

May 20, 2011

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

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

SUBJECT: Issue and Decision Memorandum for the Final Results of New
Shipper Review of Polyethylene Terephthalate Film, Sheet, and
Strip (PET Film) from India

I. Summary

We have analyzed the case and rebuttal briefs submitted by SRF Limited (SRF) as well as the case brief submitted by Petitioners,¹ in the new shipper review of polyethylene terephthalate film, sheet, and strip (PET Film) from India.² We have also analyzed the comments submitted by SRF and Petitioners regarding U.S. Customs and Border Protection (CBP) information the Department placed on the record after the Preliminary Results. See Memorandum to the File from Toni Page, International Trade Analyst Re: Antidumping and Countervailing Duty New Shipper Reviews of Polyethylene Terephthalate Film, Sheet, and Strip from India: U.S. Customs Entries from December 2009 to present (April 13, 2011) (Post-Preliminary CBP Data Memorandum).³ The Department of Commerce (Department) published the preliminary results for this review on December 28, 2010. See Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results of Antidumping Duty New Shipper Review, 75 FR 81570 (December 28, 2010) (Preliminary Results). The period of review (POR) is July 1, 2009, through December 31, 2009. Based on our analysis of the comments received, we have not made changes to the findings in the Preliminary Results. However, we have made some adjustments to our analysis as discussed below in Comments 1 and 4. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of issues for which we received comments and rebuttal comments by parties.

¹ Dupont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc. and Toray Plastics (America) (collectively, Petitioners).

² See Polyethylene Terephthalate (PET) Film, Sheet, and Strip from India: Petitioners' Case Brief (January 27, 2011) (Petitioners' Case Brief); Polyethylene Terephthalate Film, Sheet, and Strip from India: Antidumping Case Brief (January 27, 2011) (SRF Case Brief); and Polyethylene Terephthalate Film, Sheet, and Strip from India: Antidumping Rebuttal Brief (February 1, 2011) (SRF Rebuttal Brief).

³ See also Polyethylene Terephthalate (PET) Film, Sheet, and Strip from India: Petitioners' Comments on CBP Data (April 18, 2011) (Petitioners' Post-Preliminary CBP Comments) and Polyethylene Terephthalate (PET) Film, Sheet, and Strip from India/New Shipper Review Comments on CBP Data (April 18, 2011) (SRF's Post-Preliminary CBP Comments).

Comment 1: Whether the Department Should Adjust the Export Price in the Antidumping Calculations by the Calculated Countervailing Duty Rate

Comment 2: Whether SRF's Single Sale and its U.S. Customer Are Indicative of a Bona Fide Sale

Comment 3: Whether the Price and Quantity of SRF's New Shipper Sale Are Indicative of a Bona Fide Sale

Comment 4: Whether SRF's PET Film Entry Was Re-sold for a Profit

II. Analysis of Comments

Comment 1: Whether the Department Should Adjust the Export Price in the Antidumping Calculations by the Calculated Countervailing Duty Rate

SRF argues that the Department failed to adjust upward the export price (EP) used in the margin calculation by the amount of the countervailing duty (CVD) rate. SRF argues that the Department did not make this adjustment even though SRF reported, as a required adjustment to EP, the then prevailing total CVD duty rate of 20.40 percent in its May 13, 2010 Section C Questionnaire Response. SRF notes this rate was the CVD rate imposed by CBP on SRF's entry of subject merchandise.⁴ SRF further notes that the Department did not explain why it did not adjust EP for the CVD rate. According to SRF, section 772(c)(1)(C) of the Tariff Act of 1930, as amended (the Act) states that EP or constructed export price "shall be increased by the amount of any countervailing duty imposed on the subject merchandise." SRF argues that section 772(c)(1)(C) of the Act requires such an adjustment.

