

DATE: September 17, 2008

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates (UAE)

I. Summary

On May 5, 2008, the Department of Commerce (the Department) published the preliminary determination in this investigation. See Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 24547 (May 5, 2008) (Preliminary Determination). Cost and sales verifications of Flex Middle East FZE (Flex UAE) were conducted by the Department in May 2008. See Memorandum to Neal M. Halper, Director, Office of Accounting, Verification of the Cost of Production and Constructed Value Data Submitted by Flex Middle East FZE in the Antidumping Duty Investigation of Polyethylene Terephthalate (PET) Film, Sheet, and Strip from United Arab Emirates, dated July 8, 2008 (Cost Verification Report), and Memorandum to the File from Douglas Kirby, International Trade Compliance Analyst, Verification of the Sales Response of Flex Middle East (FZE) in the Antidumping Investigation of Polyethylene Terephthalate Film, Sheet and Strip (PET film) from the United Arab Emirates (UAE), dated July 23, 2008 (Flex UAE Sales Verification Report). A sales verification of Flex UAE's U.S. affiliate, Flex America Inc. (Flex America) was conducted in July 2008. See Memorandum to the File from Douglas Kirby, International Trade Compliance Analyst, Verification of the Sales Response of Flex America Inc. in the Antidumping Investigation of Polyethylene Terephthalate Film, Sheet and Strip (PET Film) from the United Arab Emirates (UAE), dated August 11, 2008 (CEP Sales Verification Report).

Subsequent to the Preliminary Determination, the Department issued a memorandum containing our analysis of a targeted dumping allegation by petitioners.¹ See Memorandum to Stephen

¹ DuPont Teijin Films, Mitsubishi Polyester Film of America, Inc., SKC, Inc. and Toray Plastics (America), Inc. (collectively, petitioners).

Claeys, Deputy Assistant Secretary for Import Administration, from Barbara E. Tillman, Director, AD/CVD Operations, Office 6, Antidumping Duty Investigation of Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from the United Arab Emirates: Analysis of Petitioners' Allegation of Targeting Dumping, dated August 4, 2008 (Targeted Dumping Memorandum).

We requested parties to submit comments on the Preliminary Determination and the Targeted Dumping Memorandum. Both petitioners and Flex UAE, the respondent for this investigation, submitted case briefs and rebuttal briefs. The following is a list of issues raised by interested parties in their briefs:

- Comment 1: Date of Sale/Credit Expenses for U.S. Channel 1 Sales**
- Comment 2: Calculation of Inventory Carrying Costs for U.S. Sales**
- Comment 3: Reclassification of Direct Sales Reported as Channel 3 Sales**
- Comment 4: Correction to Erroneous Calculation for a U.S. Credit Expense**
- Comment 5: Treatment of Bank Charges Incurred on U.S. Sales**
- Comment 6: Unreported Cash Discounts for a U.S. Sale**
- Comment 7: Treatment of U.S. Sample Sales**
- Comment 8: Whether to Adjust Normal Value for Customs Clearance Fees Incurred on Home Market Sales**
- Comment 9: Whether to Adjust Normal Value for Export Credit Insurance Incurred on Home Market Sales**
- Comment 10: Whether to Include the Surrogate Cost for a Domestic Product Sold but Not Produced During the POI**
- Comment 11: Corrections to Flex UAE's Reported Cost of Production**
- Comment 12: Targeted Dumping**

The "Analysis of Comments" section below addresses the comments submitted by the parties in their briefs. We recommend that you approve the positions described in this memorandum.

I. Background

The Department published its preliminary determination of sales at less than fair value (LTFV) on May 5, 2008. See Preliminary Determination. Additionally, the Department postponed the deadline for the final determination to the 135th day following publication of the Preliminary Determination. See id at 24548. As a result, the deadline for this final determination is September 17, 2008.

On March 21, 2008, the petitioners submitted a timely allegation that Flex UAE engaged in targeted dumping during the period of investigation (POI) in accordance with 19 CFR 351.301(d)(5). On March 31, 2008, Flex UAE submitted comments in response to the petitioners' targeted dumping allegation. On April 11, 2008, the Department requested additional information from the petitioners regarding their targeted dumping allegation. The additional information requested was filed on April 21, 2008. The Department stated in the Preliminary Determination that there was not sufficient time to analyze the information and fully consider the petitioners' allegation for the preliminary determination, and therefore would issue a

decision regarding targeted dumping following the issuance of the preliminary determination, and would allow parties to comment on it prior to the final determination. After reviewing petitioners' April 21, 2008 supplemental information, the Department determined that additional information was needed from petitioners and issued a second request for information to petitioners on June 6, 2008. Petitioners filed their submission on June 9, 2008. On August 4, 2008, the Department determined that petitioners' allegation did not contain sufficient information to conduct a targeted dumping analysis for the final determination of this investigation. See Targeted Dumping Memorandum.

