



A-520-803

POR: 11/01/2010-10/31/2011

Public Document

O6: AH

DATE: May 13, 2013

MEMORANDUM TO: Paul Piquado  
Assistant Secretary  
for Import Administration

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

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

## **I. Summary**

We have analyzed the comments of the interested parties in the administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip (PET Film) from the United Arab Emirates (UAE) covering the period of review (POR), November 1, 2010, through October 31, 2011. As a result, we have made changes to the margin calculation for the respondent, JBF RAK LLC (JBF). For FLEX Middle East FZE (FLEX), we have corrected minor SAS programming errors; however, these changes had no effect on FLEX's final margin. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

## **II. Background**

On November 16, 2012, the Department of Commerce (the Department) received pre-preliminary comments and an allegation of targeted dumping<sup>1</sup> from Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastic (America), Inc. (collectively, Petitioners). JBF filed a response to Petitioners' allegation of targeted dumping on November 29, 2012.

On December 7, 2012, the Department published the preliminary results of the administrative review of the antidumping duty order on PET Film from the UAE.<sup>2</sup> The Department did not address the allegation of targeted dumping in the Preliminary Results because it did not have

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<sup>1</sup> See "Polyethylene Terephthalate (PET) Film, Sheet, and Strip from the United Arab Emirates: Pre-Preliminary Comments and Allegations of Targeted Dumping," November 16, 2012.

<sup>2</sup> See Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review; 2010-2011, 77 FR 73010 (December 7, 2012) (Preliminary Results), and accompanying Preliminary Decision Memorandum.

sufficient time to fully analyze the allegation for purposes of the preliminary results. The Department stated its intention to address this allegation at a later date.<sup>3</sup>

The Department received timely filed case briefs from Petitioners and JBF on January 14, 2013. Petitioners filed a timely rebuttal brief on January 22, 2013. We received no briefs from FLEX.

On March 8, 2013, the Department released a post-preliminary analysis memorandum of JBF which addressed Petitioners' targeted dumping allegation.<sup>4</sup> JBF submitted comments on the Department's Post-Preliminary Analysis on March 18, 2013; Petitioners submitted rebuttal comments on March 25, 2013.

Based on our analysis of all the comments received, the weighted average margin for JBF has not changed from the margin calculated in the Post-Preliminary Analysis. The revised margin is published in the accompanying Federal Register notice. We also have changed the margin calculation for FLEX to account for certain minor errors in the SAS programming; however, the weighted average margin for FLEX remains zero.

### **III. Discussion of the Issues**

#### **Comment 1: Targeted Dumping**

Petitioners allege that, during the POR, JBF engaged in targeted dumping and submit that the Department should calculate the weighted-average dumping margin for JBF using the average-to-transaction (A-T) methodology.

In its case brief submitted prior to the Post-Preliminary Analysis, JBF argued that the Department should reject Petitioners' targeted dumping allegation and apply the average-to-average (A-A) methodology for the following reasons:

- There is no statutory or regulatory authority for the Department to consider an allegation of targeted dumping in the context of an administrative review. JBF alleges that FAG Italia S.p.A. v. United States, 291 F.3d 806 (Fed. Cir. 2002) (FAG Italia) demonstrates that any claim that the Department has authority in reviews to consider the allegation by virtue of the statutory authority in investigations must fail. Citing Nken v. Holder, 556 U.S. 418, 430 (2009) (Nken) and Brown v. Gardner, 513 U.S. 115, 120 (1994) (Brown), JBF contends further that the Department cannot consider the statutory provisions for investigations to fill in a presumed gap in the statutory authority.
- Petitioners' allegation is untimely rebuttal factual information pursuant to 19 CFR 351.301(c)(1). New factual information to rebut previously submitted factual information must be submitted 10 days after the original factual information and Petitioners' allegation was submitted long after the 10-day time period. The Department previously has found such an allegation to be untimely new factual information. Further,

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<sup>3</sup> See Preliminary Decision Memorandum at 3.

<sup>4</sup> See Memorandum to Paul Piquado, "2010-2011 Administrative Review of the Antidumping Duty Order on Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Post-Preliminary Analysis and Calculation Memorandum of JBF RAK LLC," March 8, 2013 (Post-Preliminary Analysis).

due to the late submission of Petitioners' allegation the Department would have to issue an unauthorized post-preliminary determination.