SRF further notes that the Department has increased the EP in antidumping (AD) calculations in previous reviews of the AD order on PET Film from India where there was a companion CVD case. In the 2006-2007 preliminary results of the PET Film from India AD review, the Department stated that "{p}er section 772(c)(1)(C) we have increased EP to account for countervailing duties attributable to export subsidies." See Polyethylene Terephthalate Film, Sheet and Strip from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 45699, 45700 (August 6, 2008). SRF concludes that the Department should adjust EP in the AD calculations upward by 3.57 percent, which is SRF's calculated CVD rate in the companion CVD new shipper review. SRF alternatively proposes that if the company's CVD rate changes from that calculated for the preliminary results of the concurrent CVD new shipper review, then the EP should be increased by the CVD rate calculated for the final results of the companion CVD new shipper review.

Petitioners did not comment on this argument.

Department Position: As provided in section 772(c)(1)(C) of the Act, "the price used to establish export price and constructed export price shall be increased by the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an

⁴ See SRF's Section C Questionnaire Response (SCQR) at C-45.

export subsidy.” Part I refers to the portion of the Act concerning the imposition of CVD duties. SRF argues that the Department should increase EP by the CVD rate calculated for the final results; however, the Department notes that section 772(c)(1)(C) of the Act requires us to offset EP by the amount of CVD duties attributable to export subsidies. We agree that EP should be adjusted for the CVD duties attributable to export subsidies, because normal value is based on home market prices. Therefore, in accordance with the Act, the Department will increase EP by the amount of CVD duties attributable to export subsidies. In the companion CVD new shipper review, the Department calculated rates for the following export subsidy programs: Pre-shipment Export Financing; Advanced License Program; Special Economic Zone; and Export Promotion Capital Goods Scheme. The sum of the subsidy rates for these programs has been added to EP for purposes of calculating the AD margin for these final results. We note that because the calculated margin is zero without this adjustment to EP, making the adjustment in this instance has no effect on the margin. For more detailed information regarding the Department’s adjustment, see Memorandum from Toni Page to Dana S. Mermelstein, Calculations for the Final Results: Antidumping Duty New Shipper Review Under the Order on Polyethylene Terephthalate Film, Sheet and Strip (PET Film) from India, dated concurrently with this Issues and Decision Memorandum.

Comment 2: Whether SRF’s Single Sale and its U.S. Customer Are Indicative of a Bona Fide Sale

Petitioners argue that SRF’s U.S. sale was not bona fide and the Department should rescind the new shipper review. SRF argues that its sale was bona fide. Each set of arguments is in this comment as well as Comments 3 and 4. Significant portions of these arguments involve discussion of business proprietary information (BPI). Therefore, the full summary of, and the Department’s positions on, these arguments, in addition to our full analysis of the bona fides of SRF’s sale, are included in the “Memorandum from Toni Page to Dana S. Mermelstein Re: Bona Fides Analysis of the Sale in the Antidumping Duty New Shipper Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: SRF Limited” (Final Bona Fides Memorandum), issued concurrently with this Issues and Decision Memorandum.

First, Petitioners note that SRF had only one sale during the POR. Petitioners argue that, in previous determinations, the Department has found that a single sale was bona fide for the preliminary results, but not for the final results, and should do the same here, citing Hebei New Donghua Amino Acid Co., Ltd. v. United States, 374 F. Supp. 2d 1333 (CIT 2005) (New Donghua). To support its claim, according to Petitioners, the Court of International Trade (CIT) has held that, “in one sale reviews, there is, as a result of the seller’s choice to make only one shipment, little data from which to infer what the shipper’s futures selling practices would look like. This leaves the door wide to the possibility that the sale may not, in fact be typical...” See New Donghua, 374 F. Supp. 2d at 1344 (quoting Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States, 366 F. Supp. 2d 1246, 1263 (Ct. Int’l Trade 2005)) (TTPC). Petitioners also cite Shandong Chenhe Int’l Trading Co. v. United States; 2010 Ct. Intl. Trade LEXIS 136 (Nov. 22, 2010) (Chenhe), where the CIT held that “while plaintiff’s reliance on a single sale need not be fatal, a single sale leaves little to review”). Petitioners also argue that SRF acted as both exporter and importer of record for its new shipper sale, an action that, Petitioners claim, does not present an accurate picture of SRF’s typical sales activity.