On August 11, 2008, we invited parties to comment on the Preliminary Determination, the targeted dumping decision, and the verification reports. On August 18, 2008, petitioners and respondents filed timely case briefs. On August 22, 2008, both parties filed rebuttal briefs. No parties requested a hearing.

II. Analysis of Comments

Comment 1: Date of Sale/Credit Expenses for U.S. Channel 1 Sales

In the Preliminary Determination, we used invoice date as the date of sale for all U.S. sales. Petitioners argue that, because Flex UAE reported that its channel 1 sales were shipped directly from the UAE to the U.S. customers, and the invoice was issued after shipment, it is appropriate to use shipment date as date of sale. Further, according to petitioners, Flex UAE reported the invoice date from Flex America to its U.S. customer as both the date of sale and the date of shipment. As a result, petitioners argue that Flex UAE incorrectly calculated its credit expenses for channel 1 sales using Flex America's invoice date, which does not reflect the actual date of shipment from the UAE directly to the customer.

Petitioners claim that the Department correctly recognized that Flex UAE's credit expenses for channel 1 sales were inaccurately reported by Flex UAE, and as a result requested Flex UAE to report the time period between date of shipment from the UAE to the United States and the date on which payment was received. As a result, Flex UAE complied with the Department's request and reported the correct shipment date in the field labeled ONBOARDTU.

According to petitioners, it is the Department's practice to use as the date of sale the date that best reflects the point at which the material terms of sale are set. Petitioners state that when the shipment date precedes the invoice date, the Department has consistently held that the shipment date better reflects the date on which the material terms of the sale are set. See Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 72 FR 39053 (July 17, 2007); Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From Germany, 67 FR 35497 (May 20, 2002) and accompanying Issues and Decision Memorandum at Comment 2; and Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand, 69 FR 76919 (December 10, 2004) and accompanying Issues and Decision Memorandum at Comment 10.

Petitioners conclude that, since the date of shipment from the UAE is the correct date of sale for Flex UAE's channel 1 sales, the date of shipment from the UAE is also the date on which the

sale is considered a receivable for purposes of the Department's credit expense calculation. Petitioners therefore request that the Department recalculate the credit expenses for channel 1 sales using ONBOARDTU and date of payment received (PAYDATU) to determine the relevant time period.

Flex UAE argues that it has properly reported inventory carrying costs and credit expenses, and if an adjustment is made to credit expenses, then a corresponding adjustment must be made to inventory carrying costs to avoid double counting. Flex UAE states that it did report the date of sale for channel 1 sales as the date of invoice between Flex America and the U.S. customer. Flex UAE believes that this is the appropriate date of sale because this is the date that the sale is recorded in Flex America's books, and title does not transfer until the goods are delivered to the customer. Furthermore, Flex UAE calculated the credit expenses for channel 1 sales based on this date because it was on this date that the customer became liable for payment. Prior to this point, the customer had no liability to pay the invoiced amount. According to Flex UAE, the sale to the customer does not occur until delivery to the customer in the United States. Further, the two imputed expenses (credit and inventory carrying costs) cannot overlap. Therefore, Flex UAE believes that its reporting is consistent with the Department's questionnaire.

Flex UAE also argues that, if the Department decides to change the date of sale (and by extension the calculation of credit expenses) for channel 1 sales, then the corresponding inventory carrying costs also have to be recalculated. According to Flex UAE, the Department has found in numerous cases that the credit period and the inventory carrying period should not overlap. See e.g., Notice of Final Results of the Tenth Administrative Review and New Shipper Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 70 FR 12443 (March 14, 2005) and accompanying Issues and Decision Memorandum at Comment 12; Silicomanganese from India: Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances Determination, 67 FR 15531 (April 2, 2002) and accompanying Issues and Decision Memorandum at Comment 19; and also Stainless Steel Sheet and Strip in Coils From Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 69 FR 5960 (February 9, 2004).

Flex UAE refers to petitioners' brief which states "any addition to imputed credit expense associated with consignment sales would double-count the opportunity costs, prior to invoicing, which is already captured in inventory carrying expenses." Flex UAE maintains that the Department is aware that the imputed credit expense and inventory carrying costs deal with two distinct periods of time and any overlap would result in double counting. Therefore, Flex UAE argues, if an adjustment is made to the credit expense for channel 1 sales or the inventory carrying costs for channel 2 sales, then corresponding adjustments have to be made to inventory carrying costs or credit expenses as appropriate.

Department Position:

Section 351.401(i) of the Department's regulations states that "{i}n identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. Flex reported invoice date as the date of sale for both U.S. and home market sales. Furthermore,

it provided sufficient information to demonstrate that invoice date and not purchase order date was the date on which the material terms of sale were set.

