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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the
2010-2011 Antidumping Duty Administrative Review:
Polyethylene Terephthalate Film, Sheet, and Strip from India

SUMMARY

We have analyzed the comments of the interested parties in the antidumping duty (AD) administrative review of polyethylene terephthalate film (PET Film) from India. Based on the results of our analysis of the comments received, we have made changes to the preliminary results. We recommend that you approve the position described in the "Discussion of the Issues" section of this memorandum.

BACKGROUND

On August 6, 2012, the Department of Commerce (Department) published the preliminary results of administrative review of the AD order on PET Film from India.¹ This review covers three respondents, Jindal Poly Films Ltd. (Jindal), Polyplex Corporation Ltd. (Polyplex), and SRF Limited (SRF), producers and exporters of PET Film from India. The period of review is July 1, 2010, through June 30, 2011.

Jindal and Polyplex submitted timely case briefs regarding non-targeted dumping related issues on December 5, 2012. DuPont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc. (collectively, Petitioners) filed a timely rebuttal brief regarding non-targeted dumping related issues on December 13, 2012. Petitioners filed a timely case brief regarding the Department's post-preliminary targeted dumping analysis on January 3, 2013. In addition, Jindal and Polyplex filed timely rebuttal briefs on January 8, 2013.

¹ See *Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results of Antidumping Duty Administrative Review*, 77 FR 46687 (August 6, 2012) (*Preliminary Results*).



SCOPE OF THE ORDER

The products covered by the antidumping duty order are all gauges of raw, pretreated, or primed PET Film, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer of more than 0.00001 inches thick. Imports of PET Film are currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.00.90. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the antidumping duty order is dispositive.

DISCUSSION OF THE ISSUES

Comment 1: Targeted Dumping

Petitioners' Arguments

- The Department applied the *Nails* test² to both respondents, Jindal and Polyplex, and found that a certain percentage of their U.S. sales by volume passed the *Nails* test.
- The Department determined that a pattern of significant price differences does not exist for either Jindal or Polyplex, because of the low volume of U.S. sales to have passed the *Nails* test.
- In its targeted dumping analysis, the Department determines that targeted dumping exists when the proportion of a respondent's U.S. sales that pass the *Nails* test is sufficiently high, *i.e.*, significant. In this case, the Department determined that such a pattern exists for both Jindal and Polyplex, but that it is not significant.
- The Department has in previous decisions not articulated the standard by which to judge whether a particular level of targeted dumping is significant, *i.e.*, above *de minimis*.
- However, the Department has set out clear *de minimis* thresholds for AD and countervailing duty (CVD) margins, which is 0.5 percent, and for its arm's length test that compares transfer prices between affiliates to prices between unaffiliated parties. That *de minimis* threshold is two percent.
- The Department should apply 0.5 percent or two percent *de minimis* standard in evaluating whether Jindal's and Polyplex's targeted sales account for a significant proportion of U.S. sales by volume. This would lead to the conclusion that "a pattern of significant price differences" does exist for at least one respondent.
- Based on the percentage of U.S. customers passing the *Nails* test, the Department should not dismiss the cross-customer pattern for Jindal as insignificant, and continue to assess

² 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).

“whether the average-to-average method could take into account the observed price differences.”³

- Because Petitioners’ calculations indicate that the average-to-average method would not take the observed price differences for Jindal into account, the Department should apply the average-to-transaction method to determine the dumping margin for Jindal.