- Assuming that the Department has the authority to consider the allegation, the allegation does not provide a sufficient basis for the purported targeting. The allegation does not provide any explanation as to why and how the alleged targeted purchasers, regions, and time periods, were selected and, thus, resulted in targeted dumping. The allegation must provide this explanation because it is necessary for the Department to determine whether any observed pricing pattern is the result of an intentional targeted dumping strategy. The supposed pattern of targeted dumping can be explained purely by the volatility of the market during the POR.
- The allegation does not demonstrate a pattern of prices that differ significantly because it only covers a small percentage, by value and by volume, of JBF's U.S. sales. Citing Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at Less Than Fair Value, 77 FR 17027, 17028 (March 23, 2012) (Certain Stilbenic Optical Brightening Agents from Taiwan), JBF contends that in other proceedings the Department has declined to apply the A-T methodology if the allegation concerned a small portion of U.S. sales.

In its comments on the Post-Preliminary Analysis, JBF reiterates the arguments that it raised in its case brief. JBF further argues that:

- The Department has not held that it can and will ignore the question of why the pattern exists where, as here, the sales subject to an alleged pattern cannot be an attempt to masked dumped sales.
- Because there are no short-term or long-term supply contracts, there is no way for JBF to have knowledge of the price or timing of its next sale as each sale is individually negotiated. As such, the prices reflect market conditions at the time of sale and, thus, JBF cannot have any assurance that its future sales will mask dumped sales.

In their rebuttal brief filed prior to the Post-Preliminary Analysis, Petitioners maintain that the Department should reject JBF's arguments for the following reasons:

- The Department has the authority to consider targeted dumping in an administrative review. This has been addressed in several recent determinations.<sup>5</sup> Further, JBF has not demonstrated that Congress has spoken clearly on the issue and left no "gap for the Department to fill," nor that the Department's methodology to fill such a gap is unreasonable.
- Petitioners' allegation was timely. Petitioners point to Circular Welded Carbon Steel Pipes and Tubes from Turkey, where the Department similarly found a targeted dumping allegation timely. Moreover, the targeted dumping allegation is not untimely rebuttal factual information pursuant to 19 CFR 351.301(c)(1), but instead is similar to other

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<sup>5</sup> See, e.g., Circular Welded Carbon Steel Pipes and Tubes from Turkey: Final Results of Antidumping Duty Administrative Review; 2010 to 2011, 77 FR 72818 (December 6, 2012) (Circular Welded Carbon Steel Pipes and Tubes from Turkey), and accompanying Issues and Decision Memorandum (IDM) at Comment 1; Stainless Steel Plate in Coils from Belgium: Antidumping Duty Administrative Review, 2010-2011, 77 FR 73013 (December 7, 2012), and accompanying IDM at Comment 2.

allegations under 19 CFR 351.301(d). Further, the Department is not barred from issuing a post-preliminary determination. JBF did not cite any statutory or regulatory provision prohibiting the Department from considering a targeted dumping allegation after the preliminary results.

- There is no requirement in the statute or Statement of Administrative Action (SAA) that a targeted dumping allegation show intent. Petitioners note that the Department rejected a similar argument in Circular Welded Carbon Steel Pipes and Tubes from Turkey.
- The allegation demonstrates a pattern of prices that differ significantly. JBF's assertion that the allegation does not demonstrate a pattern of prices that differ significantly rests on an incomplete understanding of the allegation. JBF's argument in this regard is improperly focused on the customer-specific allegation. When the time-basis allegation is considered as well, the allegations, as a whole, are well-founded.

Petitioners repeated these arguments in their rebuttal to JBF's comments on the Post-Preliminary Analysis. Petitioners also noted that the Department's targeted dumping analysis is specifically designed to exclude the anomalies and impact of individually priced sales that JBF claims were the cause of the instances of targeted dumping identified by the Department.

### **Department's Position:**

We disagree with JBF and continue to find that, for JBF, a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or time periods does exist and, therefore, the Department has considered whether the A-A comparison method can account for such differences. Further, the Department finds that the A-A comparison method cannot account for such differences because there is a meaningful difference in the weighted-average dumping margins calculated using the A-A and A-T comparison methodologies. Therefore, the Department has continued to use the A-T comparison methodology applied in the Post-Preliminary Analysis to calculate the weighted-average dumping margin for JBF in these final results.

#### **A. Application of Alternative Methodology**

Although JBF claims that the Department does not have the statutory authority to employ an alternative comparison method and to use the targeted dumping analysis in administrative reviews, we disagree.