However, for all of Flex UAE's channel 1 sales², the merchandise is shipped directly to the U.S. customer. Once the customer receives the merchandise, Flex America issues the invoice. As described in Flex UAE's questionnaire responses and confirmed at verification, the material terms of the sale are set prior to importation into the United States and these sales are destined for the U.S. customer at the time of shipment from Flex UAE's production facilities. See Flex UAE section A Questionnaire Response dated December 19, 2007 at A-20; see Flex UAE Sales Verification Report at 14; see also CEP Verification Report at 9-10. At verification, we found no examples of any changes to the material terms of sale after shipment from the UAE for Flex UAE's channel 1 sales.

As such, while we agree that invoice date is the appropriate date of sale in accordance with 19 CFR 351.401(i), when shipment date precedes invoice date, it is the Department's practice to use shipment date as the date of sale. See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Luxembourg, 67 FR 35488 (May 20, 2002) and accompanying Issues and Decision Memorandum at Comment 4; Notice of Final Determination of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada, 68 FR 52741 (September 5, 2003) and accompanying Issues and Decision memorandum at Comment 3; and Stainless Steel Bar from Japan: Final Results of Antidumping Duty Administrative Review, 65 FR 13717 (Mar.14, 2000) and accompanying Issues and Decision memorandum at Comment 1. Since the preliminary determination, we have established that, for all Flex UAE's channel 1 sales, shipment date precedes invoice date. Flex UAE reported the shipment date for its U.S. sales in the field ONBOARDTU. We have therefore used shipment date as the date of sale for all Flex UAE's channel 1 sales.

In addition, because we have corrected the date of shipment, we have recalculated the credit expenses. Furthermore, Flex UAE's channel 1 sales are made directly to the customer, so Flex UAE incurred no inventory carrying costs in the United States and reported this field accurately. However, Flex UAE did report domestic inventory carrying costs on U.S. sales. For the purposes of these final results, we have adjusted this field to avoid an overlap in the time periods used for calculating domestic inventory carrying costs incurred on U.S. sales, and credit expenses. For further information, see Analysis Memorandum for the Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates, dated September 17, 2008 (Final Analysis Memorandum).

Comment 2: Calculation of Inventory Carrying Costs for U.S. Sales

In the Preliminary Determination, we calculated inventory carrying costs for channel 2 and channel 3 sales using the period from date of delivery to the warehouse to invoice date. Petitioners state that Flex UAE reported consignment sales as U.S. Channel 2 sales. Petitioners argue that, as is the case with all consignment sales, Flex UAE shipped the merchandise to the

² As reported by Flex UAE, Channel 1 sales are shipped directly from the UAE to the U.S. customer, and invoiced upon delivery to the customer; Channel 2 sales are shipped to the customer's warehouse, and invoiced when the customer withdraws the material from its warehouse; and, channel 3 sales are delivered to Flex America's warehouse and invoiced when withdrawn from Flex America's warehouse.

customer's warehouse but did not record the sale to the customer until the date the customer withdrew the merchandise from inventory. Petitioners further state that, while the merchandise is physically on the premises of Flex America's customer, it remains part of Flex America's inventory until the customer withdraws it from the warehouse, and Flex America therefore bears the inventory carrying costs until the date on which the customer withdraws it from inventory. Petitioners argue that Flex UAE incorrectly reported the inventory carrying costs for these U.S. sales. As a result of the incorrect reporting, petitioners argue, the calculation of the opportunity costs associated with these sales is incorrect. Petitioners' arguments rely on proprietary information, which is presented in full detail in the Final Analysis Memorandum.

Petitioners explain that, in the "Summary of Issues" section of the CEP Sales Verification Report, the Department notes that it requested Flex America to calculate the inventory carrying costs from the date the merchandise arrived in the United States until the date it was shipped to the customer. Petitioners add that, prior to verification, Flex UAE had not provided the requested information, and for this reason, the Department asked Flex UAE, at verification, to provide the entry date for all U.S. sales. See CEP Sales Verification Report at 3. Petitioners explain that Flex UAE complied with the Department's request and submitted a revised database on August 4, 2008. Petitioners argue that the Department now has the information necessary to recalculate the inventory carrying costs on all U.S. Channel 2 and Channel 3 sales to take into account the entire period it is in inventory.

In addition, petitioners claim that Flex UAE reported some U.S. sales as U.S. Channel 2 sales without reporting inventory carrying costs. Petitioners state that Flex UAE shipped the merchandise to the customer's warehouse but did not record the sale to the customer until the date the customer withdrew the merchandise from inventory. Petitioners further state that, while the merchandise is physically on the premises of Flex America's customer, it remains part of Flex America's inventory until the customer withdraws it from the warehouse, and Flex America therefore bears the inventory carrying costs until the date on which the customer withdraws it from inventory. Petitioners argue that the Department's practice on this issue is clear, as demonstrated in Notice of Antidumping Duty Order: Stainless Steel Bar From Italy, 67 FR 10384 (March 7, 2002) (SS Bar Italy). According to petitioners, even though the petitioner in SS Bar Italy argued that the Department should treat the period that merchandise is held in inventory by the customer as credit expenses rather than as inventory carrying costs, the Department disagreed and treated the opportunity cost as inventory carrying costs. Therefore, petitioners argue that the Department should calculate an inventory carrying cost for all U.S. channel 2 sales that does not already include such a cost.