According to Petitioners, SRF's choice of U.S. customer also indicates that the new shipper sale was atypical. Petitioners contend that the timing of the U.S. customer's formation and the fact that the U.S. customer did not have any other business transactions after the POR purchase should not be considered typical commercial sales activity.⁵ Petitioners contend that the U.S. customer's choice to do business with SRF does not make sense considering: 1) that SRF was a risky choice because the company had not previously shipped to the United States; 2) the uncertainty of potential U.S. AD and CVD liabilities for the shipment; and 3) that one of the owners of the U.S. customer's company previously worked for another established Indian exporter of PET Film.⁶ Petitioners conclude that, based on information on the record of this case, one can infer that the U.S. customer's purchase from SRF was made to obtain a favorable result in the instant new shipper review and to limit SRF's dumping liabilities.

SRF disagrees with Petitioners' arguments regarding the bona fide nature of its new shipper sale. SRF maintains that the facts of the court cases cited by Petitioners are different from the facts of the instant new shipper review. For instance, SRF notes that, in the review underlying New Donghua, the Department found that the sale was not bona fide because the sales price was aberrationally high and because the U.S. customer did not re-sell the imported merchandise. See New Donghua, 374 F. Supp. 2d at 1336, 1340. SRF argues that in Chenhe, the Department found that the high price and low quantity of the new shipper sale was atypical of the U.S. customer's normal commercial practices. See Chenhe, 2010 Ct. Intl. Trade LEXIS 136 at *8-9. SRF argues that, in TTPC, the Department found that sale to be not bona fide, and the CIT agreed, because: 1) the average unit value (AUV) of the sale was higher than other imports of the same product; 2) the seller was not paid for the new shipper sale until nine months after the payment due date, which was inconsistent with the company's normal business practices; and 3) the Department noticed inconsistencies in the CBP documentation for the import of the merchandise. See TTPC, 366 F. Supp. 2d at 1248. SRF concludes that none of the factors in the aforementioned court cases are present in the instant new shipper review.

With respect to Petitioners' argument that a single sale cannot be used to determine the bona fide nature of a new shipper, SRF notes the Department's regulations at 19 CFR 351.214(f)(2)(i) provides for "rescission of a new shipper review if the Secretary finds, in pertinent part, that there has not been an entry and sale ..." According to SRF, the use of the indefinite article "an" in the regulation clearly indicates that one sale is all that is required for a new shipper review to proceed. SRF argues further that there are numerous examples of the Department's practice to base new shipper reviews on a single sale. SRF notes that in Pipe and Tube from Turkey, the Department found the single sale under review to be a commercially reasonable and bona fide transaction. See Notice of Final Results of Antidumping Duty New Shipper Review: Certain Welded Carbon Steel Pipe and Tube from Turkey, 71 FR 43444 (August 1, 2006), and accompanying Issues and Decision Memorandum at Comment 1 (Pipe and Tube from Turkey). In that case, the Department also stated that "single sales, even those involving small quantities, are not inherently commercially unreasonable and do not necessarily involve selling practices atypical of the parties' normal selling practices." See id. In addition, SRF submits that the Court upheld the Department's determination in Pipe and Tube from Turkey. See Allied Pipe and Tube Conduit Corp. v. United States, 556 F. Supp. 2d 1350, 1355 (CIT 2008).

⁵ See SRF's Section A Questionnaire Response (May 11, 2010) (SAQR) at Attachment A-1, pp. 1 and 6.

⁶ See id.