Section 771(35)(A) of the Tariff Act of 1930, as amended (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." The definition of "dumping margin" calls for a comparison of normal value and export price or constructed export price. Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act describes three methods by which the Department may compare normal value and export price (or constructed export price) and places certain restrictions on the Department's selection of a comparison method in antidumping investigations. The statute places no such restrictions on the Department's selection of a comparison method in

administrative reviews. The Department's regulations at 19 CFR 351.414(b) describe the methods by which normal value may be compared to export price or constructed export price in antidumping investigations and administrative reviews, *i.e.*, A-A, Transaction-to-Transaction (T-T), and A-T. These comparison methods are distinct from each other. When using T-T or A-T comparisons, a comparison is made for each export transaction to the United States. When using A-A comparisons, a comparison is made for each group of comparable export transactions for which the export prices, or constructed export prices, have been averaged together (*i.e.*, for an averaging group). The Department's regulations at 19 CFR 351.414(c)(1) address the ambiguity in the statute concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department has determined that in both antidumping investigations and administrative reviews, the A-A method will be used "unless the Secretary determines another method is appropriate in a particular case."

The Act, the SAA, and the Department's regulations do not address directly whether the Department should use an alternative comparison method in an administrative review based upon a targeted dumping analysis conducted pursuant to section 777A(d)(1)(B) of the Act.<sup>6</sup> In light of the statute's silence on this issue, the Department indicated that it would consider whether to use an alternative comparison method in administrative reviews on a case-by-case basis, but declined to "speculate as to either the case-specific circumstances that would warrant the use of an alternative methodology in future reviews, or what type of alternative methodology might be employed."<sup>7</sup> At that time, the Department also indicated that it would look to practices employed by the Department in antidumping investigations for guidance on this issue.<sup>8</sup>

In antidumping investigations, the Department has examined whether to use an A-T method by using a targeted dumping analysis consistent with section 777A(d)(1)(B) of the Act:

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if:

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

Although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in an administrative review is, in fact, analogous to the issue in antidumping investigations. Accordingly, the Department

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<sup>6</sup> See section 777A(d)(1)(B) of the Act; SAA at 842-43; 19 CFR 351.414.

<sup>7</sup> See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification, 77 FR 8101, 8107 (February 14, 2012) (Final Modification for Reviews).

<sup>8</sup> See id. 77 FR at 8102.

finds the analysis that has been used in antidumping investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review.

The SAA does not demonstrate that the Department should conduct targeted dumping analysis in investigations only. The SAA discusses section 777A(d)(1)(A)(i) of the Act, concerning the types of comparison methods that the Department may use in investigations. That provision, however, is silent on the question of choosing a comparison method in administrative reviews. Section 777A(d)(1)(A) of the Act does not require or prohibit the Department from adopting a similar or a different framework for choosing a comparison method in administrative reviews as compared to the framework required by the statute in investigations. The SAA states that “section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction comparison methodology cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods.”<sup>9</sup> Like the statute, the SAA does not limit the proceedings in which the Department may undertake such an examination.

The silence of the statute with regard to application of an alternative comparison methodology in administrative reviews does not preclude the Department from applying such a practice. Indeed, the Court of Appeals for the Federal Circuit (Federal Circuit) has stated that courts “must, as we do, defer to Commerce’s reasonable construction of its governing statute where Congress ‘leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the agency’s generally conferred authority and other statutory circumstances.’”<sup>10</sup> Further, the Court of International Trade has stated that this “silence has been interpreted as ‘an invitation’ for an agency administering unfair trade law to ‘perform its duties in the way it believes most suitable’ and courts will uphold these decisions ‘{s}o long as the {agency}’s analysis does not violate any statute and is not otherwise arbitrary and capricious.’”<sup>11</sup> We find that the above discussion of the extension of the statute with respect to investigations is a logical, reasonable, and deliberative method to fill the silence with regard to administrative reviews.

Further, the Department’s revision of its practice with regard to administrative reviews, and to follow its World Trade Organization (WTO)-consistent practice for investigations, was a deliberate decision on the part of the Executive Branch pursuant to the authority provided in section 123 of the Uruguay Round Agreements Act. Specifically, the Executive Branch solicited public comments, consulted with the appropriate congressional committees, and issued a preliminary and final determination. This decision was made in order to implement several adverse WTO reports in which it was found that the United States was not meeting its WTO obligations. As such, the wisdom of the Department’s legitimate policy choices in this situation is not subject to judicial review.<sup>12</sup>

JBF’s arguments on this issue are unavailing. With respect to FAG Italia, JBF mischaracterizes the Federal Circuit’s holding. In that case, and unlike the instant review, the Federal Circuit

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<sup>9</sup> See section 777A(d)(1)(B) of the Act; SAA at 842-43; 19 CFR 351.414.