As discussed above in Comment 1, Flex UAE argues that it has properly reported inventory carrying costs and credit expenses, and if an adjustment is made to inventory carrying costs, then a corresponding adjustment must be made to credit expenses to avoid double counting. Flex UAE states that it did report the date of sale for channel 1 sales as the date of invoice between Flex America and the U.S. customer. Flex UAE believes that this is the appropriate date of sale because this is the date that the sale is recorded in Flex America's books and title does not transfer until the goods are delivered to the customer. Furthermore, Flex UAE calculated the credit expenses for channel 1 sales based on this date because it was on this date that the customer became liable for payment. Prior to this point, the customer had no liability to pay the

invoiced amount. According to Flex UAE, the sale to the customer does not occur until delivery to the customer in the United States. Further, the two imputed expenses (credit and inventory carrying costs) cannot overlap. Therefore, Flex UAE believes that its reporting is consistent with the Department's questionnaire.

Furthermore, Flex UAE takes issue with petitioners' argument that inventory carrying costs should be added for Channel 2 sales because, although the goods are physically located at the customer's warehouse, title has not transferred from Flex America to the customer. Flex UAE argues that petitioners are being internally inconsistent in that they want the date that quantity and value are determined to be controlling for Channel 1 sales, but they want the transfer of title to be controlling in the case of Channel 2 sales. Flex UAE argues that the Department should use the reported date of sale and inventory carrying costs in this final determination. Flex UAE further argues that the Department should ensure there is not an overlap between credit expenses and inventory carrying costs during the POI.

Department Position:

For its channel 2 and channel 3 sales, Flex America calculated the inventory carrying costs incurred in the United States (INVCARU) using the time period between delivery date to the customer's warehouse and the issuance of the commercial invoice, and the Department used INVCARU as reported for the preliminary determination calculations. However, in the original section C questionnaire, the Department requested Flex UAE to report INVCARU based on the time period between the date of arrival in the United States and the date of shipment to the first unaffiliated customer. At verification, we checked entry dates for a number of U.S. sales, and subsequent to verification, we requested Flex UAE to provide the entry date in a revised U.S. sales database. See CEP Sales Verification Report at 3 and 14. We received the revised U.S. sales database on August 4, 2008.

Therefore, for Flex UAE's channel 2 and channel 3 sales, the Department has recalculated Flex UAE's reported U.S. inventory carrying costs for the final determination using the period from the date of entry into the United States to the date of shipment to the customer, which for these sales is the invoice date. We acknowledge Flex UAE's concern regarding an overlap of the time periods used to calculate credit expenses and inventory carrying costs. However, we are calculating INVCARU from the date of entry into the United States to the date of shipment to the customer (invoice date) and credit expenses from the date of shipment to the customer to the date of payment, so there is no overlap.

In addition, for certain channel 2 sales made by Flex UAE during the POI and reported without inventory carrying costs, we have reclassified these sales as channel 1 direct sales. See Final Analysis Memorandum for a discussion of business proprietary information regarding this issue. Flex UAE did not report inventory carrying costs for these channel 2 sales, and there is no evidence to suggest that these are actually channel 2 sales. Therefore, we have reclassified these sales as channel 1 direct sales, and have adjusted the date of sale and credit expenses accordingly for these misclassified channel 2 sales.

Contrary to Flex UAE's arguments, there is no inconsistency in our date of sale analysis. We have accepted the invoice as the documentation which establishes the material terms of sale.

However, in those instances where the goods are shipped directly from the UAE to the U.S. customer and the ship date falls before the invoice date, we are relying on shipment date because it is at that point that no additional changes can be made to quantity and price. On the other hand, for channel 2 and 3 sales which enter a U.S. warehouse and which are invoiced as they are shipped from the warehouse, we are using the invoice date as date of sale because, among other things, the goods are not shipped to the customer prior to the invoice date.

Comment 3: Reclassification of Direct Sales Reported As Channel 3 Sales

Petitioners argue that the results of verification establish that some U.S. channel 3 sales were shipped directly to the customer. See CEP Sales Verification Report at 3. Petitioners state that Flex America explained that these sales were shipped directly to the customer because there was a ‘qualification’ process. Petitioners contend that the explanation, however, is irrelevant with respect to the calculation of credit expenses or inventory carrying costs.

According to petitioners, Flex UAE’s reporting fails to take into account the opportunity costs associated with these sales; either credit expenses should be calculated if these sales are considered channel 1 sales, or alternatively, inventory carrying expenses should be calculated if these sales are considered channel 3 sales. Petitioners contend that, if these sales are, in fact, shipped directly to the customer, they should be treated as channel 1 sales in which the credit expense calculation should cover the period from the date of export from the UAE to the date of payment. Petitioners argue that if, on the other hand, Flex UAE has correctly characterized these sales as channel 3 sales (i.e., sales that are warehoused by Flex America prior to delivery), then there must be inventory carrying costs and warehousing associated with the sales. According to petitioners, the data strongly suggest that some of Flex UAE’s channel 3 sales are, in fact, direct or channel 1 sales. Either way, petitioners request that the Department recalculate the opportunity costs and their impact on price.