Jindal’s Arguments

- Jindal concurs with the Department’s finding that “a pattern of significant price differences does not exist for ... Jindal ... because of the low volume of U.S. sales found to have passed the Nails test.”⁴ Jindal refers to its initial comments summarized by the Department’s memorandum.⁵ In these initial comments, Jindal also alleges that Petitioners’ targeted dumping allegation is untimely.⁶

Jindal’s Rebuttal Arguments

- The Department found that, due to the low volume of U.S. sales found to have passed the *Nails* test, a pattern of significant price differences does not exist for Jindal.⁷
- Petitioners object to the Department’s finding because the Department applied an unspecified *de minimis* threshold. Petitioners want the Department to adopt a threshold for its targeted dumping analysis, and favor the existing lower thresholds, *i.e.*, the *de minimis* rate for the margin calculations and the arm’s length test, over the apparently higher threshold the Department applied to its targeted dumping analysis.⁸
- Thresholds are valid in their own, specific frames of reference, and the threshold the Department set for targeting need not and should not have any connection or relevance to thresholds set by the Department for other considerations. Petitioners themselves draw attention to this fact by recognizing that different thresholds exist for different considerations. Thus, the Department is right in keeping with its practice of setting thresholds based on the actual, specific considerations involved.⁹
- By citing to *Ball Bearings from France, Germany and Italy*, Petitioners acknowledge that the Department’s most recent ruling on setting a threshold relating to targeting is directly contrary to the position Petitioners are taking by demanding that the Department set a targeting threshold.¹⁰

³ See Petitioners’ Targeted Dumping Case Brief, dated January 3, 2013, at 4.

⁴ See Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, Polyethylene Terephthalate Film, Sheet and Strip (PET film) from India: Post-Preliminary Analysis and Calculation Memorandum, dated December 20, 2012 (Post-Prelim Analysis and Calculation Memorandum), at 5.

⁵ See Jindal’s Comments on Department’s Post-Preliminary Targeting Analysis Memorandum, dated January 2, 2013. For a summary of Jindal’s original comments to Petitioners’ targeted dumping allegation, see Post-Preliminary Analysis and Calculation Memorandum, at 2-3.

⁶ See Jindal’s Reply to Petitioners’ Allegations of Targeted Dumping, dated July 19, 2012, at 2.

⁷ See Jindal’s Rebuttal Brief, dated January 8, 2013, at 1-2 (citing Post-Prelim Analysis and Calculation Memorandum, at 5).

⁸ See *id.* at 2.

⁹ See *id.* at 2-3.

¹⁰ See *Ball Bearings and Parts Thereof, From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010-2011*, 77 FR 73415 (December 10, 2012), and accompanying Issues and Decision Memorandum (*Ball Bearings from France, Germany and Italy*).

- Other than demonstrating that thresholds exist that could be applied, Petitioners provide no rationale for overturning the Department's most recent ruling on the issue.
- To overcome the lack of significant volume determined by the Department, Petitioners represent Jindal's data as a percentage and as total number of customers targeted. In addition, the output of the Department's calculations clearly indicates a lower number of customers than is presented by Petitioners.¹¹ Thus, the actual percentage is considerably lower. Jindal supports its statement with the output from the Department's margin calculation program.
- There were substantial price fluctuations during the period of review (POR). When there are significant deviations in price, the CONNUM-specific monthly weighted-average price should be considered to evaluate the effect of periodic price changes on the targeting analysis. The standard deviation test requires that at least 33 percent of the alleged sales are more than one standard deviation below the weighted average price. Almost all of Jindal's sales of CONNUMs in the targeting analysis were made only during a period when prices were low and, thus, the standard deviation test will show the requisite deviation.¹²
- With the exception of one, the U.S. net price for the allegedly targeted sales was actually higher than the monthly weighted-average U.S. net price of the identical CONNUM.¹³

Polyplex's Rebuttal Arguments

- In its initial comments on Petitioners' targeted dumping allegation, Polyplex argued that the allegation was untimely.¹⁴
- The Department made the preliminary ruling that a pattern of significant price differences does not exist for Polyplex because of the low volume of U.S. sales found to have passed the *Nails* test.¹⁵
- Petitioners provided no basis for the Department to alter its position for Polyplex in the final ruling.
- Petitioners' argument that the Department has failed to establish a standard to determine which level of targeting is significant was addressed in *Welded Carbon Steel Pipes and Tubes From Turkey*.¹⁶ The Department stated that the statute does not require a specific test for determining whether targeting occurred.
- Petitioners' proposed percentages for determining significance, *i.e.*, 0.5 percent or two percent, have no legal basis.
- The Department has articulated levels of significance that are more analogous to the issue of targeted dumping, *i.e.*, change in the cost of manufacturing (COM) greater than 25

¹¹ See *id.* at 3-4.