<sup>10</sup> See U.S. Steel Corp. v. United States, 621 F.3d 1351, 1357 (Fed. Cir. 2010) (citation omitted).

<sup>11</sup> See PSC VSMPO-AVISMA Corp. v. United States, 755 F. Supp. 2d 1330, 1338 (CIT 2011) (citation omitted).

<sup>12</sup> See Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 665 (Fed. Cir. 1992).

determined that the statute unambiguously did not provide the Department with the authority to take action because the “absence of a statutory probation cannot be the source of agency authority.”<sup>13</sup> In administrative reviews, section 751(a)(2)(A) of the Act directs the Department to determine the normal value and export price (or constructed export price) of each entry of subject merchandise and the resulting dumping margin for each entry. Thus, the Act provides the Department with the authority to engage in comparisons between normal value and export price to calculate dumping margins; however, as explained above, in the context of an administrative review, the Act does not state explicitly which method the Department must use in so doing. The Department has reasonably filled that gap to allow it to use the A-T comparison method when it encounters certain patterns of export prices. Thus, FAG Italia is inapposite to the current proceeding. Similarly, in Brown, the Supreme Court found the relevant statutory language at issue to include express terms that resolved the inquiry. 513 U.S. at 120. However, as explained above, the provision at issue in this proceeding does not expressly resolve the issue. Consequently, Brown does not support JBF’s arguments. Finally, as to Nken, that case did not involve an interpretation of a statute under the Chevron<sup>14</sup> framework by which the Department also must interpret the Act and, thus, concerns a different scenario than that faced by the Department in this proceeding.<sup>15</sup>

## **B. Timeliness of Allegation & the Department’s Authority to Issue the Post-Preliminary Analysis**

The Department disagrees with JBF’s argument that Petitioners’ allegation was untimely. Neither section 777A(d)(1)(B) of the Act nor the SAA provide any deadline as to when an interested party must file a targeted dumping allegation in either an investigation or an administrative review.<sup>16</sup> Similarly, the Department’s regulations do not provide for such a deadline in an investigation or an administrative review. Moreover, when the Department recently announced that it would consider whether to use an alternative comparison method in administrative reviews on a case-by-case basis, the announcement contained no guidelines on the filing of a request to apply an alternative comparison method.<sup>17</sup> By permitting JBF to comment on the Post-Preliminary Analysis, the Department has preserved JBF’s right to comment upon the targeted dumping allegation.<sup>18</sup> For these reasons, the Department finds that Petitioners’ allegation was timely filed.

JBF’s arguments on the timeliness of the allegation are unpersuasive. While 19 CFR 351.301(c)(1) pertains to rebuttal factual information, Petitioners’ targeted dumping allegation cannot reasonably be characterized as rebuttal factual information, as JBF claims. Rather, Petitioners used the information on the record of this review for purposes of advocating that the Department consider using a different method to compare normal value and export price (or constructed export price). However, that does not transform Petitioners’ allegation into the submission of facts, for the facts that served as the basis for Petitioners’ claim already were on

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<sup>13</sup> See FAG Italia, 291 F.3d at 815-16.

<sup>14</sup> See Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (Chevron).

<sup>15</sup> See Nken, 556 U.S. at 430.

<sup>16</sup> SAA, at 842-43.

<sup>17</sup> See generally Final Modification for Reviews.

<sup>18</sup> See Post-Preliminary Analysis at 4.

the record. In other words, Petitioners did not submit additional facts to disprove anything that JBF previously submitted; instead, Petitioners relied upon the very facts submitted by JBF to make an allegation. Moreover, in its regulations, the Department explicitly has delineated factual submissions from documents containing allegations similar to Petitioners' targeted dumping allegation.<sup>19</sup> Because the nature of the filings listed in 19 CFR 351.301(d) closely resemble Petitioners' targeted dumping allegation, (and in fact the now-withdrawn targeted dumping allegation was listed under that very provision),<sup>20</sup> it stands to reason that the Department properly considered Petitioners' submission as an allegation and not rebuttal factual information.