Flex UAE did not comment on this issue.

Department Position:

At the verification of Flex America, we asked Flex America why certain channel 3 sales (sales normally stored in one of Flex America’s warehouses) did not have inventory carrying costs or warehousing expenses reported. Flex America answered that for certain sales there is a qualification process, and for these types of sales, the merchandise is shipped directly to the customer’s facilities, and not to Flex America’s warehouse. We asked Flex America to provide us with the sales documentation for one specific sale, a sale reported as a sale to a channel 3 customer, for which there were no warehousing expenses or inventory carrying costs reported. Our review of the shipping documentation confirmed that the merchandise was shipped directly to the customer. See CEP Sales Verification Report, Exhibit 16. Flex America explained that this sale was such a pre-qualification sale, and therefore the customer requested that it be delivered directly to the company’s facilities. Based on this explanation and our review of the documentation that confirmed it, we have reclassified as channel 1 sales those channel 3 sales for which no inventory carrying costs or warehousing expenses were reported and we have recalculated the credit expenses accordingly. See Final Analysis Memorandum.

Comment 4: Correction to Erroneous Calculation for a U.S. Credit Expense

Petitioners explain that, in the U.S. sales database Flex UAE submitted on August 4, 2008, Flex UAE reported a U.S. credit expense with a calculation error, and at verification, Flex UAE conceded that this was a calculation error. At verification, Flex America stated that no payment had been received for this sale. See CEP Sales Verification Report at 3. Petitioners argue that the Department should calculate credit expenses for this sale for its final determination based on the period between the date of sale and the date of the Department's final determination.

Flex UAE did not comment on this issue.

Department Position:

At verification, Flex America confirmed that it had inaccurately reported the credit expense for one U.S. sale and that the inaccuracy was due to a calculation error. Company officials further explained that payment had not yet been received for this sale. See CEP Sales Verification Report at 3. Pursuant to section 776(a) of the Act and 19 CFR 351.308, because necessary information is not on the record, we have recalculated the credit expense for this sale using, as facts available, the last day of CEP verification, as the payment date. In instances where payment has not been received, the Department's general practice has been to use the last date that respondent could have submitted new factual information. See e.g., Notice of Final Determination of Sales at Not Less Than Fair Value: Structural Steel Beams from Italy, 67 FR 35481, Issues and Decision Memorandum at Comment 9 (May 20, 2002). In light of the fact that Flex America had not received payment as of the time of verification and the fact that it could have provided the payment information for this one sale up until the last day of the CEP verification, we have recalculated the credit expense for this sale using the period between the date of sale and the date of the last day of verification.

Comment 5: Treatment of Bank Charges Incurred on U.S. Sales

According to petitioners, neither Flex UAE nor Flex America reported incurring any bank charges on their U.S. sales. Further, at the verifications of both Flex UAE and of Flex America, the Department discovered bank charges that were originally not reported. Regarding bank charges incurred in the UAE by Flex UAE on U.S. sales activities, petitioners suggest that the Department calculate a value based on facts available, and deduct that amount from all U.S. sales.

Petitioners also argue that an adjustment for bank charges discovered during the Department's CEP verification of Flex America should be made as well. Petitioners argue that the amount should be included as part of the overall indirect selling expense deduction.

Flex UAE responds that petitioners are correct in stating that certain bank charges were not reported as selling expenses, but maintains that these expenses were included in the financial expense ratio used by the Department and noted in the cost verification report. Moreover, Flex UAE, states that the Department's questionnaire did not specifically ask for bank charges and Flex UAE did not report them separately knowing that these charges were already included in the financial expense ratio. Therefore, Flex UAE states there is no basis for a facts available determination or any adjustment to constructed export price (CEP) in this regard.

Flex UAE further argues that should a CEP adjustment be made, the Department has the accounting records to apply the actual amount of bank charges and deduct that amount in calculating the financial expense ratio. Flex UAE disagrees with petitioners' suggested approach of applying a per invoice charge, noting that one charge applies to multiple sales. Flex UAE cites to Timken v. United States, 354 F.3d 1334, 1345 (Fed. Cir. 2000); citing F.Iii De Cecco Di Filippo Fara S. Martino S.p.A v. United States, 216 F3d 1027, 1032 (Fed. Cir. 2000), and the CAFC's statement that the Department must balance the statutory objectives of finding an accurate dumping margin and inducing compliance rather than creating an overly punitive result. Flex UAE states that there is no evidence on the record indicating that it hid information or in any way attempted to impede the investigation, and the bank commissions were included in the data supplied to the Department. Therefore, Flex UAE argues that accepting petitioners' suggestion would be punitive and contrary to the CAFC rulings.