¹² Jindal states that it made those sales during the first and the fourth quarter of the POR only, when prices were low, whereas prices started to increase during the second quarter and did not start decreasing again until the fourth quarter. *Id.* at 4-5.

¹³ Jindal references its Reply to Petitioners' Allegation of Targeted Dumping, dated July 19, 2012 (Jindal's Reply to TD Allegation), at Exhibit 1.

¹⁴ See Polyplex's Reply to Petitioners' Allegations of Targeted Dumping, dated July 24, 2012, at 1-2; see also Post-Prelim Analysis and Calculation Memorandum, at 3.

¹⁵ See Polyplex's Rebuttal Brief, dated January 8, 2013, at 1.

¹⁶ See *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 77 FR 72818 (December 6, 2012), and accompanying Issues and Decision Memorandum (*Welded Carbon Steel Pipes and Tubes from Turkey*).

percent, or the twenty percent threshold to disregard sales below costs. These thresholds involve deviations from normal pricing or cost practices on the part of the respondent, resulting in deviations in the Department's calculation methodology.

Department's Position: In these final results, and consistent with our finding in the Post-Prelim Analysis and Calculation Memorandum, we continue to find that a pattern of significant price differences does not exist for either Jindal or Polyplex because of the low volume of U.S. sales found to have passed the *Nails* test.¹⁷ Therefore, for these final results of review, we continue to calculate the weighted-average dumping margins for Jindal and Polyplex, pursuant to 19 CFR 351.414(c)(1), based on the average-to-average method.

We address below interested parties' comments in three parts, with the first section dedicated to the timeliness of Jindal's and Polyplex's allegation in their reply to Petitioners' targeted dumping allegation,¹⁸ the second dedicated to the framework under which the Department determines whether to use an alternative comparison method in administrative reviews as contemplated in 19 CFR 351.414(c)(1), and the third dedicated to our analysis of whether to use the average-to-transaction method to calculate a respondent's weighted-average dumping margin. Our reasoning is set forth below.

1. Whether Petitioners' Targeted Dumping Allegation Was Timely Filed

The Department disagrees with Jindal's and Polyplex's argument that Petitioners' allegation was untimely filed. Importantly, neither section 777A(d)(1)(B) of the Tariff Act of 1930, as amended (Act) nor the Statement of Administrative Action (SAA) provide any deadline as to when an interested party must file a targeted dumping allegation in either an investigation or an administrative review.¹⁹ Similarly, the Department's regulations do not provide for such a deadline in an investigation or an administrative review. In this review, Petitioners filed their targeted dumping allegation prior to the preliminary results of review; however, the Department needed additional time to analyze each allegation.

While 19 CFR 351.301(c)(1) pertains to new factual information, Petitioners' targeted dumping allegation is not based on new factual information, as Polyplex claims. Rather, Petitioners use the information on the record of this review for purposes of a different method of analysis. 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.²⁰ Further, the Department's current practice regarding the submission of a targeted dumping allegation in the initiation notice for an antidumping investigation is limited to antidumping investigations and not administrative reviews. Finally, by permitting Petitioners

¹⁷ See Post-Prelim Analysis and Calculation Memorandum, at 2.

¹⁸ See Jindal's Reply to TD Allegation, at 2.

¹⁹ Uruguay Round Agreements Act, Statement of Administrative Action, H.R. 5110, H.R. Doc. No. 316, Vol. 1, 103d Cong., 2d Sess., at 842-43 (1994) (SAA).

²⁰ See generally *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

and the respondents to comment and rebut the Post-Prelim Analysis and Calculation Memorandum, the Department has preserved the interested parties' right to comment on the targeted dumping allegation.²¹ For these reasons, the Department finds that Petitioners' allegation was timely filed.