Further, while the Act and the regulations provide deadlines for preliminary and final determinations in administrative reviews,<sup>21</sup> the Department is not limited by any statutory or regulatory provision to issuing only preliminary and final results in such a proceeding. In this proceeding, the Department issued its Preliminary Results by the applicable deadline and is issuing these final results by the applicable deadline. Moreover, the Department enjoys wide discretion in conducting its proceeding, including the allocation of resources to develop suitable approaches for new policies such as the Final Modification for Reviews.<sup>22</sup> Issuing a Post-Preliminary Analysis and providing all parties with an opportunity to comment on that analysis embodies the principles of transparency and openness underlying the Act and administrative law in general. For example, when issues arise or information is submitted too late in a proceeding to be considered for the preliminary results, issuing a Post-Preliminary Analysis ensures that parties are aware of all issues before the Department releases final results and that they have an adequate opportunity to provide comments to the Department. Because all parties were provided an opportunity to comment on the Post-Preliminary Analysis (the same opportunity they were provided to comment on the Preliminary Results), JBF was not disadvantaged by this approach.

### C. Targeted Dumping Analysis

In recent antidumping investigations and administrative reviews where the Department has addressed targeted dumping allegations, the Department has employed the Nails Test<sup>23</sup> for each respondent subject to an allegation to determine whether a pattern of export prices or constructed export prices for comparable merchandise that differ significantly among purchasers, regions or

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<sup>19</sup> See 19 CFR 351.301(d).

<sup>20</sup> See 19 CFR 351.301(d)(5).

<sup>21</sup> See section 751(a)(2)(B)(iv) of the Act.

<sup>22</sup> See, e.g., Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States, 268 F.3d 1376, 1381 (Fed. Cir. 2001) ("In antidumping cases, this court has previously recognized 'Commerce's special expertise,' and it has 'accord{ed} substantial deference to its construction of pertinent statutes.'" (citation omitted)); Michron Tech., Inc. v. United States, 117 F.3d 1386, 1394 (Fed. Cir. 1997) (same); accord Corus Staal BV v. United States, 395 F.3d 1343, 1346 (Fed. Cir. 2005) (same).

<sup>23</sup> See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) and Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008) (collectively, Nails), as modified in more recent investigations, e.g., Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011); see also Mid Continent Nail Corp. v. United States, Slip. Op. 2010-47 (Ct. Int'l Trade May 4, 2010) and Mid Continent Nail Corp. v. United States, Slip. Op. 2010-48 (Ct. Int'l Trade May 4, 2010).

time periods existed within the U.S. market. The Nails Test involves a two-step process, as described below, that determines whether the Department should consider whether the A-A method is appropriate in a particular situation. In the first stage of the test, the “standard-deviation test,” we determined the volume of the allegedly targeted group’s (i.e., purchaser, region or time period) sales of subject merchandise (by sales volume) that are at prices more than one standard deviation below the weighted- average price of all sales under review, targeted and non-targeted. We calculated the standard deviation on a product-specific basis (i.e., by CONNUM) using the weighted-average prices for the alleged targeted group and the groups not alleged to have been targeted. If that volume did not exceed 33 percent of the total volume of the respondent’s sales of subject merchandise for the allegedly targeted group, then we did not conduct the second stage of the Nails Test. If that volume exceeded 33 percent of the total volume of the respondent’s sales of subject merchandise for the allegedly targeted group, on the other hand, then we proceeded to the second stage of the Nails Test.

In the second stage, the “gap test,” we examined all sales of identical merchandise (i.e., by CONNUM) sold to the allegedly targeted group which passed the standard-deviation test. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales for allegedly targeted group and the next higher weighted-average price of sales to the non-targeted groups exceeds the average price gap (weighted by sales volume) for the non- targeted groups. We weighted each of the price gaps between the non-targeted groups by the combined sales volume associated with the pair of prices for the non-targeted groups that defined the price gap. In doing this analysis, the allegedly targeted group’s sales were not included in the non-targeted groups; the allegedly targeted group’s average price was compared only to the average prices for the non-targeted groups. If the volume of the sales that met this test exceeded five percent of the total sales volume of subject merchandise to the allegedly targeted group, then we determined that targeting occurred and these sales passed the Nails Test.

As explained in the Post-Preliminary Analysis, if the Department determined that a sufficient volume of U.S. sales were found to have passed the Nails Test, then the Department considered whether the A-A method could take into account the observed price differences. To do this, the Department evaluated the difference between the weighted-average dumping margin calculated using the A-A method and the weighted-average dumping margin calculated using the A-T method. Where there is a meaningful difference between the results of the A-A method and the A-T method, the A-A method would not be able to take into account the observed price differences, and the A-T method would be used to calculate the weighted- average margin of dumping for the respondent in question. Where there is not a meaningful difference in the results, the A-A method would be able to take into account the observed price differences and the A-A method would be used to calculate the weighted-average dumping margin for the respondent in question.

