvents, was produced in larger or smaller quantities, or required transparent or colored bags.

TPBI argues further that the Department determined incorrectly that TPBI shifted costs from one market to the other. TPBI contends that there is no evidence that TPBI's reporting methodologies shifted costs away from subject merchandise or the foreign like product. TPBI also asserts that its production efficiencies do not benefit PRCBs produced for one market or the other. According to TPBI, neither of its factories is dedicated exclusively to producing PRCBs for domestic or export production. TPBI claims that, because there was substantial overlap in production for the various markets between the two facilities, there was no cost-shifting between markets.

TPBI also contends that the Department used TPBI's managerial standards incorrectly to justify rejection of TPBI's reported costs. According to TPBI, one of the reasons the Department gave for rejecting TPBI's reported costs was that TPBI's methodology for allocating conversion costs by machine times is inconsistent with the methodology applied by TPBI in its books and records for this purpose. TPBI asserts that record evidence demonstrates that TPBI's management accounts were not based on actual costs and were otherwise unreliable. Thus, TPBI contends, the Department erred factually in using a purported inconsistency with these unreliable management costs to reject TPBI's reported costs. TPBI also argues that the Department has not provided an adequate explanation of its reasoning behind this finding nor the evidence on which it relied in making it. According to TPBI, the Department has not explained exactly what it means when it refers to "the methodology applied by TBPI in its books and records" used to allocate conversion costs.

TPBI asserts that, because the conversion costs it records in its managerial costs were not based on actual costs, TPBI did not use them. Instead, TPBI states, it used total actual conversion costs from its financial accounting system correctly and allocated those costs to specific CONNUMs using machine times kept in the ordinary course of business. TPBI argues that, because it allocated total actual costs using the main cost driver (machine times), this was the most accurate methodology it could have used. TPBI also contends that, while its methodology was inconsistent with its unreliable management cost system, it was consistent with its financial accounting system and its normal books and records (*i.e.*, machine times recorded on individual job orders).

TPBI argues that the Department used the wrong legal standard in rejecting TPBI's reported conversion costs. TPBI contends that the Department erred by using the legal standard for the DIFMER test in judging the reasonableness of TPBI's reported costs. TPBI asserts that the DIFMER statute only authorizes adjustments to prices and not costs. Citing Policy Bulletin 92.2, TPBI contends that the DIFMER adjustment is used only to measure and adjust prices for cost differences that are attributable to physical differences in the merchandise being compared. TPBI asserts that Policy Bulletin 92.2 explains that there may be genuine costs differences attributable to factors other than physical characteristics, such as when different facilities are used. TPBI argues that this is normal and not to be used as grounds for rejecting a respondent's costs for COP and CV purposes.

TPBI also asserts that Policy Bulletin 92.2 shows that, if the Department finds that purported cost differences are not attributable to the physical characteristics, then the Department should disregard the DIFMER adjustment. TPBI contends further that the principles articulated in Policy Bulletin 92.2 are reflected in the SAA. Thus, TPBI argues, should the Department want to address its perception that TPBI's costs somehow do not reflect physical characteristics, then the Department should disregard the DIFMER adjustment rather than adjust TPBI's reported COP and CV data.

TPBI argues that the Department's reliance on *Stainless Steel Bar from the United Kingdom: Final Results of Antidumping Duty Administrative Review*, 72 FR 43598 (August 6, 2007), and accompanying I&D Memo at Comment 1 (*UK Bar*) is misplaced because the facts in that case are distinguishable from the instant review. According to TPBI, the methodology used by the respondent in *UK Bar* rendered the CONNUM-specific costs highly dependent on the timing and market prices of purchase of the main material input. TPBI contends that this review involves cost differences affecting CONNUMs produced at different factories and not distortions caused by the timing of input purchases. Further, in *UK Bar*, TPBI avers, the Department adjusted the respondent's costs by weight-averaging costs by grade, thereby limiting the cost-averaging to subject merchandise which the Department did not do in this case.

TPBI argues that the Department's citation to *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 FR 24329, 24351-53 (May 6, 1999), at Comment 22 (*Japan Hot-Rolled*) is irrelevant because, according to that decision, the Department used the respondent's reported actual costs from each factory and simply re-weighted them to "more properly reflect actual production quantities at the facilities." TPBI also argues that the Department's citation to *Notice of Final Determination of Sales at Less Than Fair Value: Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe From Brazil,* 60 FR 31960, 31966 (June 19, 1995), at Comment 2 (*Brazil Pipe*) does not support the Department's decision because, in that case, the Department observed certain distortions in the respondent's reported costs and the Department modified the costs on a product-specific basis. According to TPBI, the Department did not reject portions of the respondent's reported costs on a wholesale basis nor did it use the costs of non-subject merchandise in *Brazil Pipe*.

TPBI argues that the Department should have used TPBI's reported costs to judge the reasonableness of TPBI's conversion costs. According to TPBI, the Department relied exclusively on contrived mathematical conversion-cost differences among nine different sets of similar CONNUMs in making its determination. TPBI claims that such an analysis misses the point that TPBI's reported costs are based on actual costs as incurred which are driven by many variables, including production efficiencies, different cost structures at each factory, and the day-to-day requirements of individual production runs and customer orders. TPBI asserts that allocating conversion costs by machine times results in accurate per-CONNUM costs because more such costs are attributed to those specific products and production runs that take more time to produce.

TPBI argues further that the Department erred in relying on facts available to weight-average TPBI's conversion costs. According to TPBI, the Department relied on section 776(a) of the Act as authority for recalculating TPBI's costs but did not mention, much less discuss, section 782(e) of the Act which sets parameters for the Department's use of facts available. TPBI asserts that, at a minimum, the Department must consider all of the evidence on the record and weigh the evidence used as facts available carefully to ensure it is most probative of the issue under consideration. TPBI claims that the Department has not explained why its approach was the best approach or why it was the preferred alternative to other information on the record, including TPBI's alternative set of costs based on actual costs allocated by production output rather than by machine hours. TPBI asserts that the Department must use the alternative cost information or explain why it has not done so and explain why the Department's methodology is the best alternative.

Finally, TPBI also contends that the Department may not weight-average both subject and non-subject merchandise arbitrarily. TPBI claims that it has provided costs separately for subject merchandise only and that the use of non-subject merchandise for weight-averaging purposes is neither the most probative nor the most reasonable approach for calculating TPBI's costs based on facts available. TPBI asserts that the Department must limit any such weight-averaging to the subject merchandise and explain its reasons for doing so.

The petitioners contend that the regulations, the SAA, and Policy Bulletin 92.2 provide that the Department will consider only differences in variable costs associated with the physical differences between products and not cost differences associated with extraneous factors such as whether the domestic and exported products are produced in different facilities with differing production efficiencies. The petitioners assert that TPBI's reported conversion costs vary according to extraneous factors unrelated to physical characteristics. The petitioners argue that the Department reallocated TPBI's conversion costs properly to mitigate this distortion.

The petitioners contend that the Department was correct to find that TBPI's reported conversion costs do not reflect cost differences attributable to physical characteristics. The petitioners claim that TPBI's arguments miss the point of the Department's selection of CONNUM pairings. According to the petitioners, the CONNUM pairings which the Department selected simply illustrate that TPBI's methodology results in the allocation of vastly different conversion costs to products that are virtually identical. The petitioners allege that this does not imply that TPBI's reporting methodology necessarily has that effect on every possible CONNUM pairing but, where similar CONNUM pairings do have similar costs, it is not because of their similar physical characteristics but, rather, it is attributable to extraneous factors such as that, by chance, they were manufactured at the same facility during the same month.

The petitioners assert that TPBI's allocation methodology is distortive because it results in cost differences that are not attributable to physical characteristics. The petitioners contend that, under TPBI's methodology, different conversion costs are attributable to extraneous factors such as the month of production or the efficiency of the manufacturing facility at which the product happens to be made. According to the petitioners, TPBI acknowledged that differences in its reported conversion costs are driven largely by the efficiencies of each factory where the merchandise was produced. The petitioners contend further that TPBI appears to admit that the decision about where to manufacture any given CONNUM is a business decision with home-market CONNUMs produced at the facility close to Bangkok and U.S. CONNUMs produced at the facility close to the seaport.