As additional examples, SRF highlights the fact that the Department has recently used a single sale to determine the bona fides of new shippers in Fresh Garlic From the People's Republic of China: Final Results of New Shipper Review, 75 FR 61130, 61131 (October 4, 2010) (Fresh Garlic from the People's Republic of China) and Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Reviews, 75 FR 72794 (November 26, 2010). SRF concludes that, although a single sale may be more carefully scrutinized than multiple sales, the correct finding in this case is that the sale was commercial.

In response to the specific arguments made by Petitioners regarding the commercial viability of its sale, SRF argues that Petitioners have provided no evidence that would justify a finding that the sale was not bona fide, and that, if Petitioners had such information, they should have brought it forward during the review process. SRF states that it has made sales of PET Film to the United States since the POR. However, SRF argues, even if no additional sales had been made, the fact that only one sale was made is not grounds for the Department to rescind the new shipper review. SRF further notes that the Department recognized that the sale was made towards the end of the POR, but “does not by itself indicate that SRF’s sale was not made on a bona fide basis,” quoting the Memorandum from Toni Page to Thomas Gilgunn, RE: Bona Fide Nature of the Sale in the Antidumping Duty New Shipper Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: SRF Limited (December 21, 2010) (Preliminary Bona Fides Memorandum) at 3. In addition, SRF notes, it submitted information demonstrating that it made sales of subject merchandise to the United States subsequent to the POR.⁷

Next, SRF argues that there is nothing unusual about an exporter acting as its own importer of record, noting that CBP regulations permit a non-resident corporation to enter merchandise and act as its own importer of record under 19 CFR 141.18. In addition, SRF argues that this is a common practice for exporters that are subject to AD or CVD orders because U.S. buyers may be reluctant to risk importing from companies subject to AD or CVD duties. SRF argues that the Post-Preliminary CBP Data Memorandum supports its claim that acting as the importer of record is a standard procedure for the company. SRF believes that other Indian exporters are also serving as both the exporter and the importer of record. Because other exporters have acted as importer of record, SRF concludes that such action cannot be construed as presenting an inaccurate picture of a company’s typical sales activity. SRF states that it undertook the risk of being the importer of record to make the sale because it is not an established exporter to the United States like other Indian PET Film exporters. If the Department were to consider importer of record status as a negative in its bona fides analysis, it would undermine the new shipper review provisions because exporters would not be able to enter the U.S. market without protecting the U.S. buyer from unanticipated increases in the duties. SRF concludes that this behavior is typical of a new shipper and cannot be viewed as negating the bona fides of a sale.

SRF disagrees with Petitioners’ argument that the circumstances surrounding SRF’s U.S. customer do not indicate typical commercial activity. According to SRF, the fact that its U.S. customer was formed in July 2009 and then purchased PET Film from SRF several months later does not present any unusual circumstances, and the timing of the incorporation of its U.S. customer provides no reason to question its operations as not commercial or not at arm’s-length. SRF also takes issue with Petitioners’ argument regarding the fact that the company’s U.S.

⁷ See Polyethylene Terephthalate Film, Sheet and Strip from India: Reply of SRF Limited to the Department Letter of February 11, 2011 (February 25, 2011) at Attachment 1.

customer did not purchase PET Film from another Indian exporter of PET Film that previously employed one of the owners of SRF's U.S. customer. SRF argues that this fact is not evidence that the new shipper review sale was not commercial in context, maintaining that suppliers and buyers are regularly seeking out new producers and new customers and it is not unusual for a company that has previously done business with one company to choose to do business with another. In SRF's view, the U.S. customer's choice to purchase from SRF was purely a commercial decision made by the customer based on its past knowledge of, and acquaintance with, SRF.

Finally, SRF disagrees with Petitioners' contention that the choice to purchase PET Film from SRF was risky due to the uncertainty of the potential AD and CVD duties. Pointing out that all exporters of PET Film from India are subject to AD and CVD duties and that the transaction did not present a risk to its U.S. customer because SRF acted as the importer of record, SRF concludes that the behavior of both the company and its U.S. customer are indicative of good business practices, and are not atypical nor non-commercial.