With respect to JBF, the Department continues to find that a pattern of export prices (or constructed export prices) for comparable merchandise, that differ significantly among purchasers, regions, or time periods, does exist, and has considered whether the A-A method can account for the observed price differences. Further, the Department continues to find that there is a meaningful difference between the weighted-average dumping margins calculated

using the A-A method and the A-T method. As a result, the Department continues to find that it is appropriate to use the A-T method to calculate the weighted-average margin of dumping for JBF in these final results.<sup>24</sup>

The Department disagrees with JBF's claim that Petitioners' allegation did not demonstrate a pattern of prices that differ significantly. Petitioners' targeted dumping allegation included customer- and time-based allegations.<sup>25</sup> The Department agrees with Petitioners that JBF based its argument on an incomplete understanding of the allegation. An examination of the statistics discussed in JBF's case brief reveals that JBF considered Petitioners' customer-based allegation only and did not account for Petitioners' analysis of the time-period allegation. Both Petitioners' allegation and the Department's own analysis show a pattern of prices that differ significantly.<sup>26</sup> Moreover, when the time- and customer-specific allegations are considered together, the Department's analysis covers a large number of sales, in contrast to the situation faced by the Department in Certain Stilbenic Optical Brightening Agents from Taiwan.

We reject JBF's arguments that the findings in the Post-Preliminary Analysis should not be used in these final results because they are the result of statistical anomalies – *i.e.*, sales during a time of extreme price volatility, or the results of individually negotiated prices. As the Department recently stated in Circular Welded Carbon Steel Pipes and Tubes from Turkey, and accompanying IDM at Comment 1:

The Act and the regulations do not provide detailed guidance on comparing different sets of U.S. prices for purposes of determining the existence of targeted dumping. The only obligations imposed on the Department in its analysis appear in section 777A(d)(1)(B) of the Act. Section 777A(d)(1)(B) of the Act requires the Department (1) to examine whether there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or time periods and, if such a pattern exists, (2) to explain why such differences cannot be taken into account using the average-to-average or transaction-to-transaction comparison methods. The Act does not require the Department to discern why such patterns arise. Instead, the Act asks the Department to focus on U.S. sales prices alone; *i.e.*, export price or constructed export price.

In other words, the Act does not require the Department to establish that a particular respondent intended to target certain purchasers, regions, or time periods before the Department may find that such a pattern of export prices exists. Moreover, and contrary to JBF's claim, neither the Act nor the Department's regulations provide for any consideration of price fluctuations caused by market conditions. The Department has reached these same conclusions in several other proceedings.<sup>27</sup> Therefore, for these reasons, we reject JBF's arguments.

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<sup>24</sup> See Post-Preliminary Analysis at 3 and 4.

<sup>25</sup> See Petitioners' allegation at Exhibit 2.

<sup>26</sup> See Post-Preliminary Analysis at 3 and 4.

<sup>27</sup> See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Administrative Review of Antidumping Duty Order; 2010-2011, 78 FR 9670 (February 11, 2013), and accompanying IDM at Comment 1; Stainless Steel Plate in Coils from Belgium: Antidumping Duty Administrative Review, 2010-2011, 77 FR 73013 (December 7, 2012), and accompanying IDM at Comment 2.

## **Comment 2: Grade A and Grade B Sales**

JBF argues in its case brief that the Department erred by not matching any home market sales of grade B film to U.S. sales of grade A film. JBF contends that, because JBF distinguishes grade A film from grade B film based on customer specifications, rather than some “physical defect,” there is no potential for distortion from comparing grade A film with grade B film, which was a concern for the Department in Certain Polyethylene Terephthalate Film, Sheet and Strip from India: Final Results of Antidumping Duty Administrative Review, 71 FR 47485 (August 17, 2006) (PET Film from India), and accompanying IDM at Comment 4. JBF notes several instances where grade B film home market sales were priced higher than sales of grade A film of the same CONNUM. JBF requests that the Department not distinguish between grade A and grade B film in the final results.

In their rebuttal brief, Petitioners argue that JBF failed to document the extent of differences or similarities between grade A and grade B and, therefore, there is no basis not to distinguish between grade A and grade B film. To the contrary, Petitioners observe that products either meet specifications or do not meet specifications. Failing to meet specifications is an indication that there is a physical or chemical defect in the product that prevents the product from being used as intended. For this reason, the Department has long distinguished between products based upon specifications in its margin analysis. Petitioners also point to numerous other cases in which the Department has explained its practice of distinguishing sales based on whether they satisfied certain specification criteria, such as Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Taiwan, 63 FR 40461 (July 7, 1998), and accompanying IDM at Comment 22.