The petitioners argue further that, in *Thai Plastic Bags Industries, Co., Ltd. v. United States*, No. 09-00537, Slip Op. at 23 n.28, 24-25 (October 26, 2010) (*TPBI v. United States*), the CIT upheld the Department's decision to reallocate TPBI's conversion costs in the prior review and that TPBI does not explain how the record of the current review is different so as to justify a different conclusion. According to the petitioners, the facts of this review are essentially the same.

The petitioners allege that, in the prior review, the Department considered and rejected TPBI's argument that, because the DIFMER adjustment is a price adjustment, it cannot be used as a basis for reallocating costs for COP or CV in *PRCBs 4*. According to the petitioners, the Department stated that its normal practice is to calculate a single COP for both the sales-below-cost test and the DIFMER adjustment and that the CIT upheld this approach as reasonable and consistent with the statute.

The petitioners argue that TPBI's attempt to distinguish this review from *UK Bar* is unavailing because, in both *UK Bar* and this review, the cost differences are a function of extraneous factors that are not permitted to drive cost differences.

In response to TPBI's argument that its reported costs represent the "actual" costs, the petitioners aver that it is meaningless to refer to any of these allocations as "actual" costs. According to the petitioners, the starting point for any allocation is the total conversion costs as maintained in TPBI's financial accounting system; that is an "actual" cost. The issue, the petitioners assert, is how to allocate the total amount to individual CONNUMs.

The petitioners also argue that the Department should continue to make a DIFMER adjustment when comparing similar CONNUMs. According to the petitioners, TPBI does not acknowledge that, although no DIFMER adjustment is appropriate with respect to differences in reported conversion costs which are not related to physical characteristics, an adjustment is still required in order the capture differences in the cost of direct materials among products which are related to physical characteristics. The petitioners assert that, by reallocating conversion costs evenly to all products, the Department ensures that there will be no conversion-cost differences among products to be picked up in the calculation of the DIFMER adjustment. This does not mean, the petitioners aver, that the Department should disregard other, legitimate cost differences which are attributable to differences in physical characteristics.

Finally, the petitioners argue that the Department's methodology did not distort conversion costs for the subject merchandise. The petitioners contend that TPBI's financial accounting system does not keep separate conversion costs for subject and non-subject merchandise. Consequently, the petitioners aver, any suggestion by TPBI that "actual" total conversion costs for the subject merchandise are maintained in its financial accounting system is false. According to the petitioners, although TPBI claimed that it provided costs separately for subject merchandise only, the costs are based on an allocation of the costs using the same distortive methodology as it used to allocate costs to individual CONNUMs. The petitioners assert that the Department's methodology is not distortive because, by assigning the same conversion costs to all products, no artificial cost differences unrelated to physical characteristics are created.

<u>Department's position</u>: We have continued to reject TPBI's reported conversion costs and have reallocated them by weight-averaging these costs across all product lines in order to diminish the distortions in TPBI's reported costs.

TPBI asserts that the differences in costs between products are attributable to physical differences in the merchandise. This is not correct. In fact, as TPBI has acknowledged in its case brief, TPBI's conversion costs vary between products as a result of factors such as whether a particular CONNUM was produced at a more or less efficient factory, whether a particular CONNUM generates more or less waste, whether a particular CONNUM was produced “off-line” or “on-line,” whether a particular CONNUM was produced in larger or smaller quantities, or whether a particular CONNUM required transparent or colored bags. Thus, the cost differences observed are not a result of the physical characteristics of the merchandise but, rather, they result from factors that are unrelated to the physical characteristics of the merchandise.[1]

Furthermore, TPBI claims that its cost differences are attributable to physical differences in the merchandise because a product’s physical characteristics dictate where it will be produced and, thus, the resulting cost differences for different CONNUMs are attributable to the physical differences in the products. TPBI’s claim is belied by the fact that most of the CONNUM pairs we cited were pairs where both CONNUMs were produced at the same facility. Compare the Preliminary Cost Memo at Attachment 4 with TPBI’s supplemental response dated May 20, 2010, at Exhibit S3D-1. Of the nine CONNUM pairs we cited, only one pair involved CONNUMs produced entirely at different facilities. Compare Preliminary Cost Memo at Attachment 4 with TPBI’s August 18, 2010, supplemental response at Exhibit S5D-8. Moreover, TPBI did not claim that either of the CONNUMs in that CONNUM pair could not be produced at the other facility. See TPBI’s August 18, 2010, supplemental response at Exhibit S5D-8. Thus, the cost differences we observe are not a result of products’ physical characteristics dictating where they will be produced.

With respect to the nine example models we cited in Attachment 4 of the Preliminary Cost Memo, we chose the CONNUM pairs based on a manual examination of TPBI’s cost database. Based on that examination, we cited the CONNUM pairs we observed which had the most egregious differences in reported conversion costs despite being extremely similar in physical characteristics. The differences in the reported conversion costs for the similar CONNUM pairs in Attachment 4 of the Preliminary Cost Memo are so large that we find that they cannot be credibly explained solely by the slight differences in physical characteristics for these CONNUMs. For example, with respect to CONNUM pair A in Attachment 4 of the Preliminary Cost Memo, the *only* difference in physical characteristics between the two models was a slight difference in the percentage of color concentrate contained in each product. Given that this was the only difference between the two products, it is not credible that it takes an extensively longer period of time to produce one of the CONNUMs than it takes to produce the other as a result of the single difference in color concentrate. The only logical conclusion is that there must be other reasons for the differences in machine hours (and, as a result, conversion costs) that have nothing to do with the physical difference between the two CONNUMs.

TPBI suggests we should have used our standard model-matching methodology in order to select the CONNUM pairs. The purpose of our analysis was not to discover the single most similar non-identical CONNUM; rather, it was to ascertain the reasonableness of TPBI’s methodology

[1] There is a physical difference between transparent or colored bags. While it is apparent how this physical difference could affect the material costs of the bags, it is not apparent, nor does TPBI explain, why such a difference would take one CONNUM so much longer to manufacture than another otherwise identical CONNUM such as to explain the extreme differences in conversion costs we observed. See TPBI’s August 18, 2010, supplemental response at Attachment S5D-8.

by examining very similar CONNUMS regardless of where in the hierarchy of physical characteristics a particular difference may fall. For example, the difference with respect to CONNUM pair A was a difference in percentage of color concentrate. As it happens, the percentage of color concentrate is the twelfth (of fifteen) physical characteristics we examined with respect to TPBI. Given that the difference in percentage of color concentrate was the only difference between the two CONNUMs in pair A, this is a reasonable comparison for ascertaining the degree of differences in the reported costs for these CONNUMs.

Section 773(f)(1)(A) of the Act provides that, for the calculation of the COP and/or the calculation of CV, "costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country ... and reasonably reflect the costs associated with the production and sale of the merchandise." The Department is directed to "consider all available evidence on the proper allocation of costs ... if such allocations have been historically used by the exporter or producer."

With respect to the allocation of costs under this provision, Congress indicated in the SAA that "costs shall be allocated using a method that reasonably reflects and accurately captures all of the actual costs incurred in producing and selling the product under investigation or review." See SAA at 834-35. In addition, Congress stated in the SAA that, if the Department determined that costs reported by a respondent "shifted away from the production of the subject merchandise, or the foreign like product," the Department had the authority to "adjust costs appropriately to ensure that they (the costs) are not artificially reduced." *Id*. at 835.