Department Position: Where a review is based on a single sale, exclusion of that sale as non-bona fide necessarily must end the review. See TTPC, 366 F. Supp. 2d at 1249. To determine whether a sale in a new shipper review is unrepresentative or extremely distortive, and therefore excludable as non-bona fide, the Department employs a totality of the circumstances test. See, e.g., Glycine From The People's Republic of China: Rescission of Antidumping Duty New Shipper Review of Hebei New Donghua Amino Acid Co., Ltd., 69 FR 47405, 47406 (August 5, 2004). In examining the totality of the circumstances, the Department looks to whether or not the transaction is "commercially unreasonable" or "atypical of normal business practices." See New Donghua, 374 F. Supp. 2d at 1333, 1339 (citing Windmill Int'l Pte., Ltd. v. United States, 193 F. Supp. 2d at 1303, 1313 (Ct. Int'l Trade 2002) (Windmill)); see also TTPC, 366 F. Supp. 2d at 1249-50.

In evaluating whether or not a sale is commercially reasonable, the Department considers, inter alia, such factors as: (1) the timing of the sale; (2) the price and quantity; (3) the expenses arising from the transaction; (4) receipt of payment; (5) whether the goods were resold at a profit; and (6) whether the transaction was made on an arms-length basis. See TTPC, 366 F. Supp. 2d at 1250; see also New Donghua, 374 F. Supp. 2d at 1339; Windmill, 193 F. Supp. 2d at 1310; Am. Silicon Techs. v. United States, 110 F. Supp. 2d 992, 995 (Ct. Int'l Trade 2000). Therefore, the Department considers a number of factors in its bona fides analysis, "all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise." New Donghua, 374 F. Supp. 2d at 1342, citing Fresh Garlic From the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review, 67 FR 11283 (March 13, 2002), and accompanying Issues and Decision Memorandum: New Shipper Review of Clipper Manufacturing Ltd.

The Department continues to find that SRF's sale was a bona fide sale. In reference to Petitioners' argument that SRF's single POR sale cannot be used to determine the bona fide nature of the new shipper, we note that the Department has used a single sale to conduct a bona fides analysis. See, e.g., Certain Preserved Mushrooms From the People's Republic of China: Final Results and Final Rescission in Part, of Antidumping Duty New Shipper Reviews, 76 FR 16604, 16606 (March 24, 2011). The Department looks to the totality of the circumstances in

conducting its bona fides analysis and, contrary to Petitioners' argument, does not rescind a new shipper review on the sole basis that a company had a single sale during the POR, although it does consider this element in comparison with other factors. The CIT cases to which Petitioners cite do not hold that a single sale cannot be the basis of a new shipper review. See, e.g., New Donghua, 374 F. Supp. 2d at 1343-44 (holding that the actions of the company's U.S. customer demonstrated that the sale was not commercially reasonable). Furthermore, SRF had subsequent sales after the POR sale, which detracts from Petitioners' argument that SRF made one sale for the sole purpose of minimizing its trade remedy liabilities. The CBP information regarding SRF's subsequent sales demonstrates to the Department that SRF's new shipper review POR sale was not a "one-off" sale and was indicative of SRF's commercial behavior. See Post-Preliminary CBP Data Memorandum at Attachment 1.

The Department also disagrees with Petitioners' claim that because SRF acted as importer of record for the sale, SRF has presented an inaccurate picture of its typical sales activity. SRF provided a reasonable explanation for its decision to act as importer of record. Furthermore, SRF has since acted as importer of record for subsequent sales of subject merchandise to the United States, which demonstrates to the Department that this is a typical business practice of the company. See Post-Preliminary CBP Data Memorandum at Attachment 2.