### **Department Position:**

Consistent with the Department’s established practice to consider grade when matching PET Film products,<sup>28</sup> and previous segments of this proceeding,<sup>29</sup> the Department has not made JBF’s suggested changes. The product characteristics identify grade as the first and most important criterion.<sup>30</sup> The Department is not persuaded by JBF’s argument that instances where home market sales of grade B film were priced higher than sales of grade A film of the same CONNUM shows that difference in grade is not significant. Because many factors can determine the price for individual sales, instances of grade B film priced higher than grade A film are not evidence that grade is insignificant. For example, some grade A film may be priced lower than grade B film due to the longstanding relationship between the producer and the

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<sup>28</sup> See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip From India, 67 FR 34899 (May 16, 2002) and accompanying IDM at Comment 5; PET Film from India, and accompanying IDM at Comment 4.

<sup>29</sup> See Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 73 FR 55036 (September 24, 2008); Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Final Results of Antidumping Duty Administrative Review, 77 FR 20357 (April 4, 2012).

<sup>30</sup> See Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review, 76 FR 76365, 76366 (December 7, 2011) (“We have relied on five criteria to match U.S. sales of subject merchandise to comparison-market sales: grade, specification, thickness, thickness category, and surface treatment.”).

purchaser. JBF states in its case brief that it distinguishes grade A PET Film from grade B PET Film on the basis of “customer’s specification” (i.e., grade B PET Film is film that does not meet a particular customer’s specifications), but that grade B PET Film “could” meet JBF’s own specifications for PET Film. As an initial matter, JBF has failed to document the extent of the differences or similarities between grade A PET Film and grade B PET Film. Moreover, while JBF indicates that it has its own specifications for PET Film, it does not cite to any record evidence that discusses the parameters of its specifications.<sup>31</sup> Furthermore, there is no information on the record whether any of the PET Film JBF has identified as grade B in its questionnaire responses meets its own specifications. Without more, JBF has failed to substantiate its claim.

JBF also has not demonstrated that the products it identifies as grade B PET Film are similar to products identified as grade A PET Film. As JBF notes in its case brief, the Department asked JBF to define grade in a supplemental questionnaire. In its response, JBF did not indicate that the difference between grade A PET Film and grade B PET Film was insignificant or that either of these grades closely resembles the specifications for its own film.<sup>32</sup> Thus, JBF has failed to carry its burden of building an adequate record that demonstrates the similarities between grade A PET Film and grade B PET Film.<sup>33</sup>

Therefore, because JBF has not identified evidence on the record in support of its claim, the Department finds no compelling reason to depart from its practice in PET Film proceedings and to change the matching criteria for these final results.

### **Comment 3: 15-Day Liquidation Policy**

In its case brief, JBF noted that, in the Preliminary Results, the Department stated its intention to send assessment instructions to U.S. Customs and Border Protection fifteen days after publication of the final results, while section 516A(a)(2)(A)(i)(I) of the Act allows parties thirty days to bring an action in the Court of International Trade. JBF maintains that the Department’s 15-day policy is unlawful, citing to SKF USA Inc. v. United States, 659 F. Supp. 2d 1338, 1351 (CIT 2009) (SKF USA Inc.) in support of its position. Consequently, JBF avers that the Department should state that it intends to issue assessment instructions no earlier than the day after the expiration of time to commence action contesting the final results; that is, 30 days after the publication of the final results.

No other party commented on this issue.

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<sup>31</sup> See “Polyethylene Terephthalate (PET) Film, Sheet and Strip from the United Arab Emirates (A-520-803); Case Brief of JBF RAK,” January 14, 2013 at 11 and 12.

<sup>32</sup> See “Polyethylene Terephthalate (PET) Film, Sheet and Strip from the United Arab Emirates (A-520-803); Response to the first Supplemental questionnaire by JBF RAK LLC.” July 5, 2012, at 1.

<sup>33</sup> See, e.g., QVD Food Co. v. United States, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (citations omitted) (explaining that “the burden of creating an adequate record lies with {interested parties} and not with Commerce”).