The ability to adjust costs in this manner is significant because, pursuant to section 773(b)(1) of the Act, the Department "shall" disregard certain home-market sales in its calculation of normal value if it concludes that the cost to produce the foreign like product is greater than the price at which the merchandise was sold in the home market. In other words, the greater the allocation of COPs to certain home-market sales, the more likely that those sales will "fail" the Department's "cost test" and be disregarded from the calculation of normal value which the Department compares to U.S. price in its antidumping calculations. Further, an allocation methodology that shifts costs unreasonably from U.S. sales to home-market sales can heavily influence the Department's entire antidumping calculation by changing the universe of sales the Department uses to determine the magnitude of dumping by a given respondent.

TPBI's methodology for reporting labor and overhead costs does not reasonably reflect the costs associated with the production of the subject merchandise and foreign like product, as required by section 773(f)(1)(A) of the Act, because it results in products with few or minor physical differences having significantly different COMs assigned to them. See Preliminary Cost Memo at pages 1-3 and Attachment 4. As described above, the differences we observed in TPBI's reported conversion costs are not a result of the physical characteristics of the merchandise but, rather, result from factors that are unrelated to the physical characteristics of the merchandise.

In TPBI's normal cost-accounting system, it calculates a single monthly per-kilogram average cost for all labor and overhead for all products based on the costs and quantities from the previous three months. Thus, TPBI uses a three-month moving average as the monthly labor and overhead amount for each of its products. See TPBI's section D response dated December 16, 2009, at D-14. TPBI did not follow its normal cost-accounting system for purposes of reporting labor and overhead costs in its responses to the Department in this case. Rather, TPBI developed a methodology for reporting purposes. TPBI's reporting methodology allocated labor and overhead costs to individual models based on production hours. See TPBI's section D response dated December 16, 2009, at D-26 to D-28. TPBI explained that it created this allocation methodology for this administrative review because its normal cost-accounting system masks differences in labor and overhead costs between merchandise under consideration and merchandise not under consideration and its normal method does not vary the costs by CONNUM. See TPBI's section D response dated December 16, 2009, at D-15. Thus, the allocation methodology TPBI used for the purposes of its response does not appear in its normal cost-accounting system in its books and records and does not reflect its "actual" costs.

The costs a respondent reports to the Department should reflect cost differences attributable to the different physical characteristics. This ensures that the product-specific costs we use for the below-cost test reflect the costs incurred by a respondent to obtain the corresponding product's physical characteristics. This principle is supported by section 773(a)(6)(c)(ii) of the Act, which requires the Department to account for and adjust for any differences attributable to physical differences between the subject merchandise and the foreign like product if similar products are compared in the analysis of home-market price and U.S. prices.[2] Such comparison criteria are logical because physical characteristics provide the Department with a dependable, measurable means of comparing two different products sold in two different markets.

Similarly, 19 CFR 351.411(b) states that, when making this adjustment, "{t}he Secretary will consider only differences in variable costs associated with the physical differences." Thus, when additional factors unreasonably influence the allocation of costs, it is the Department's practice to adjust a company's reported allocation methodology to reflect costs based solely on physical characteristics.[3] In *UK Bar*, and accompanying I&D Memo at Comment 1, we explained this

[2] TPBI contends that we erred in using the legal standard for the DIFMER test in judging the reasonableness of TPBI's reported costs. The DIFMER adjustment refers to an adjustment to the U.S. price in accounting for physical differences between the U.S. and foreign markets pursuant to section 773(a)(6)(C)(ii) of the Act. Although we recognize that the DIFMER adjustment, which applies to two similar but not identical products, is an adjustment to price and not costs such that the provision does not apply directly, as a matter of law, to our analysis of costs, the necessity of using physical characteristics in making comparisons is key to both types of analyses. In a DIFMER adjustment, it is clear that physical differences will influence the prices of the products and, as a result, such differences are relevant to our analysis.

[3] In an analysis of costs among products, we also look at the variable COMs, including direct labor and variable overhead, of the subject merchandise and of the foreign like product. These costs must accurately reflect the differences in physical characteristics for this adjustment to be accurate. If the reported costs are distorted, this can affect our identification of the most similar model because sales of the most similar model may fail the cost test inappropriately and be discarded from consideration as the basis for normal value. Sales of a similar but actually below-cost model might pass the cost test inappropriately because of the distortions and be used as the basis for normal value. While there are many factors that may influence cost differences between products, an allocation of costs by physical characteristics is most certainly the primary factor in any cost analysis. Thus, the costs a respondent reports should reflect cost differences attributable to the different physical characteristics to ensure that the product-specific costs we use for the below-cost test reflect the costs incurred by a respondent to generate the corresponding product's physical characteristics.

policy of not allowing cost differences when such cost differences are attributable to factors beyond physical characteristics (such as situations where the merchandise is produced at separate facilities or the cost differences are high even though the physical differences appear small). In such instances, we have adjusted costs to address the distortion.

With respect to *UK Bar*, TPBI argues that the facts of *UK Bar* are distinguishable because the distortions in *UK Bar* were caused by "timing" of raw input material purchases as opposed to the facts in this case in which "differences" are caused by "production efficiencies." In *UK Bar*, the respondent's allocation of costs resulted in the creation of cost differences not attributable to the physical differences between CONNUMs. See *UK Bar* at Comment 1. Put another way, the Department concluded in *UK Bar* that the use of the methodology offered by the respondent would shift costs between products that were otherwise physically similar unreasonably, distorting its comparisons of home-market and U.S. sales in its antidumping calculations. Thus, consistent with the language of section 773(f)(1)(A) of the Act and the SAA, the Department adjusted the respondent's calculations to "ensure" that costs were not artificially reduced or increased as a result of distortive cost allocations. See SAA at 835.

Likewise, the same situation exists in this case. Although, as TPBI argues, the facts were different between the *UK Bar* proceeding and this case with respect to the perceived cost distortions and the remedies we applied to address those distortions, without question we acted consistently in each case to address those distortions on the administrative record.

A similar analysis obtains with respect to TPBI's objections to our citation to *Japan Hot-Rolled* and *Brazil Pipe*. TPBI's description of the facts in *Japan Hot-Rolled* is, in fact, not complete. In *Japan Hot-Rolled*, we found that the respondent's submission methodology inappropriately resulted in product cost differences due to plant efficiencies. See *Japan Hot-Rolled*, 64 FR 24351 at Comments 21 and 22. The respondent's methodology in that case calculated product-specific costs using the product mix of one product group rather than the product mix of the four subject merchandise product groups. *Id.* Because the reported cost differences were unrelated to the actual physical differences between products, the Department reallocated the respondent's reported COP. Using information specific to that administrative record, we were able to re-weight the respondent's production costs on a product group basis to reflect overall production at the two plants more properly. Similar information does not exist on this administrative record to permit such a calculation. Nonetheless, in both cases the Department addressed distortions in the respondent's cost-allocation methodology.

In *Brazil Pipe*, we found the respondent's reporting methodology to be distortive because it did not neutralize the cost differences resulting from different production processes or supply sources for input bar which was an inherent result of its normal cost accounting system. To correct this, we modified the respondent's variable COMs for those products for which we had information on the record to enable us to compute a DIFMER adjustment exclusive of the cost differences unrelated to physical differences. Just as in *UK Bar* and *Japan Hot-Rolled*, the cost differences were unrelated to physical differences between products. As TPBI points out, for the most part, we were able to revise the reported costs in *Brazil Pipe* based on product-specific data. How we revise costs for the same type of issue can certainly vary by case. We strive to use the most relevant data to adjust costs in each situation. So, although our adjustment to correct the problem may vary based on record evidence, our decision in *Brazil Pipe* for cost differences unrelated to physical differences was the same as our decision in this review for TPBI.