Finally, Flex UAE states that petitioners are arguing for a facts available determination for an expense not even related to subject merchandise. Flex UAE notes that the Department's verification report explained that this expense was not specifically related to subject merchandise. See Flex UAE Sales Verification Report at 2.

Department Position:

It is the Department practice to request that respondents report all selling expenses incurred in the comparison market and in the U.S. market during the POI. As discussed in the verification report, in the course of checking the accuracy and completeness of the reported selling expenses, we found some bank charges incurred by Flex UAE and Flex America that had not been reported. See Flex UAE Sales Verification Report at 2 and CEP Sales Verification Report at 2 and 6. While there were some unreported bank charges incurred on U.S. sales of subject merchandise, the record shows that most such charges were not for subject merchandise. Therefore, we do not agree with petitioners that we must deduct the highest amount found at verification from each U.S. sale. Instead, we have only included as a deduction from U.S. price those bank charges that can be reasonably attributed to U.S. sales of subject merchandise. For a further explanation of how we calculated the amount of bank charges to deduct see Final Analysis Memorandum. Furthermore, we disagree with respondent that since the questionnaire did not explicitly request bank charges be reported that it had no obligation to report them. The Department's questionnaire requests respondent to report all other selling expenses incurred during the POI, which includes expenses such as bank charges.

A corresponding reduction in the financial expense ratio, as proposed by respondent, might be appropriate if the bank charges at issue were included in the reported financial expenses. However, the record does not show how these bank charges are part of the financial expenses reported and the resulting ratio calculated. See Section A Questionnaire Response dated December 19, 2007 at Exhibit 8 (UFlex Annual Report at 66). Furthermore, since Flex UAE did not report any such charges as selling expenses, as it should have, we find that the corresponding adjustment to the financial expense ratio is not warranted.

Comment 6: Unreported Cash Discounts for a U.S. Sale

Petitioners explain that, contrary to the explanations provided by Flex UAE throughout the investigation, the Department discovered at verification that Flex America grants cash discounts

and that, in at least one instance, the discount was granted on a sale of subject merchandise. See Flex UAE Sales Verification Report at 6. Petitioners state that a review of the database indicates that there are additional sales that meet the requirements to receive the discount and, absent affirmative information that the discount was not given, the Department should assume that the discount was granted for all sales that meet the requirements and deduct the cash discount amount from the relevant transactions.

Flex UAE counters that petitioners' argument for a cash discount to be applied to sales that could, in theory, have received a discount is without factual support. Flex UAE points out that, at verification, the Department found all of the entries with cash discounts represented sales of non-subject merchandise, with the exception of one. Therefore, Flex UAE believes it would be inappropriate, contrary to the evidence on the record, and unduly punitive for the Department to make adjustments to CEP for cash discounts granted only on sales of non-subject merchandise. According to Flex UAE, there was one entry of subject merchandise for which the discount was inadvertently not reported, and Flex UAE agrees to an adjustment for this invoice.

Department Position:

In order to verify the questionnaire response that no discounts were granted on U.S. sales, we checked the expense account labeled "cash discounts" and found that there were entries in that account. We tested this account in order to confirm that no discounts were granted on U.S. sales of subject merchandise. In the course of conducting this test, we found one unreported cash discount on a U.S. sale, but we found no other such discounts. Consequently, while the procedures for checking that no discounts were provided did uncover one discount, those same procedures resulted in verifying that no other U.S. sales of subject merchandise received discounts. See CEP Sales Verification Report at 6. Furthermore, at verification, we found no evidence of discounts in our detailed examination of sales and payment documentation in the five pre-selected sales and two surprise sales traces. See CEP Verification Report at 14. Therefore, we disagree with petitioners that we should assume a cash discount was granted on all sales that meet the terms of the discount. Rather, based on the results of verification, we are only adjusting U.S. price for the one sale for which we found a discount had been provided.

Comment 7: Treatment of U.S. Sample Sales

Petitioners argue that all U.S. sample sales should be included in the U.S. sales database at their respective prices. Petitioners further maintain that, if Flex UAE had disclosed these sales and the associated expenses prior to verification, it would be reasonable to treat them and the associated expenses as a selling expense to be allocated over all of Flex UAE's sales of subject merchandise. However, petitioners argue that Flex UAE's failure to disclose the sample sales should foreclose that option. Petitioners further argue that if the Department decides to treat the sample sales and associated expenses as a selling expense, there must be a downward adjustment to Flex's U.S. prices for the value of those sales and associated expenses.

Flex UAE states that petitioners' claim that Flex UAE did not disclose its sample sales is false and not supported by the record. Flex UAE states that it removed the sample sales from the database at the request of the Department, and therefore, petitioners' request for these sales to be included is contrary to the Department's explicit instructions.