## Department Position:

The Department disagrees with JBF's claim that the 15-day policy is unlawful. The statute establishes a period within which entries must be liquidated, but is silent regarding a minimum amount of time to refrain from liquidation.<sup>34</sup> In light of this statutory silence, the Department has established a practice of issuing "liquidation instructions 15 days after publication unless we are aware that an injunction has been filed or is imminent."<sup>35</sup> Indeed, as we have stated previously:

{o}ur practice of issuing liquidation instructions 15 days after publication of the final results is based upon administrative necessity, namely that we must provide CBP with sufficient time to liquidate all entries, particularly in large and complex cases like the instant reviews, before the entries are deemed liquidated. Extreme consequences follow from deemed liquidation, specifically the government's inability to collect duties calculated. Furthermore, our current policy is in accordance with the CIT's statement that we must provide "some reasonable opportunity in which a plaintiff may seek to obtain the specific type of injunction described in {section 516A(c)(2)}."<sup>36</sup>

The instant review similarly involves a number of entries and complex issues, and we continue to harbor the same concerns about deemed liquidation. Finally, through the 15-day policy, we continue to provide interested parties with a reasonable opportunity to obtain injunctive relief. The 15-day policy affords interested parties a reasonable amount of time to study the Department's final results, to determine whether it intends to appeal those determinations, and to inform the Government that it imminently seeks to protect its entries from liquidation.

With regard to JBF's other arguments on the 15-day policy, we also disagree. As an initial matter, the opinion to which JBF cites – SKF USA Inc., concerns a practice no longer followed by the Department. In that case, the Court of International Trade addressed the Department's former practice of issuing liquidation instructions within 15 days.<sup>37</sup> As explained above, that practice has changed, and the Department now issues liquidation instructions 15 days after publication absent an injunction or notice that such request for injunction relief is imminent. And while the Department recognizes that the Court of International Trade subsequently has issued decisions after SKF USA Inc. that find our current 15-day policy unlawful, we recognize that the same issue remains pending in other cases and, thus, has not been resolved finally. Compare, e.g., SKF USA Inc. v. United States, 800 F. Supp. 2d 1316, 1326-28 (CIT 2011), with JBF RAK LLC v. United States, No. 11-00141, CM/ECF Docket No. 30 (CIT filed Oct. 12, 2011). With respect to JBF's argument that the Department should wait 30 days to issue liquidation instructions because section 516A(a)(2)(A)(i)(I) of the Act allows parties thirty days to bring an action in the Court of International Trade, this claim finds no support in the text of

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<sup>34</sup> See section 751(a)(3)(B) of the Act.

<sup>35</sup> See, e.g., Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Revocation of an Order in Part, 74 FR 44819 (August 31, 2009) (Ball Bearings), and accompanying IDM at Comment 3.

<sup>36</sup> See id.

<sup>37</sup> See SKF USA Inc., 659 F. Supp. 2d at 1361.

section 751(a)(3)(B) of the Act. We reached a similar conclusion in Ball Bearings, explaining that the Court of International Trade in SKF USA Inc. rejected a similar argument.<sup>38</sup> Finally, we note that the Department's prior policy of issuing liquidation instructions within 15 days of publication of its final results has been sustained by the Court of International Trade as a reasonable interpretation of the statute.<sup>39</sup> Consequently, it stands to reason that the Department's interpretation of the statute allowing for the issuance of liquidation instructions after that time similarly is reasonable.

**Comment 4: Correction of Certain Errors in FLEX's SAS Program**

In their case brief, Petitioners identify five errors in the SAS programming related to FLEX's margin calculation. Specifically, Petitioners contend that the Department should: (1) correct the beginning and ending date range of U.S. sales reviewed; (2) recalculate home market prices to account for missing values and to recognize fields reported in the home market currency; (3) converted currencies for certain values in the cost of production; (4) re-convert certain U.S. sales variables denominated in pounds to kilograms; and (5) deduct indirect selling expenses incurred in the United States from U.S. price.

No other party commented on this issue.

**Department Position:**

The Department agrees with Petitioners' comments. Accordingly, the Department has made these changes to the SAS programming for FLEX to correct these errors.<sup>40</sup>

**IV. Recommendation**

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

Agree \_\_\_\_\_ Disagree \_\_\_\_\_

\_\_\_\_\_  
Paul Piquado  
Assistant Secretary  
for Import Administration

\_\_\_\_\_  
Date

<sup>38</sup> Ball Bearings, and accompanying IDM at Comment 3.

<sup>39</sup> Mittal Steel Galati S.A. v. United States, 502 F. Supp. 2d 1295, 1313-14 (Ct. Int'l Trade 2007).

<sup>40</sup> See Memorandum to Mark Hoadley, "Final Analysis Memorandum for Flex Middle East FZE," dated concurrently with this memorandum.