TPBI contends further that, in *UK Bar*, the Department adjusted the respondent's costs by weight-averaging costs by grade, thereby limiting the cost-averaging to subject merchandise. TPBI argues that we should not weight-average both subject and non-subject merchandise because, according to TPBI, it has provided costs separately for subject merchandise. As the petitioners have pointed out, however, TPBI's reported per-unit costs are not actual costs. Only the total costs are actual costs; the per-unit costs are derived from a distorted allocation methodology that does not reflect TPBI's normal books and records. Moreover, TPBI's argument that we should limit our reallocation only to the costs TPBI reported for subject merchandise is unavailing because that total cost was derived from the same distorted methodology. Further, with respect to TPBI's reference to the methodology we applied in *UK Bar*, grade is not a physical characteristic of the subject merchandise in this proceeding and, thus, it is not possible to use the same methodology we applied in that case.

TPBI's reported conversion costs do not reflect what TPBI records in its normal books and records nor do they reflect cost differences which are attributable to physical characteristics of the products. Accordingly, pursuant to section 776(a) of the Act, as facts otherwise available, we have recalculated the per-unit direct labor (including subcontract labor), variable overhead, and fixed overhead costs of each product by weight-averaging these costs (exclusive of plate, ink, and oil) across all product lines in order to prevent such significant differences in costs between physically similar merchandise. See SAA at 834-5 (stating that, if the Department determines that costs reported by a respondent "shifted away costs from the production of the subject merchandise, or the foreign like product," the Department has the authority to "adjust costs appropriately to ensure that they (the costs) are not artificially reduced"). This is the same methodology which we used in the preliminary and final results of the prior administrative review. See *PRCBs 4*, and accompanying I&D Memo at Comment 1; see also *Polyethylene Retail Carrier Bags from Thailand: Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 39928 (August 10, 2009).

TPBI disagrees with our assessment in the *Preliminary Results* of its methodology and claims that its methodology is based on "actual, product-specific" costs, while our methodology is distortive because it averages all costs in its calculations – including costs incurred by the company's factories in producing both subject and non-subject merchandise. TPBI's arguments are based on an incorrect assessment of the administrative record. As described in detail above, TPBI's reported costs were "model-specific" but they were also distorted by TPBI's allocation methodology. As a result of factors such as differing factory efficiencies, TPBI's reported costs were artificially reduced or increased by its allocation methodology. On the other hand, although the methodology we used in the *Preliminary Results,* and which we continue to use in these final results is not model-specific, it allocates TPBI's direct labor and overhead costs evenly across all of the merchandise TPBI produced, thereby diminishing the possibility of the undervaluation or overvaluation of TPBI's direct labor, fixed overhead, and variable overhead costs.

Furthermore, despite TPBI's claims, our methodology was based on TPBI's "actual" books and records. TPBI reported that its job-order cost system recorded labor and overhead costs based on costs and quantities from the previous three months. See TPBI's section D response dated December 16, 2009, at D-14. In other words, TPBI used the standard weighted-average costs of all its products from the previous three months to calculate those costs at any given time. Rather than using a "floating" three-month average, we calculated a "fixed" weighted-average figure for the POR which we derived from TPBI's reported annual costs for direct labor and overhead expenses, all based on TPBI's books and records. Thus, our methodology is as much based on TPBI's books and records as the methodology advocated by TPBI, but it is far less distortive.

TPBI argues that our analysis is misplaced and unreasonable because not all cost differences are necessarily related to physical differences of the merchandise, such as when different facilities are used. We recognize that different facilities might incur different costs based on production decisions. We also recognize, however, that the company as a whole bears such costs and not just a single facility. To the extent that such costs affect the price of merchandise sold, it is unlikely that the change in price will apply only to products manufactured at one facility, especially in a case such as this one in which TPBI's second facility produces the identical or similar merchandise. Indeed, TPBI cites to no evidence on the administrative record that its consumers are, or would be, willing to pay different prices for virtually identical PRCBs from Thailand depending on the specific facility at which the merchandise was produced.

TPBI contends that there is no evidence that its reported methodology shifted costs away from subject merchandise or the foreign like product and that its production efficiencies do not benefit subject merchandise for one market or the other. Because TPBI's allocation methodology is distortive, however, it allocates grossly disparate conversion-cost amounts to different models even if those models are very similar. Therefore, the reported conversion costs are understated for some models of the subject merchandise and foreign like product while they are overstated for other models; there is no support for TPBI's claim on this point.

In addition, TPBI argues that, if we find that purported cost differences are not attributable to the physical characteristics, then we should disregard the DIFMER adjustment. In fact, our reallocation does disregard the DIFMER adjustment with respect to conversion costs. Because we assigned the same conversion costs to all models, any DIFMER adjustments we calculate is based solely on differences in the costs of materials. There is no reason not to adjust for the differences in materials cost that TPBI reported so we have continued to apply the DIFMER adjustment based on the material-cost difference.

TPBI claims that the Department did not explain in the Preliminary Cost Memo why its approach was the best approach or why it was the preferred alternative to TPBI's alternative set of costs based on actual costs allocated by production output rather than by machine hours. As explained above, our methodology diminishes the distortions caused by TPBI's allocation methodology based on machine hours. With respect to TPBI's alternative methodology (*i.e.*, allocation by production output), TPBI has not explained how this methodology, which departs from its normal books and records, results in more accurate conversion costs than our calculation. In addition, the conversion costs in the databases using TPBI's alternative methodology have the same distortions (*i.e.*, extreme differences in conversion costs between very similar models) that are in TPBI's original databases. See the Final Analysis Memo at Attachment 1 which shows the differences in the conversion costs based on the alternative methodology (*i.e.*, the production-output allocation) for the same CONNUM pairs as in Attachment 4 of the Preliminary Cost Memo. While two of the nine CONNUM pairs have similar conversion costs using the alternative methodology, the remaining CONNUM pairs still have grossly different conversion costs. Thus, TPBI's alternative allocation methodology appears to be no more accurate than its original reporting methodology and is certainly less accurate than our methodology which minimizes these distortions.

TPBI argues further that we did not mention, much less discuss, section 782(e) of the Act. Section 782(e) of the Act provides that the Department "shall not decline to consider information that is submitted by an interested party and is necessary to the determination" but does not meet all the applicable requirements established by the Department if:

(1) the information is submitted by the deadline established for its submission,
(2) the information can be verified,
(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
(5) the information can be used without undue difficulties.

Section 782(e) of the Act requires the Department to use TPBI's cost information if it satisfies all five above-listed requirements.

We find that TPBI's cost information did not satisfy all five criteria specified in section 782(e) of the Act because TPBI's cost information cannot be used without undue difficulties. The costs TPBI reported to the Department were allocated based on factors that are unrelated to the physical characteristics of the merchandise. For all of the reasons described above, we cannot use TPBI's reported costs because the allocated costs are artificially reduced or increased based on factors unrelated to physical-characteristic differences. As we have explained, we have used TPBI's overall actual costs and it is only the allocation methodology which TPBI did not prepare in its normal books and records but developed solely for this proceeding, that we have determined we cannot use pursuant to section 782(e) of the Act without undue difficulties. Thus, the application of non-adverse facts otherwise available is warranted pursuant to section 776(a) of the Act for the sole purpose of allocating TPBI's conversion costs.

Finally, it is significant that the Department applied the same cost-conversion methodology in its analysis of TPBI[4] in the 2007/08 administrative review and was affirmed by the CIT in *TPBI v. United States*. The Court affirmed the Department's "reading of the record" as "reasonable" with respect to the agency's following statements: 1) TPBG's allocation methodology "is a departure from its normal cost-accounting system;" 2) "TPBG's reported conversion costs resulted in product-specific cost differences which were unrelated to differences in physical characteristics;" 3) TPBG's reported conversion costs were "based, by TPBG's own admission"

[4] In *PRCBs 4* and *TPBI v. United States*, references to the respondent included the acronym "TPBG."

on internal decisions "concerning the export and home-market production runs and not due to production activities or requirements of the domestic product;" 5) the Department's "reallocation of costs to compensate for price distortions," absent "proof of physical differences," "more accurately describe the cost structure." *Id.* at 23-25 (citing to pages 4-5 of the I&D Memo accompanying *PRCBs 4*). Although TPBI stated several times in its comments for this review that there is a relationship between its cost-allocation methodology and the physical characteristics of its bags, the facts on the record, as described above, do not support such statements. In fact, there are no facts on the record of this review that would distinguish TPBI's reported cost-conversion methodology in this 2008/09 review from that which it used in the 2007/08 administrative review. The CIT found that our analysis in *PRCBs 4* was "supported by substantial evidence on the record" and we do not find anything in this review to distinguish between the two cases with respect to TPBI's reported methodology. Accordingly, we believe that our reallocation of TPBI's conversion costs in this case is not only accurate and reasonable, we also believe that it is fully consistent with the CIT's decision in *TPBI v. United States*.