Further, Flex UAE cites the CAFC ruling that samples for which no consideration is provided are not “sales” and as such should not be included in calculating the antidumping margin. See NSK Ltd. And NSK Corp. v. United States, 115 F.3d 965, 975 (because NSK’s samples did not constitute “sales” they should not have been included in calculating United States price) (June 10, 1997). According to Flex UAE, a zero charge sample is not a sale and therefore there is nothing to report.

Department Position:

We disagree with petitioners that we should include the zero-priced sales for purposes of calculating the dumping margin. As Flex UAE reported, these zero-priced sales of sample merchandise were not sales in the U.S. market; because there was no consideration, Flex UAE did not include them in the U.S. sales database. At verification, we examined invoices for these sample sales, and found that they were, as reported, zero-price transactions. See CEP Sales Verification Report at 2. Petitioners are correct, however, that the expenses associated with the delivery of the sample merchandise should be recognized as selling expenses and included as deductions to U.S. price. We collected information about these expenses at verification. See Flex UAE Sales Verification Report, at 2. For purposes of this final determination, we have calculated the total expenses incurred on U.S. sample sale transactions and deducted them from U.S. price on a customer-specific basis where possible, and we have allocated the expenses over all U.S. sales in instances where the U.S. customer is unknown. Furthermore, we have continued to treat as an actual sale the one sale that Flex UAE identified as a sample for which a price was charged (since it was a transaction for consideration) (see NSK 115 F.3d at 975), and we have retained it in the U.S. sales database for margin calculation purposes, deducting all of the relevant expenses. For additional information about these adjustments, see Final Analysis Memorandum.

Comment 8: Whether to Adjust Normal Value for Customs Clearance Fees Incurred on Home Market Sales

Flex UAE argues that the Department should adjust normal value for customs clearance expenses that were reported and verified by the Department. According to Flex UAE, the Department did not make this adjustment in the preliminary determination, and requested additional information on this adjustment at that time. Flex UAE states that it responded to the Department on May 9, 2008, explained that these expenses related to customs clearance documents and provided supporting documentation. In that response, Flex UAE also explained it had inadvertently omitted these expenses from its January 18, 2008 response, but included them subsequently in its April 8, 2008 response. Flex UAE further states that the information was verified by the Department. See Flex UAE Sales Verification Report. Flex UAE argues that section 773(a)(6)(B) of the Act requires an adjustment for expenses incurred to bring the foreign like product from the original place of shipment to the place of delivery of the purchaser, and therefore, normal value should be reduced for the customs clearance fees as adjusted at verification.

Petitioners did not oppose this adjustment.

Department Position:

The Department did not make an adjustment to normal value for customs clearance expenses in the preliminary determination because Flex UAE had not provided any explanation or supporting worksheets and information to demonstrate the origin of these expenses at that time. In fact, Flex UAE had not reported these expenses in its original response and only included them at a later date without sufficient explanation of the expense. In order to consider these expenses properly, the Department requested clarification and documentation to demonstrate the validity of these expenses in a supplemental questionnaire issued on April 25, 2008. Flex UAE responded on May 9, 2008 with the required information. See Flex UAE supplemental questionnaire response dated May 9, 2008 at 2. Flex UAE explained that these expenses related to customs clearance fees on home market sales to customers outside the Jebel Ali Free Zone. At verification, Flex UAE presented minor corrections relating to this expense reported in the May 9, 2008 response. The Department examined the changes Flex UAE claimed were minor corrections and subsequently accepted the changes as minor corrections. The Department then verified these expenses. See Flex UAE Verification Report at 3 and 23.

Thus, the Department has considered these expenses and, in accordance with section 773(a)(6)(B) of the Act, has made an adjustment to normal value for this final determination.

Comment 9: Whether to Adjust Normal Value for Export Credit Insurance Incurred on Home Market Sales

Flex UAE argues that the Department should adjust normal value for export credit insurance expenses that were reported and verified by the Department. Flex UAE states that, similar to the customs clearance fees, the Department did not make an adjustment for export credit insurance in the preliminary determination but sought additional information on this expense. Flex UAE states that it responded with the required information and further, the Department verified this expense at verification. Flex UAE argues that, under the statute, normal value should be reduced for this expense.

Petitioners did not oppose this adjustment.

Department Position:

For the same reasons as explained in the Department's Position on Comment 8 above, we did not make an adjustment for export credit insurance in the preliminary determination. The Department sought additional information from Flex UAE in its April 25, 2008 supplemental questionnaire and Flex UAE provided the same in its May 9, 2008 response. Further, the Department verified this expense at verification by examining Flex UAE's contract with the insurance company and related entries in Flex UAE's books, and established that Flex UAE is required to pay insurance for sales to the UAE that are outside the Jebel Ali Free Trade Zone. See Flex UAE Verification Report at 23. We have therefore, in accordance with section 773(a)(6)(B) of the Act, made an adjustment for export credit insurance for this final determination. See Final Analysis Memorandum.