2. Legal Framework For The Application of An Alternative Comparison Method in Administrative Reviews

Petitioners submitted an allegation of targeted dumping by Jindal and Polyplex prior to the *Preliminary Results*.²² Petitioners claimed that employing an alternative comparison method to calculate Jindal's and Polyplex's weighted-average dumping margins in this review would show that there are patterns of U.S. sales prices for comparable merchandise that differ significantly among purchasers, regions or time periods.²³

Section 771(35)(A) of the Act, defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." The definition of "dumping margin" calls for a comparison of normal value and export price or constructed export price. Before making the called for comparison, 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 regulation at 19 CFR 351.414 also describes the methods by which normal value may be compared to export price or constructed export price in administrative reviews: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from each other. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average 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.*, by averaging group). The Department's regulation at 19 CFR 351.414(c)(1) fills the silence in the statute on the choice of comparison method in the context of administrative reviews. In particular, the Department has determined that in both antidumping investigations and administrative reviews, the average-to-average method will be used unless the Secretary determines another method is appropriate in a particular case.²⁴

The AD statute, the SAA, and the Department's regulations do not address directly whether the Department should use an alternative comparison method in an administrative review as set forth

²¹ See Jindal's Reply to Petitioners' Allegations of Targeted Dumping, dated July 19, 2012, at 2.

²² See Petitioners' Allegation of Targeted Dumping, dated July 13, 2012.

²³ See *id.* at 6.

²⁴ See 19 CFR 351.414(c)(1); *Final Modification for Reviews*.

for antidumping investigations pursuant to section 777A(d)(1)(B) of the Act.²⁵ In light of the statute's silence on this issue, the Department recently 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."²⁶ At that time, the Department also indicated that it would look to practices employed by the agency in antidumping investigations for guidance on this issue.²⁷

In AD investigations, the Department examines whether to use an average-to-transaction 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, mostly analogous to the issue in antidumping investigations. Accordingly, the Department finds the analysis that has been used in antidumping investigations may be 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 a targeted dumping analysis in investigations only. The SAA does discuss 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) does not require or prohibit the Department from adopting similar or 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 methodology cannot account for a pattern of prices that differ significantly among purchasers,

²⁵ See section 777A(d)(1)(B) of the Act; SAA, H.R. Rep. No. 103-316 at 842-43; 19 CFR 351.414.

²⁶ See *Final Modification for Reviews*, 77 FR at 8106-07.

²⁷ See *id.* at 8102.

regions or time periods.”²⁸ Like the statute, the SAA does not limit the proceedings in which the Department may undertake such an examination.²⁹

3. *Targeted Dumping Analysis of Jindal and Polyplex*

In recent antidumping investigations where the Department has addressed targeted dumping allegations, the Department has employed the *Nails* test 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 time periods existed within the U.S. market.³⁰ The *Nails* test involves a two-step process, as described below, that determines whether the Department should consider whether the average-to-average method is appropriate in a particular situation. For Jindal and Polyplex, Petitioners submitted various targeted dumping allegations, as discussed in the Post-Prelim Analysis and Calculation Memorandum.³¹

For our targeted dumping analysis, in the first stage of the test, the “standard-deviation test,” we determined the volume of the allegedly targeted group’s sales of subject merchandise 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 sales prices to the allegedly targeted groups and the groups not alleged to have been targeted. If that volume did not exceed 33 percent of the total volume of a respondent’s sales of subject merchandise to 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 a respondent’s sales of subject merchandise to 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 to the allegedly targeted group and the next higher weighted-average price to a non-targeted group exceeds the average price gap (weighted by sales volume) between 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 non-targeted groups that defined the price gap. In doing this analysis, the allegedly targeted sales were not included in the non-targeted groups; the allegedly targeted group’s weighted-average sales price was compared only to the weighted-average sales prices to 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

²⁸ See SAA, H.R. Rep. No. 103-316 at 843.