2. *Affiliated-Party Inputs*

<u>Comment 2</u>: TPBI argues that the Department should not apply the major-input rule with respect to resin TPBI purchased from one of its resin suppliers.

TPBI contends that it is not affiliated with that particular resin supplier (the Supplier).[5] According to TPBI, there are two prongs for finding TPBI and the Supplier to be affiliated under section 771(33)(F) of the Act: 1) the Department must find that the Supplier is legally or operationally in a position to exercise restraint or direction over VN Plastics Industries Co., Ltd. (VNPI), and 2) the Department will not find that control exists unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. TPBI alleges further that the courts have held consistently that the burden rests on petitioners to demonstrate that both prongs have been satisfied for affiliation to exist.

TPBI argues that the Department must consider the totality of the circumstances and that mere common ownership in a third party does not suffice to establish common control. Citing *TIJID, Inc. v. United States*, 366 F. Supp. 2d 1286, 1294 (CIT 2005), TPBI contends that, even where a company controlled one of the two joint venture's board members and that board member had the authority to sign off on the joint venture's financial statements and certifications, no affiliation was found with the other company that actually controlled the joint venture. Citing *Jinfu Trading Co., Ltd. v. United States*, 30 CIT 1465, 1472 (2006), TPBI argues that the courts have found that the inquiry is whether the "relationship provides one entity the significant potential for manipulation of price or production of the other."

TPBI asserts that the Supplier has no potential to impact decisions concerning the production, pricing, or costs of the subject merchandise or foreign like product through VNPI. TPBI contends that VNPI does not produce the subject merchandise or foreign like product, that TPBI did not sell the subject merchandise or foreign like product to VNPI, and that there is no evidence that either VNPI or the Supplier sold the subject merchandise or foreign like product to

[5] The name of the Supplier is business-proprietary information.

the United States, Thailand, or anywhere else. TPBI avers that there were no commercial transactions whatsoever between TPBI and VNPI. TPBI claims that the Department ignored these facts and relied on inconsequential circumstances in its determination, none of which has anything to do with the relevant merchandise. According to TPBI, the Department did not explain how the joint venture in Vietnam has the potential to impact the Thai subject merchandise or foreign like product.

TPBI also contends that the Department did not consider all pertinent facts. As an example, TPBI claims, the charter agreement for VNPI precludes the Supplier's potential manipulation of resin prices to VNPI and TPBI to lower TPBI's production costs, nor is there any evidence of such manipulation. TPBI also asserts that the Department conflated the Supplier with an affiliate of the supplier in its analysis.

TPBI argues that the precedent in *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010), and accompanying I&D Memo at Comment 10 (*OCTG*) cannot stand as support for the preliminary affiliation finding, as most of the relevant facts in *OCTG* are business proprietary and unavailable to the parties in this proceeding. According to TPBI, what is public in *OCTG* involved the exporter and related U.S. importer being collapsed under a single-entity analysis, a refusal by the exporter to provide requested information in a supplemental response, and questionable company practices at verification. In addition, TPBI asserts, the joint venture in *OCTG* apparently was also trading in the subject merchandise. TPBI avers that these are just a few of the central factual predicates completely at odds with the facts in the instant review.

TPBI also argues that the statutory definitions of "subject merchandise" and "foreign like product" render VNPI's PRCBs produced in Vietnam irrelevant, regardless of where sold or whether there has been an antidumping duty investigation of PRCBs produced in Vietnam. According to TPBI, only PRCBs produced in Thailand can be considered the subject merchandise or foreign like product. Because VNPI is located in Vietnam and all of its production takes place in Vietnam, TPBI maintains that none of VNPI's production can be either the subject merchandise or foreign like product.

TPBI argues further that the Department has held that affiliation is not found in similar situations. Citing *Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent To Rescind in Part*, 69 FR 40859, 40861 (July 7, 2004), TPBI claims that the Department found that, because certain companies were not involved in subject merchandise or foreign like product, it was not necessary to consider further whether they were affiliated with the respondent. TPBI also cites *Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 68 FR 68336, 68337-38 (December 8, 2003), in support of its argument.

TPBI contends that neither the Supplier's minority share ownership in VNPI nor its control of some seats on VNPI's Member's Council constitute affiliation pursuant to section 771(33)(F) of the Act because TPBI wholly controls all actions of VNPI's Member's Council. TPBI asserts that the Supplier can neither pass nor block an operational resolution by the Member's Council because TBPI's ownership exceeds the minimum threshold for approving a resolution. According to TPBI, the Supplier's Members are simply irrelevant to decision-making at VNPI because they cannot pass or block a resolution, call a meeting, or even be present for a meeting of the Member's Council.

TPBI alleges further that the unanimous-consent language for certain extraordinary actions by the Member's Council is inoperative because Member's Council decisions do not require a meeting of the Member's Council. Further, TPBI argues that other provisions of VNPI's charter agreement give TPBI complete control over every Member's Council decision, including those extraordinary ones in which the Department found, incorrectly, unanimous consent to be "necessary." Furthermore, TPBI contends, the VNPI charter agreement makes clear that a "unanimous" resolution can readily be taken up in a Member's Council meeting just among the TPBI Members and "unanimously" adopted by just those Members while the Supplier can neither do the same nor stop it. Thus, TPBI concludes, the VNPI charter agreement itself nullifies any putative unanimity language.

Finally, TPBI asserts that, even if TPBI and the Supplier are found to be affiliated, the major-input rule cannot be applied. According to TPBI, the statute limits the application of the major-input rule to only those situations where the affiliated supplier is a producer of the major input. TPBI contends that there is no transaction involving the production by an affiliated person of a major input in this review. Furthermore, TPBI claims, the Department gave the misimpression that the input here concerns all resins. According to TPBI, if the major input under consideration is "resins," in fact TPBI paid a higher average price to the Supplier than to unaffiliated suppliers for resins. Alternatively, if the Department limits its analysis to concern only a particular resin, TPBI contends that the resin constitutes an insufficient proportion of COM and is, therefore, not a major input.

The petitioners argue that the Department's findings regarding inputs purchased from the Supplier are correct. The petitioners assert that the facts of this case are nearly identical to those in *OCTG* where the Department found an affiliation between joint-venture owners such that, although it could not direct day-to-day operations of the joint venture, the minority owner could influence certain decisions.

The petitioners argue that TPBI is wrong in asserting that the Supplier has no ability to restrain or direct any actions by VNPI. According to the petitioners, the Supplier's representatives can block any actions of those present at a meeting merely by being present. The petitioners also assert that there is no indication that a certain provision trumps the more specific unanimity requirement for the most fundamental corporate decisions. Were this the case, the petitioners aver, the entire charter agreement would be superfluous and without any legal effect in protecting the interests of the minority shareholders. Thus, the petitioners conclude, the charter and joint-venture agreements cannot be read as granting TPBI the ability to take unilateral actions with respect to certain extraordinary activities.