Comment 10: Whether to Include the Surrogate Cost for a Domestic Product Sold but Not Produced During the POI

Petitioners state that Flex UAE sold one product during the POI which was only produced before the POI. Petitioners state that at the request of the Department, Flex UAE identified a surrogate product for purposes of assigning a POI cost for the product sold, but failed to include the surrogate cost data in its database. As a consequence, petitioners state, the Department's preliminary margin calculations had zero values for this product for the variable cost, total cost and cost of production. Petitioners claim that while the sales for this product technically passed the cost test when compared to the zero costs, they were eliminated as a potential match during the DIFMER test because they were not within the twenty percent range of the variable cost. Petitioners request the Department to correct this inadvertent error by including a cost for this product as reported by Flex UAE.

Flex UAE did not comment on this issue.

Department Position:

The Department agrees the zero values in the cost database were incorrect and has corrected the error by including the appropriate costs for the specified product. See revised COP database presented in the Memorandum to Neal M. Halper, Director, Office of Accounting, Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Flex Middle East FZE, dated September 17, 2008 (Cost Calculation Memorandum), at attachment 2.

Comment 11: Corrections to Flex UAE's Reported Cost of Production

Petitioners state that, during verification, the Department discovered several errors in Flex UAE's cost of production data. Specifically, petitioners state, the Department reclassified control numbers for six products that were misclassified, and confirmed the need to adjust Flex UAE's reported cost of manufacture to reflect the higher of the transfer price and the market price for inputs purchased by Flex UAE from affiliated suppliers. Petitioners' arguments rely on the discussion of business proprietary information, but in general, state the total effect of these adjustments would alter the cost of manufacture, financial expense ratio and SG&A. The full summary of the BPI detail is presented in the Final Analysis Memorandum. Petitioners agree with the changes the Department proposed in the Cost Verification Report, and request the changes be implemented in the final determination.

Flex UAE did not comment on this issue.

Department Position:

The Department agrees with petitioners, and for the final determination we have adjusted Flex UAE's cost of production data according to our findings during verification. See the Cost Verification Report and the Cost Calculation Memorandum.

Comment 12: Targeted Dumping

Petitioners argue that the Department's rejection of petitioners' targeted dumping allegation appears to turn on the Department's conclusion that petitioners failed to demonstrate the "significance of the price differences at issue in the context of the PET film industry."

Petitioners maintain that they referred the Department to a series of detailed analyses by the U.S.

International Trade Commission (USITC) of the PET film industry which do, in fact, support the proposition that pricing differences of a “few pennies” per pound are often decisive in sales of commodity-grade PET film, which they state is precisely the PET film imported from the UAE. Therefore, petitioners conclude that the Department simply failed to analyze the relevant USITC reports.

According to petitioners, the Department has ignored the fact of the pricing “gap” between the targeted sales and non-targeted sales, the proprietary details of which are provided in their brief. Petitioners state that the Department never addressed this data or explained its rejection of petitioners’ targeted dumping allegation in light of this specific pricing data, and therefore petitioners urge the Department to reconsider the targeted dumping allegation for Flex UAE.

Petitioners conclude that the Department has assessed targeted dumping by a rote application of a formula which by design will not find targeting because it tests the targeted sales against a benchmark that includes the substantial volume of targeted sales. According to petitioners, such an approach necessarily distorts the analysis.

Flex UAE rebuts petitioners’ arguments, stating that despite being given two opportunities to submit targeted dumping allegations, petitioners have failed to meet the statutory burden necessary for the Department to initiate a targeted dumping investigation. According to Flex UAE, the Department should continue to reject petitioners’ targeted dumping claim.

Department Position:

The Department addressed petitioners’ targeted dumping allegation in the Targeted Dumping Memorandum, stating that petitioners had not addressed the Department’s concerns regarding the significance of price differences between allegedly targeted and non-targeted customers. Petitioners stated in their April 21, 2008 submission that PET film is a commodity-like product where price is an important factor in purchasing decisions. Petitioners also stated that a price difference of a few pennies can cause a U.S. company to lose a sale. While the Department acknowledges that the USITC characterized certain PET film as commodity-grade in the Investigation Nos. 731-TA-1131-1134 (Preliminary): Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, China, Thailand, and the United Arab Emirates, dated November 13, 2007 (72 FR 67756) (ITC Preliminary Determination), in order to make a finding of targeted dumping, the Department requires evidence that the price differences at issue are significant in the context of the PET film industry. Specifically, other than the assertion that PET Film is a commodity product, like coated free sheet paper, the record (including the USITC report) does not contain an adequate explanation of why a two-percent price difference, which petitioners derived from CFS Paper from Korea, should be considered to be significant for PET Film, given the characteristics of the PET Film market. See Targeted Dumping Memorandum at 5. Absent this type of evidence, and apart from stating that PET film is a commodity-like product, the allegation does not allow the Department to determine whether observed price differences between allegedly targeted and non-targeted customers are significant.

VIII. Recommendation

Based on the results of verification and our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final determination in the Federal Register.

Agree_____

Disagree_____

David M. Spooner
Assistant Secretary
for Import Administration

Date