²⁹ See *id.*

³⁰ See, *e.g.*, *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 FR 14569 (March 26, 2010); *OCTG from the PRC; Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 59217 (September 27, 2010).

³¹ See Post-Prelim Analysis and Calculation Memorandum, at 2.

allegedly targeted group, then we determined that targeting occurred and these sales passed the *Nails* test.

As explained in the Post-Prelim Analysis and Calculation Memorandum, 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 average-to-average 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 average-to-average method and the weighted-average dumping margin calculated using the average-to-transaction method. Where there was a meaningful difference between the results of the average-to-average method and the average-to-transaction method, the average-to-average method would not be able to take into account the observed price differences, and the average-to-transaction method would be used to calculate the weighted-average dumping margin for the respondent in question. Where there was not a meaningful difference in the results, the average-to-average method would be able to take into account the observed price differences, and the average-to-average method would be used to calculate the weighted-average dumping margin for the respondent in question.

We continue to find that a pattern of significant price differences does not exist for either Jindal or Polyplex, because of the low volume of U.S. sales found to have passed the *Nails* test.³² Accordingly, the Department determines, pursuant to 19 CFR 351.414(c)(1), to continue to base the weighted-average dumping margin for each respondent on the average-to-average method for these final results of review.

We agree with Petitioners that the Department did not articulate, in this or in prior decisions, the standard by which to judge whether a particular level of targeted dumping is significant, *i.e.*, *de minimis* standard. Petitioners argue that the Department should establish such a threshold along the lines of the thresholds set for the Department's margin calculations and its arm's-length tests, whereas Polyplex believes such threshold should be analogous to the issue of targeted dumping. First, as explained in *Ball Bearings from France, Germany, and Italy* and in *Welded Carbon Steel Pipes from Turkey*,³³ the Department is under no obligation to establish such a threshold, as implicitly stated in *Borden, Inc. v. United States*,³⁴ as below:

Under the appropriate circumstances Commerce has the discretion to *not* apply the targeted dumping exception to its normal methodology, even upon a finding of targeted dumping.

Thus, even if both prongs of the statute are met, it does not obligate the Department to use the average-to-transaction method, or any alternative method, to calculate the weighted-average dumping margin. Rather, it properly allowed the Department to determine what factors it should consider in its analysis.

³² See Analysis Memorandum for the Post-Preliminary Results of the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: Jindal Poly Films Limited and Polyplex Corporation Ltd., dated December 20, 2012, at 2, respectively.

³³ See *Ball Bearings from France, Germany, and Italy*, and accompanying Issues and Decision Memorandum at 14; see also *Welded Carbon Steel Pipes from Turkey*, and accompanying Issues and Decision Memorandum at 14.

³⁴ See *Borden, Inc. v. United States*, 4 F. Supp. 2d 1221, 1228 (Ct. Int'l Trade 1998)(emphasis in original).

Neither the statute nor the Department's regulations require the Department to set any such *de minimis* threshold. In the *Final Modification for Reviews*, the Department states that "it will determine, on a case-by-case basis, whether it is appropriate to use an alternative comparison methodology by examining the same criteria the Department examines in original investigations pursuant to sections 777A(d)(1)(A) and (B) of the Act."³⁵ Accordingly, the Department has found that it is more appropriate to consider each case on its merits and determine whether to apply the alternative methodology by applying the *Nails* test. The Department finds that such an analysis is reasonable and, therefore, declines to set a *de minimis* threshold.

Further, contrary to Jindal's belief that the Department should take into consideration any price fluctuations during the POR for purposes of these targeted dumping analyses, we find there is no basis for this demand.

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 alone – *i.e.*, export price or constructed export price. We note that neither the Act nor the Department's regulations provide for any consideration of such price fluctuations.³⁶ Further, in these final results, the Department affirms its finding that a pattern of significant price differences does not exist for either Jindal or Polyplex because of the low volume of U.S. sales found to have passed the *Nails* test.