The petitioners argue further that TPBI is wrong in asserting that the Supplier's control has no potential to impact production, pricing, or cost of the subject merchandise or foreign like product. As a preliminary matter, the petitioners point out that the Department rejected the same argument in *OCTG* in which the Department explained that the terms "subject merchandise" and "foreign like product" as they are used at 19 CFR 351.102(b)(3) are interpreted more broadly to include the "merchandise under consideration" which does not necessarily depend upon the location of production. The petitioners contend that the Supplier's control of VNPI has the potential to impact pricing and cost of PRCBs made in Thailand. The petitioners assert that VNPI's sales activities are not limited geographically and it is known that VNPI exports to the United States. Thus, the petitioners aver, VNPI may sell the same products into the same markets as TPBI and is therefore capable of influencing pricing and production decisions for PRCBs manufactured in Thailand and sold in either the home or U.S. markets. The petitioners argue that there is another way in which VNPI directly affects the cost of the subject merchandise or foreign like product that cannot be summarized here because of its business-proprietary nature.

The petitioners argue that the joint control exercised by the Supplier and TPBI over VNPI satisfies the requirements set forth at 19 CFR 351.102(b)(3) because the relationship has the potential to impact decisions regarding the price paid by TPBI for its resin purchases from the Supplier. The petitioners contend that the fact that the Supplier is in a position to block certain actions that TPBI might wish to take with respect to VNPI gives the Supplier a certain degree of leverage over TPBI that it potentially could use when negotiating prices for its resin sales to TPBI. Conversely, the petitioners aver, TPBI's control over VNPI may also give it leverage that could affect its purchasing decisions with respect to the Supplier. According to the petitioners, it is not relevant whether there is evidence that any manipulation of resin prices actually occurred because the regulations require only that the control potentially could be used to affect TPBI's purchasing decisions and costs for producing PRCBs in Thailand.

Finally, the petitioners argue that the Department's cost adjustment is correct. The petitioners contend that, contrary to TPBI's assertion, the Department did not make the adjustment pursuant to the major-input rule at section 773(f)(3) of the Act. Rather, the petitioners state, the Department indicated that it made the adjustment pursuant to the transactions-disregarded rule at section 773(f)(2) of the Act. The petitioners contend that it is irrelevant whether the input is considered "major" under the transactions-disregarded rule.

<u>Department's position</u>: We determine that TPBI and the Supplier are affiliated within the meaning of section 771(33) of the Act. Because of the business-proprietary nature of the discussion, please see the memorandum to Laurie Parkhill entitled "Polyethylene Retail Carrier Bags from Thailand - Affiliation" dated concurrently with this memorandum for a discussion of our determination.

With regards to our application of the major-input rule under section 773(f)(3) of the Act, because, as TPBI has pointed out, the Supplier is not a producer of the resin, we have revised our preliminary adjustment for TPBI's affiliated resin input purchases from the Supplier during the POR to be under the transactions-disregarded rule under section 773(f)(2) of the Act. As stipulated in section 773(f)(3) of the Act, the major-input rule is applicable only in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise. Because the Supplier does not produce resin, the major-input rule is not applicable in this case. Therefore, we have applied the transactions-disregarded rule which relates to direct or indirect transactions between affiliated persons. See section 773(f)(2) of the Act. As to TPBI's contention regarding the computation of our adjustment for resin purchases from affiliated parties, in the *Preliminary Results,* we compared only the transfer prices and purchases from unaffiliated parties of linear low-density resin from the Supplier during the POR. We have revised our analysis to include all the resin purchases from the affiliate.

As explained in *Stainless Steel Bar from Germany: Final Results of Antidumping Duty Administrative Review*, 71 FR 42802 (July 28, 2006) (*Bar from Germany*) and accompanying I&D Memo at Comment 11, the Department's practice is to compare the average transfer prices for each affiliate to the average unaffiliated purchase prices. In this instance, this would include all resin purchases from the Supplier. Consistent with our calculation in *Bar from Germany,* we have recalculated our comparison for these final results. As a result of our revised comparison for the final results, we have determined that TPBI's purchase prices for resin inputs from the Supplier were not made at arm's-length prices during the POR because the transfer prices were below the comparable market prices on a weighted-average basis. Therefore, for the final results, we have adjusted TPBI's transfer prices for resin purchases from its affiliated supplier to reflect market prices from its unaffiliated suppliers under the transactions-disregarded rule at section 773(f)(2) of the Act. See Final Cost Memo at adjustment 1.

3. *Blue Corner Rebates*

<u>Comment 3</u>: TPBI disagrees with the Department's decision not to accept TPBI's reported adjustment for BCR revenues. TPBI contends that BCR revenues relate to TPBI's material costs in that the Thai Government refunds to TPBI the "compensation fee" charged by TPBI's suppliers for import duties on resin. TPBI claims that it documented the fact that such import duties were included in its COM for subject merchandise. Thus, TPBI asserts, any refunds or revenues received in connection with these material costs should be deducted from COM. Citing *Certain Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Antidumping Duty Order in Part,* 75 FR 50999 (August 18, 2010), and accompanying I&D Memo at Comment 9, TPBI argues that the Department adjusts COM downward to account for various revenues or refunds received in connection with raw material input costs.

TPBI argues that using its BCR revenues to offset its costs captures its "actual" costs to produce the subject merchandise. TPBI also contends that this is consistent with its audited financial statements because the auditor treated the BCR revenues as an offset to TPBI's COGS consistent with Thai GAAP.

In the alternative, TPBI argues, the Department must adjust TPBI's G&A expenses downward to account for the BCR revenues it received from the Thai Government. As support, TPBI cites *Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada*, 70 FR 12181 (March 11, 2005), and accompanying I&D Memo at Comment 9 (allowing government subsidies as an offset to production costs), *Final Determination of Sales at Less than Fair Value: Furfuryl Alcohol From South Africa*, 60 FR 22550, 22556 (May 18, 1995) (including grant revenue as an offset to reported costs), and *Notice of Final Determination of*

Sales at Less Than Fair Value: Certain Pasta From Italy, 61 FR 30326 (June 14, 1996) (allowing an offset to G&A for "grant revenue" received by the respondent).

The petitioners argue that the Department's denial of a cost adjustment for BCR revenues was appropriate because they relate to the export of the merchandise under consideration and not the cost to produce the product. The petitioners assert that this is consistent with the Department's longstanding practice with respect to revenues received under the BCR program.

The petitioners also contend that the Department should not use BCR revenues as an offset to G&A expenses. The petitioners claim that the precedents cited by TPBI did not involve export incentives and, consequently, are inapposite.

Department's position: We have not adjusted TPBI's costs for any BCR revenues. TPBI receives BCR revenues when it exports finished bags under the BCR program. See TPBI's supplemental section D response dated March 22, 2010, at S1D-15. Thus, the BCR revenues are related to sales (*i.e.*, exports) and not the production of the merchandise under consideration. Thus, it is not appropriate to make an adjustment to TPBI's COP (either the COM or G&A components of COP) for BCR revenues.

TPBI's costs include a "compensation fee" charged by resin suppliers to account for import duties in recognition of the fact that TPBI will be rebated the duties upon export of the finished bags under the BCR program. *Id*. In other words, BCR revenues are import duties imposed by Thailand which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise. Thus, BCR revenues are analogous to duty-drawback revenues with the variant that there are three parties involved (the input supplier, the producer/exporter, and the foreign government) whereas, in a typical duty-drawback situation,[6] there are only two parties involved (the producer/exporter and the foreign government). Thus, the appropriate adjustment, if one were to be made, would be to increase TPBI's U.S. price for the import duties rebated. We only make such adjustments, however, where there is a sufficient link between the import duty or taxes and the rebate and whether there are sufficient imports of the imported material to account for the duty drawback received for the export of the manufactured product. See *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Thailand*, 69 FR 34122 (June 18, 2004), and accompanying I&D Memo at Comment 7, and *Saha Thai Steel Pipe (Public) Company Ltd. v. United States*, Ct. No. 2010-1220, 1224 (Fed. Cir. Feb. 14, 2011) at *12. TPBI has not attempted to demonstrate either of these requirements nor has it even claimed BCR revenues as an adjustment to export price. Accordingly, we have made no adjustment to export price for TPBI's BCR revenues.