Regarding Petitioners' argument that the "circumstances surrounding" SRF's U.S. customer are "hard to reconcile with typical commercial activity,"⁸ our evaluation of SRF's original and supplemental questionnaire responses, as well as information received from the U.S. customer, indicate that the transaction was conducted on an arms-length basis. See Preliminary Bona Fides Memorandum at 5. In reference to Petitioners' argument regarding the formation of SRF's U.S. customer, the Department acknowledges that the U.S. customer was newly-established, during the POR.⁹ However one of the owners has previous experience in the PET Film industry.¹⁰ Thus, even though the timing of the company's formation might raise concerns, the prior industry involvement of one of the U.S. customer's principals weighs against a finding that the company was formed just to facilitate the sale under review. In response to Petitioners' claim that the U.S. customer did not have any other business after the POR, the Department determines that this information is not a sufficient basis to find the sale not bona fide. BPI regarding the sale price and quantity also does not provide sufficient basis to find the sale not bona fide, this indicates that neither SRF nor its customer were setting up a sale that was not typical or commercial. See the Department Position on Comment 3 below. In addition, the Department's analysis of the BPI regarding the U.S. customer further supports a conclusion that SRF's sale was bona fide. See Final Bona Fides Memorandum at Comment 1.

Finally, Petitioners' speculation that the U.S. customer's choice to do business with SRF is suspicious does not lead to a conclusion that the sale was not typical or not commercial. The Department notes that, even though SRF had not previously sold PET Film in the United States, the company is a long established manufacturer and seller of PET Film.¹¹ Furthermore, the production of PET Film requires significant investment in plant and equipment; therefore, it is not easy for a producer to easily enter or exit the industry. As for Petitioners' point that one of

⁸ See Petitioners' Case Brief at 3.

⁹ See SAQR at Attachment A.

¹⁰ See id.

¹¹ See id. at A-11.

the U.S. customer's owners had previously worked for another established Indian exporter of PET Film and yet chose not to purchase from that Indian manufacturer, the Department notes that any and all imports of PET Film from India are subject to AD and CVD duties, and so the U.S. customer's choice to purchase PET Film from another producer and exporter is not suspicious and does not call into question whether SRF's sale was commercial. See Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip from India, 67 FR 44175 (July 1, 2002). The totality of the circumstances demonstrate that the sale was made on a bona fide basis, and information regarding the U.S. customer and the fact that there is a single sale during the POR do not detract from the finding that the sale is bona fide. See the Final Bona Fides Memorandum for a discussion of the BPI facts regarding the totality of circumstances for SRF's POR sale.

Comment 3: Whether the Price and Quantity of SRF's New Shipper Sale Are Indicative of a Bona Fide Sale

Petitioners contend that the price and quantity of the new shipper sale is indicative of a non-bona fide sale. Petitioners argue that the Department should place Petitioners' arguments concerning the price comparisons of SRF's export sales, contained in Petitioners' case brief filed in the CVD new shipper review, on the record of this review, because it is relevant to this review. Petitioners argue that the price and quantity of SRF's new shipper sale should not be compared to the price and quantity of other Indian imports of PET Film during the new shipper review POR, because the issue is what SRF's sale says about SRF's own future commercial behavior in the U.S. market. Petitioners also include a chart comparing the quantity of SRF's single POR entry to the total number of entries and aggregate quantity of PET Film by other Indian exporters to the United States during the POR, demonstrating the differences between the quantity of SRF's entry and those of the other Indian PET exporters. See Preliminary Bona Fides Memorandum at Attachment 1 and Petitioners' Case Brief at 5. Petitioners further argue in their comments to the Department's Post-Preliminary CBP Data Memorandum that the prices and quantities of SRF's sales after the POR are vastly different from the price and quantity of its POR sale and thus show that the single POR sale was not typical of SRF's future selling practices.¹²

SRF disagrees with Petitioners' argument that the price and quantity of its new shipper sale were not commercial. SRF argues that, if the Department places data from the CVD review on this review, it should also place SRF's rebuttal brief, filed in the CVD review, on this record. SRF argues that the Department did not err in its bona fides analysis by comparing the price and quantity of SRF's single entry to the average prices and total quantity of the multiple PET Film entries made by other Indian exporters during the POR. SRF counters that its entry quantity was small compared to the overall entry quantities of the other Indian PET Film exporters because SRF made only one sale during the POR, and argues that what is relevant is that SRF's one entry was in a commercial quantity. To support its position, SRF used the chart in Petitioners' case brief to show the average quantity per entry of PET Film for all Indian exporters of subject merchandise.¹³ According to SRF, this establishes that its POR entry quantity was in line with the POR entry quantities of the other Indian PET Film exporters on a per entry basis.