Comment 2: Polyplex's Transparent Film Other Grade (TFOG) Sales

Polyplex's Arguments

- The Department's preliminary decision to apply facts available to Polyplex's sales of TFOG is inconsistent with the facts on the record and with the Department's past practice in previous PET Film proceedings.
- Section 776 of the Act states that the Department may use facts otherwise available, with adverse inference, if it finds that a party has not acted to the best of its ability to comply with an information request.
- The Department misinterpreted Polyplex's statement regarding how TFOG is created to mean that TFOG is prime merchandise and not secondary merchandise.
- The material sold as TFOG may have originally been produced as prime grade A material but it was reclassified for one of several reasons and cannot be used for higher end

³⁵ *Final Modification for Reviews*, 77 FR at 8101-02.

³⁶ See section 772(c) of the Act; see also 19 CFR 351.402.

applications (such as printing or food packaging) where specific physical characteristics are required.³⁷

- The TFOG sales documentation provided by Polyplex showing the original product characteristics when the material was produced does not mean that the material sold as TFOG continued to have those characteristics.
- The material that was originally prime and reclassified as TFOG cannot be reclassified in Polyplex America's (PA) accounting system; therefore, PA's invoicing was done based on the original classification of the material.
- The practice of classifying TFOG as secondary merchandise has been reviewed and accepted by the Department in other segments of this proceeding.³⁸
- In the 2008 investigation of PET Film from Thailand, the Department stated that TFOG was non-prime merchandise and that it would only compare non-prime merchandise sold in the U.S. market with non-prime merchandise sold in the home market.³⁹
- In accordance with *Alloy Piping*, the Department cannot reverse its precedent without providing an explanation or substantial evidence.⁴⁰

Petitioners' Rebuttal Arguments

- The Department should still continue to apply facts available to Polyplex's TFOG sales because the company has failed to supply documentation demonstrating that the product is non-prime merchandise.
- Applying facts available is justified because it would prevent Polyplex from reclassifying prime PET Film as non-prime for the purpose of circumventing the AD order.
- Polyplex has not provided any supporting documentation or evidence explaining why PA's accounting system is not structured to allow for changes to material terms of the merchandise.
- The 2008 PET Film from Thailand case cited by Polyplex involves a situation where the Department had already determined that the TFOG sold by the company consisted entirely of non-prime merchandise. However, in the instant review, this fact has not been established.

Department's Position: For the final results, the Department will treat some of Polyplex's TFOG sales as sales of prime merchandise. While Polyplex stated that all of its U.S. TFOG sales constituted of sales of secondary merchandise, we weighed all of the evidence on the record, including that which detracted from Polyplex's statement, and find that Polyplex has not demonstrated its claim that all of these were sales of secondary merchandise. Accordingly, we have continued to treat some of these U.S. TFOG sales as sales of prime material. For other sales in which Polyplex provided sufficient documentation that the U.S. TFOG sales were sales

³⁷ See Polyplex's First Supplemental Questionnaire Response at 16-17 (April 3, 2012); and Polyplex's Letter Re: TFOG (July 18, 2012).

³⁸ See *Final Determination in the Antidumping Duty Investigation of Polyethylene Terephthalate Film, Sheet, and Strip (PET film) from India*, 67 FR 34899 (May 16, 2002) and accompanying Issues and Decision Memorandum at Comment 12; and *Certain Polyethylene Terephthalate Film, Sheet and Strip from India: Final Results of Antidumping Duty Administrative Review*, 71 FR 47485 (August 17, 2006).

³⁹ See *Final Determination of the Antidumping Duty Investigation of Polyethylene Terephthalate Film, Sheet, and Strip from Thailand*, 73 FR 55043 (September, 17, 2008) and accompanying Issues and Decision Memorandum.