4. *Zeroing*

Comment 4: TPBI asserts that the WTO has found that zeroing in antidumping duty administrative reviews violates the WTO Antidumping Agreement and that those findings are

[6] For example, the two duty-drawback programs which TPBI claimed and for which we made adjustments to the export price. See *Preliminary Results*, 75 FR at 53954.

dispositive to the instant review. Accordingly, TPBI argues, the Department should calculate TPBI's final margin without zeroing in the final results.

The petitioners argue that the Department should not offset dumping margins with so-called "negative" margins. Citing *Timken Co. v. United States*, 354 F.3d 13334, 1344-45 (CAFC 2004), the petitioners claim that the CAFC held that the Department's zeroing practice is a reasonable and permissible interpretation of the statute. Citing *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1348 (CAFC 2004), the petitioners contend that the CAFC has held that WTO reports do not bind U.S. courts in construing the laws of the United States. The petitioners argue that, by statute, the Department is precluded from changing its practice outside the procedures set forth in Section 123(g) of the URAA. As a result, the petitioners conclude, the Department may not change its zeroing practice in this review in response to a WTO decision.

<u>Department's position</u>: 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 normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The 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 (CAFC 2004) (*Timken*); *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347-49 (CAFC 2005), *cert. denied*; 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006) (*Corus I*).

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 normal value exceeds export price or constructed export price, 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 export price or constructed export price exceeds the normal value 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 POR: 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.” See *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, *Corus I*, 395 F.3d 1343, *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (CAFC 2007) (*Corus II*), and *NSK Ltd. v. United States*, 510 F.3d 1375 (CAFC 2007).

TPBI has cited WTO dispute-settlement reports finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement. The CAFC has held that WTO reports are without effect under U.S. law “unless and until such a [report] has been adopted pursuant to the specified statutory scheme” established in the URAA. *Corus I*, 395 F.3d at 1347-49; *accord Corus II*, 502 F.3d at 1375, and *NSK*, 510 F.3d 1375. Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, *e.g.*, 19 USC 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 USC 3533(g); see, *e.g.*, *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006). With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure.

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 normal value, the amount by which the price exceeds normal value will not offset the dumping found in respect of other transactions.

5. *Duties in Cost of Production and Constructed Value*

<u>Comment 5</u>: The petitioners argue that the Department should add exempted import duties and drawback of duties to CV. Citing *Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review*, 75 FR 64696 (October 20, 2010), and accompanying I&D Memo at Comment 2 (*Thai Pipes*) and *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 73 FR 61019 (October 15, 2008), and accompanying I&D Memo at Comment 5, the petitioners assert that the Department’s practice is that, where duty drawback is added to U.S. price, the relevant import duties also must be included in CV. The petitioners contend further that the practice is the same for exempted import duties as well as duty drawback. The petitioners also assert that the Department’s methodology with respect to TPBI in prior reviews has been consistent with this practice. According to the petitioners, TPBI reported the amount of duties in its original CV database but discontinued reporting the field without explanation in the CV databases it submitted later with its supplemental responses. The petitioners suggest that the

Department add the amount of duties which TPBI reported in its original CV database to the calculation of CV.

In the alternative, the petitioners argue, the Department should not add the claimed amounts for import duties exempted and drawback of duties to U.S. price so that export price and CV are stated on the same "apples-to-apples" basis.

TPBI argues that the Department should not add all duty-drawback amounts to CV. TPBI asserts that the record demonstrates that it included all actual duty-drawback amounts in its reported costs correctly. According to TPBI, the only duty-drawback amounts that were not included in its reported costs are the exempted drawback amounts that were never paid upon importation and then exempted upon export.

TPBI argues further that, if the Department adjusts TPBI's costs for the exempted drawback amounts, it must do so for both COP and CV. Citing *Thai Pipes*, TPBI contends that the Department may not only adjust CV for this amount but must adjust both COP and CV.

<u>Department's position</u>: TPBI included the net duties paid in its reported costs with respect to import duties rebated under the duty-drawback program. See TPBI's May 14, 2010, supplemental response at page S2ACD-7. Thus, no adjustment is necessary with respect to this program.

TPBI did not include in its costs an amount for duties exempted under the duty-exemption program on the grounds that it "does not pay import duties on resin imports in cash at the time of importation" under this program. See TPBI's August 18, 2010, supplemental response at page S5D-25.

Our practice is "to include exempted import duties in the calculation of both COP and CV." See *Thai Pipes* and accompanying I&D Memo at Comment 2.

Section 772(c)(1)(B) of the Act directs the Department to increase U.S. price by "the amount of any import duties imposed by the country of exportation which have been rebated … by reason of exportation of the subject merchandise to the United States." The reason for adding the rebated duties to U.S. price is that the respondent receives payments on the U.S. sale from both the customer and the government of the country of exportation whereas the respondent receives payment on the domestic sale, used for normal value, only from the customer. Upon importation of the original raw materials, the respondent records the duties paid to the government as part of the cost of acquiring the raw materials. When reporting product costs to the Department, the respondent includes the duty and other costs of acquiring the raw material, along with the costs of acquiring the material from domestic sources, in the COP or CV of the merchandise under consideration. Thus, in the normal duty-drawback scheme the duty drawback is added to U.S. price and the duties are included in the COP and CV. The duty drawback may be recorded as revenue or as an offset to cost in a company's books.

In some countries, the duty-drawback scheme allows a company to hold on to its duty payment, as it is probable that subsequent exportation will occur. In such cases, the government does not remit the duty upon exportation because the imposed duty was not collected. Section 772(c)(1)(B) of the Act anticipates such variations on the duty scheme and directs the Department to increase U.S. price even in cases where the duty is not remitted because such duties "have not been collected." The fundamental transactions are identical under this "expedited" scheme and the formal scheme except for the remittance of monies between the government and the company. This type of duty scheme applies in the instant case where the Department is granting an increase to U.S. price for duty drawback even though the government did not remit the duty to TPBI.

In the internal books of the company, it does not matter under either scheme whether the gross amount of the duty and the gross amount of the drawback are individually recorded or whether the net amount of the two transactions (*i.e.*, zero) is recorded. The net impact to the company will be the same using either method. In the instant case, TPBI does not record the imposition of the duties or the duty exemption although, in order to avoid the payment of the duty, it does provide evidence of the importation of the raw material and the exportation of the finished goods to the government of Thailand. In the case of duties that have "not been collected," the statute directs the Department to treat the transactions as if they took place under the normal duty-drawback scheme; that is, the Department is to grant the increase to U.S. price even though the money was not received.

It is reasonable and necessary for the Department to treat the entire transaction as if it was conducted under the normal duty-drawback scheme. In other words, it is proper for the Department to add the duties that were not collected upon importation to the cost of producing the product in order to account for the full transaction. The CAFC recently affirmed that "any increase to export price pursuant to a duty drawback adjustment should be accompanied by a corresponding increase to COP and CV." See *Saha Thai Steel Pipe (Public) Company Ltd. v. United States*, Ct. No. 2010-1220, 1224 (CAFC February 14, 2011) at *12. The CAFC found that the Department's interpretation of the Act to be "permissible" in "including the exempted import duties in (the company's) cost of manufacture when calculating COP and CV." *Id.* at *15. See also *Saha Thai Steel Pipe (Public) Company, Ltd. v. United States*, Slip Op. 09-116 (CIT Oct. 15, 2009) at *12 (stating that it was permissible for the Department "to increase {the respondent's} export price to account for the import duties drawn back on subject merchandise exported to the United States and to account, correspondingly, for the implied cost of import duties in {the respondent's} cost of production and constructed value").

Accordingly, we have revised TPBI's COP and CV to include exempted import duties. To do so, we have used the calculation TPBI provided in its rebuttal brief, which relied on data already on the record of this review. See TPBI's December 17, 2010, rebuttal brief at pages 4-5.

6. *General and Administrative Expenses*

<u>Comment 6</u>: The petitioners argue that the Department should recalculate the G&A expense rate for TPBI to capture inventory-valuation losses and certain other expenses.