¹² See Petitioners' Post-Preliminary CBP Comments at 3.

¹³ See SRF's Rebuttal Brief at 13.

Finally, SRF takes issue with the Petitioners' statement that the "AUV data of other exporters are less probative than comparisons of SRF's own export AUVs, as the issue here is what SRF's POR sale says, if anything, about SRF's own future commercial behavior in the U.S. market."¹⁴ SRF proposes that Petitioners make this observation because they disagree with the Department's preliminary findings that SRF's AUV was not exceptionally high or low compared to the AUVs of other Indian PET Film imports during the POR. SRF counters that the Department's preliminary bona fides analysis of its AUV was correct and offers insight into SRF's future commercial behavior.

Department Position: We do not find that it is appropriate to place the arguments that Petitioners made in their CVD brief regarding SRF's AUVs on the record of this review since it is the responsibility of Petitioners to place all information and arguments they want the Department to consider on the record. See 19 CFR 351.309(c)(2). The Department continues to find that the price and quantity of SRF's sale to the United States were within the normal range for shipments of PET Film to the United States during the POR, and that the POR sale was in line with subsequent sales made by SRF after the POR. Contrary to Petitioners' argument that the Department should instead determine what SRF's sale indicates about its own future commercial behavior rather than comparing SRF's sale to other PET Film exporters, the Department will, in the course of a bona fides analysis, compare a respondent's selling price and quantity during the POR to the sales made by other exporters during the POR, and if other export sales have been made by the new shipper, to those sales prices and quantities. If the price and quantity of the new shipper sale are aberrational when compared with the prices and quantities of other exporters of subsequent sales by the new shipper, this is indicative that the new shipper sale is not bona fide. See, e.g., TTPC, 366 F. Supp. 2d at 1250-58; see also Notice of Final Results of Antidumping Duty New Shipper Review: Honey From the People's Republic of China, 68 FR 62053 (October 31, 2003), and accompanying Issues and Decision Memorandum at Comment 1. The Department finds that comparing SRF's AUV to the AUVs of other Indian manufacturers/exporters of PET Film during the POR is an appropriate indicator of SRF's commercial behavior.

The Department has compared SRF's POR sale to the POR sales of other PET film exporters to determine whether the sale under review is bona fide. In addition, we examined SRF's subsequent post-POR sales of subject merchandise. We agree with SRF that the price and quantity of its single sale were in line with the price and quantity of other Indian PET film exporters during the POR. In addition, CBP information placed on the record of this new shipper review shows that SRF made subsequent sales of subject merchandise to the United States. The price and quantity information from SRF's subsequent sales, when compared to SRF's POR sale, supports our finding that the company's POR sale is not aberrational. See Post-Preliminary CBP Data Memorandum at Attachment 2 and Final Bona Fides Memorandum at Comment 2.

Comment 4: Whether SRF's PET Film Entry Was Re-sold for a Profit

According to Petitioners, the Department was mistaken in concluding that the PET Film entered by SRF was re-sold at a profit. See Preliminary Bona Fides Memorandum at 5. In support of

¹⁴ See Petitioners' Case Brief at 4.

its argument, Petitioners note that the Department used the price the U.S. customer paid to SRF for the PET Film shipment and then added the amount of duties, brokerage, and other fees SRF paid to the purchase price. The Department then compared the sum of the price and the fees to the price the U.S. customer received from its ultimate customer, a comparison that showed a small profit. See id. at 5. According to Petitioners, the Department's analysis fails to account for the outbound U.S. freight charge paid in full by the U.S. customer to ship the merchandise to its ultimate customer.¹⁵ Petitioners state that including this freight charge produces a total cost not fully recovered by the price the U.S. customer paid for the merchandise. Petitioners conclude that because SRF's U.S. customer did not re-sell the PET Film for a profit, the sale was not bona fide.