⁴⁰ See *Alloy Piping Products v. U.S.*, 28 CIT 1805 (2004), 2004 WL 2418314, 1823-1824.

of secondary merchandise, we have compared those sales to sales of TFOG in the home market for purposes of these final results. Our analysis regarding these adjustments to Polyplex's TFOG sales relies on business proprietary information. We have included a discussion of this change in Polyplex's calculation memorandum, dated concurrently with these final results.⁴¹

Additionally, we disagree with Polyplex's view that decisions in prior segments under this or other PET Film orders necessitate the Department make the same finding in this review. The question of what products are seconds is fact-intensive. Thus, while decisions in prior reviews provide guidance, the Department is not bound to these decisions if the fact pattern is different in a subsequent proceeding. The term 'TFOG' is applied broadly and includes, by Polyplex's own admission, prime material that it reclassified as TFOG for a variety of reasons. Therefore, there is no indication that the Department can rely on the fact that the material classified as TFOG in prior segments is the same as the material classified as TFOG in the instant review.

Comment 3: Jindal's Date of Sale

Jindal's Arguments

- The Department should reconsider its rejection of the purchase order (PO) date as the date of sale for the final results.
- Jindal has consistently stated in its submissions that the PO date was the appropriate date of sale because PO sets all the material terms of sale, including price and quantity, and does not change from the issuance of the PO.⁴²
- If a PO is not rejected, then the terms of the PO become the material terms of the sale and are then confirmed by the *pro-forma* invoice.
- The Department should not reject using the PO date as the date of sale based on the fact that the *pro forma* invoice has provisions for "allowable tolerances," As these tolerances are merely industry standards and are pre-agreed upon with the customer.⁴³ Jindal has provided several *pro-forma* invoices in support.⁴⁴
- The Department has previously ruled that "with respect to these quantity changes that occurred within such delivery tolerances . . . any differences between the quantity ordered and the quantity shipped which fall within the tolerance specified by the entire contract do not constitute changes in the material terms of sale."⁴⁵
- Jindal notes that although the Department requested a revised database to include a field for "purchase order date," it did not at any time also ask Jindal to provide a field for the "pro-forma invoice date."

⁴¹ See Memorandum to Nicholas Czajkowski from Toni Page: Analysis Memorandum for the Final Results of the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: Polyplex Corporation Ltd. (Polyplex), dated February 4, 2013.

⁴² See Jindal's Section A Questionnaire Response (December 12, 2011) at Question 4.d (Jindal SAQR); Jindal's Section C Questionnaire Response (December 28, 2011) at Field Number 10.0 "Date of Sale"; and Jindal's First Supplemental Section C Questionnaire Response (February 22, 2012) at Question 91 (Jindal SCQR-1).

⁴³ See Jindal SCQR-1 at Question 92.

⁴⁴ See Jindal SAQR at Exhibit 6 and Jindal's First Supplemental Section A-C Response at Exhibit S-34(b) (March 28, 2012).

⁴⁵ See *Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 FR 49622 (September 28, 2001), and accompanying Issues and Decision Memorandum (*Hot-Rolled from Thailand*), at Comment 9.

- If the Department still maintains that the PO dates are not the appropriate dates of sale, then the Department should use the *pro-forma* invoice dates Jindal provided to recalculate U.S. sales prices instead of using the commercial invoice date.⁴⁶

Petitioners' Rebuttal Arguments

- The Department should use the commercial invoice date as the date of sale and not the date of the PO or the *pro forma* invoice.
- Jindal has previously reported, and the Department has used, invoice date as the date of sale for sales in the home market and U.S. market in prior reviews.⁴⁷
- The CIT stated in *Cinsa* that the Department cannot arbitrarily change its methodology.⁴⁸
- The regulations and the case law support the use of invoice date as date of the sale because that is the date on which all parties agree on the material terms of the sale.⁴⁹ Information on the record indicates that the price and quantity of merchandise sold by Jindal varies significantly after the date of the purchase order up until the date of the commercial invoice.⁵⁰
- Because of this significant variation in the material terms of sale up until the date of the commercial invoice, the Department must use the date of commercial invoice as the date of sale.