The petitioners contend that it is the Department's longstanding practice to include inventory-valuation losses as part of G&A expenses, excepting only finished-goods inventory write-downs. The petitioners assert that, in the prior review the Department held that TPBI's inventory-valuation losses must be included in TPBI's G&A expenses. In this review, the petitioners contend, TPBI has excluded its inventory-valuation losses and has not captured them elsewhere in its response. Accordingly, the petitioners conclude, the Department should include the full amount of TPBI's inventory-valuation losses as part of G&A expenses.

In the alternative to including the full amount of the inventory losses, the petitioners argue, the Department should apportion these losses among raw materials, WIP, and finished goods based upon the inventory schedule in TPBI's audited financial statements and include the losses attributable to raw materials and WIP as G&A expenses. The petitioners acknowledge that TPBI has claimed that its inventory-valuation losses relate solely to finished goods, but the petitioners assert that TPBI's audited financial statements demonstrate this claim to be incorrect. The petitioners contend that the burden falls on the respondent seeking to exclude inventory-valuation losses to demonstrate that the losses relate to finished-goods inventories. According to the petitioners, the documentation which TPBI submitted to support its claim related to losses during 2008 and not to losses during 2009. Because the G&A expense rate is based upon TPBI's 2009 financial statements, the petitioners contend that documentation regarding 2008 losses is irrelevant.

The petitioners claim that TPBI excluded expenses that were supposedly related to defending the antidumping case. According to the petitioners, the Department's practice is to exclude legal and consulting fees incurred as a direct result of antidumping proceedings from the calculation of the G&A expense ratio. The petitioners assert that salary expenses that TPBI excluded were not incurred as a direct result of the antidumping proceeding and should be included in G&A expenses. Moreover, the petitioners contend, even if it were appropriate to allocate a portion of this expense, TPBI did not explain the basis for its allocation. Because the burden falls upon the respondent seeking to exclude G&A items to demonstrate an entitlement to such an adjustment and because TPBI has not demonstrated such an entitlement, the petitioners urge the Department to deny TPBI's adjustment for salaries.

Finally, the petitioners observe that TPBI has excluded "claim" expenses from its G&A calculation and offered no explanation for the exclusion. The petitioners argue that, because the burden is on TPBI to justify the exclusion and TPBI did not satisfy that burden, the Department should include these expenses in TPBI's G&A expenses.

TPBI argues that the Department should not recalculate the G&A expense rate for TPBI. TPBI contends that it has responded to eight supplemental questionnaires issued by the Department in this review, none of which requested additional supporting documentation or further explanations to support its calculation of G&A expenses. TPBI asserts that the petitioners' arguments are based on vague allegations of allegedly missing data and supposed discrepancies among the documents submitted in the original response and the eight supplemental responses. TPBI also asserts that the petitioners never raised any of these issues during the review while the record was open or while the supplemental questionnaires were being prepared. TPBI contends that its G&A expense ratio is accurate and reported in accordance with the Department's requirements and Thai GAAP.

Department's position: The Department's practice is to exclude inventory-valuation losses which are attributable to finished goods from a respondent's COP. See *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 FR 19153 (April 12, 2004) and accompanying I&D Memo at Comment 7 and *PRCBs 4* and accompanying I&D Memo at Comment 3. Record evidence shows that TPBI's inventory-valuation loss relates to finished goods. TPBI specified that the inventory-valuation loss related to finished goods and provided support that the prior year's inventory-valuation loss related to finished goods. There was a 2008/2009 comparative schedule in the 2009 financial statements footnotes which tied to documentation TPBI supplied supporting its claim that the 2008 amount was related to finished goods. Because this schedule reconciled to the supporting documentation for 2008, it is reasonable for us to assume that the 2009 amount listed in the comparative financial statement schedule also related to finished goods. Moreover, the net change in finished-goods allowance accounts between 2008 and 2009 was included in the financial statement COGS and was a reconciling item to arrive at the reported costs (see reconciliation in exhibit S5D-1, worksheet D, of TPBI's August 18, 2010, supplemental D response). Because the Department does not include write-downs or write-offs of finished goods, it is appropriate to continue to exclude these items from the cost calculation. Therefore, we have not adjusted TPBI's reported G&A expense rate for inventory-valuation losses.

With regard to expenses related to the antidumping case, we have stated that our antidumping analysis should be performed without regard to fees paid for participation in the proceedings. See *Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products From Canada*, 70 FR 73437 (December 12, 2005), and accompanying I&D Memo at Comment 11. The expenses we have excluded in the past did not include allocated expense amounts from a company's normal payroll. TPBI has not provided support that the salaries at issue are uniquely related to the antidumping review; it has merely excluded a portion of its operational salary expenses. Therefore, because operating salaries, as recorded in TPBI's normal books and records, are part of TPBI's overall expenses (*i.e.*, G&A expenses), which would have been incurred regardless of the antidumping proceeding, we have added the excluded salary expenses back to TPBI's G&A expenses.

Finally, TPBI has excluded two other expenses from its G&A expense rate: claim expenses and bank charges. The claim expenses in question are normally recorded in G&A expenses whereas claim expenses reported as selling adjustments, for sales-reporting purposes, are commonly recorded in a company's net sales. In TPBI's case, claim expenses specifically related to sales have been reported as a selling adjustment whereas the claim expenses recorded in TPBI's G&A expenses were not included as a sales adjustment. Aside from claim expenses, TPBI also reduced its G&A expenses for bank charges. TPBI has not supported why it has excluded bank charges, which are normally costs incurred as part a company's general operations. Under section 773(f)(1)(A) of the Act, costs are normally calculated based on the records of the exporter or producer if such records are kept in accordance with GAAP of the exporting or producing country and reasonably reflect the costs associated with the production and sale of the merchandise. Therefore, as the questioned expenses are recorded as part of TPBI's overall G&A expenses in its normal books and records and because TPBI offered no explanation of why these expenses should be excluded, we have included them as G&A expenses.

7. *Ministerial Errors and Other Issues*

Comment 7: TPBI argues that the Department inadvertently did not use all 15 physical characteristics in its model match for the *Preliminary Results*. The petitioners did not comment on this allegation.

Department's position: We agree and have changed our calculations to correct this ministerial error.

Comment 8: TPBI argues that, in its margin calculations, the Department should use the transaction-specific sales quantities as represented on the invoices instead of the quantities shown on the work orders. Citing its section B and C response dated December 9, 2009, TPBI contends that the work-order quantities may be slightly lower than the sales quantities because additional materials may be added after production. The petitioners did not comment on this allegation.

Department's position: We agree and have used the sales quantities in our calculations.

Comment 9: TPBI argues that the Department used an incorrect G&A ratio to calculate G&A expenses. TPBI contends that the Department used the outdated ratio reported in an earlier supplemental response rather than the corrected and updated G&A ratio TPBI reported in its August 18, 2010, supplemental response. The petitioners did not comment on this allegation.

Department's position: We agree that we used the incorrect G&A ratio for the *Preliminary Results*. We have revised the G&A ratio pursuant to our position in Comment 6, above and have used that revised G&A ratio.

Comment 10: The petitioners argue that the Department should update the cash-deposit requirements for companies subject to the all-others rate to reflect the margin which the Department calculated in *Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Polyethylene Retail Carrier Bags From Thailand*, 75 FR 48940 (August 12, 2010). TPBI did not comment on this assertion.

Department's position: We agree and have changed the rate in the final results of review to reflect the August 2010 determination.

Comment 11: The petitioners argue that the Department should clarify the liquidation instructions for TPBI to indicate the "amount per kilogram" rather than the "amount per unit." TPBI did not comment on this assertion.

Department's position: We agree and have changed our draft liquidation instructions accordingly.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the review and the final dumping margins for all of the reviewed firms in the *Federal Register*.

Agree _________   Disagree _________

____
Ronald K. Lorentzen
Deputy Assistant Secretary
  for Import Administration

____
Date