SRF disagrees with Petitioners' claim that the PET Film shipment was not re-sold for a profit. According to SRF, not only did the U.S. customer make a profit on the re-sale, but the profit on the re-sale was considerably more than what the Department calculated. On this point, SRF agrees with Petitioners that the Department's calculation was flawed; SRF agrees with Petitioners that the Department did forget to take into account the outbound freight paid by its U.S. customer. However, according to SRF, the error in the Department's calculation was to consider the charges for duties, brokerage and other fees as a cost to the U.S. customer. SRF argues that the Department should not have included the charges for duties and fees in its calculation because: 1) SRF assumed all of these costs as importer of record and 2) the sale was made on a delivery duty paid (DDP) basis. Therefore, SRF concludes that the amount of duties and fees should not have been included in the Department's profit calculation. SRF further argues that the duties were just a deposit, and, as un-liquidated deposits, the amount of duties cannot be considered an actual cost until they are final. Noting that in the Preliminary Results, the Department calculated an AD margin of zero and a CVD rate of 3.57 percent, SRF states that any overpayments in the duties it deposited for this entry will be refunded by CBP with any interest.

SRF also maintains that the Department should use the invoice price paid by the U.S. customer and not the free on board price listed in the CBP documentation as the starting price to determine whether or not the PET Film was re-sold for a profit.¹⁶ SRF argues that the commercial invoice amount paid by the U.S. customer includes freight, duties, and all the other costs paid by SRF to ship the subject merchandise to the United States. SRF concludes that if the Department uses the commercial invoice amount paid by its U.S. customer, and does not include the duties and fees SRF paid to CBP, then the calculation will show that the U.S. customer re-sold the PET Film for a profit.

Department Position: The Department continues to find that SRF's U.S. customer re-sold the PET Film for a profit. However, based on SRF's and Petitioners' comments, we have reconsidered our analysis. First, contrary to Petitioners' and SRF's arguments, we did not include the charges for duties, brokerage and other fees in our calculation to determine if the PET Film shipment under review was re-sold for a profit. In the Preliminary Bona Fides Memorandum, the Department stated "{i}n addition, the entry documentation indicates that an antidumping duty fee plus various other fees were paid on this shipment." See Preliminary Bona

¹⁵ See SRF's Response to the 2nd Supplemental Questionnaire Addressed to the Importer (Aug. 30, 2010).

¹⁶ See SAQR at Exhibit A-6 and SRF's July 14, 2010, Response to the Department's 1st Supplemental Questionnaire at Exhibit A-1.

Fides Memorandum at 5. Rather than use these charges in our calculation, we simply noted the fact that the fees were paid. Because it was a deposit and the AD and CVD duties may be refunded, we generally do not include such duties as a cost for consideration in our profit analysis because they are an estimated liability and not an actual expense incurred.

However, the Department agrees with SRF that we should have used the invoice amount paid by the U.S. customer for the PET Film as the starting point for our analysis.¹⁷ We also agree with Petitioners that we should have included the freight charge paid by SRF's U.S. customer to ship the merchandise to its ultimate customer. In our revised analysis, we first summed the invoice price and the freight charge paid by the U.S. customer. We then compared this new total to the re-sale price the U.S. customer charged, and received, from its customer. Using the revised analysis continues to show that the PET Film was re-sold for a profit. See the Final Bona Fides Memorandum for the BPI discussion of the Department's revision.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of review and the final dumping margin in the Federal Register.

AGREE_____ DISAGREE_____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date

¹⁷ See SAQR at Exhibit A-6.