Department's Position: The Department will continue to use Jindal's commercial invoice date as the date of sale to calculate the company's U.S. sales price for the final results. First, we disagree with Jindal's arguments that we should use the PO date, or alternatively the *pro forma* invoice date, as the date of sale because Jindal has demonstrated this is when the final material terms of sale, including tolerances, are established. Jindal claims that the POs and the *pro forma* invoices submitted on the record of this review show that there are no changes in the material terms of sale from the issuance of the PO to the *pro forma* invoice. To support its position, Jindal refers to copies of the PO, *pro forma* invoices, and commercial invoices it submitted from various sales, insisting that these provide documentary proof that the final terms did not change from the original PO to the *pro forma* invoice and to the commercial invoice. Jindal also insists that "tolerances" is a standardized term reflected on all *pro forma* invoices and they are pre-agreed at the PO stage.⁵¹ Any subsequent changes within the tolerances, Jindal insists, do not result in changes to the material terms of sale.⁵²

For these final results, the Department further reviewed and analyzed the information on the record prior to the preliminary results, including the accompanying exhibit listing the quantities

⁴⁶ See Letter from Jindal to the Department Re: Pro-Forma Invoices (September 7, 2012).

⁴⁷ See *Polyethylene Terephthalate Film, Sheet and Strip from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 45699, 46688 (August 6, 2008).

⁴⁸ See *Cinsa, S.A. de C. V. v. United States*, 966 F. Supp. 1230, 1238 (CIT 1997) (*Cinsa*).

⁴⁹ See 19 CFR 351.401(i) and *Nakornthai Strip Mill Pub. Co. v. United States*, 614 F. Supp. 2d 1323, 1333-1334 (CIT 2009).

⁵⁰ See Jindal's First Supplemental Questionnaire Response (Jindal First Supplemental), at Exhibits S-24 and S-25 (March 28, 2011).

⁵¹ See Jindal's Case Brief of December 5, 2013 (Jindal's Case Brief), at 6; see also Jindal First Supplemental, at Exhibit S-34(b).

⁵² See *Hot-Rolled from Thailand*, and accompanying Issues and Decision Memorandum at Comment 9.

as stated on the PO, and the quantities as stated on the commercial invoice by line item, and noted for certain invoices significant changes in quantities (*i.e.*, outside of the allowable tolerances).⁵³ Specifically, while there was only one invoice for which the cumulative change in quantity from the PO to the commercial invoice exceeded the allowable tolerance,⁵⁴ the changes in quantities by line item, *i.e.*, different products on the PO or commercial invoice, were frequent, and at times exceeded the tolerance for certain line items/products.⁵⁵ Thus, we determine that the commercial invoice is when the final terms of sale are concluded, because the information on the record indicates that the material terms of sale (*i.e.*, quantities exceeding the tolerance) do change up to the issuance of the commercial invoice.⁵⁶

Second, Jindal reported⁵⁷ and the Department established the commercial invoice date as date of sale in the three prior administrative reviews of Jindal. In accordance with *Cinsa* and 19 CFR 351.401(i), the Department finds it appropriate here to continue to rely on the invoice date as the date of sale.⁵⁸ The record information that Jindal submitted regarding its *pro forma* invoice dates was insufficient support to deviate from our normal practice. Specifically, the information submitted by Jindal following the preliminary results did not demonstrate that the material terms of sale were actually established at any other point prior to the invoice date. In fact, it only provided all three dates, PO date, *pro forma* invoice date, and commercial invoice date. The information did not provide any terms of sale, such as quantity, price or payment terms.

Therefore, due to the noted changes in the terms of sale up to the issuance of the commercial invoice (*i.e.* after the issuance of the *pro forma* invoice), as discussed above, we determine that the evidence on the record of this review supports a conclusion that the material terms are set when the commercial invoice is issued, and that Jindal has failed to demonstrate that the facts in this administrative review warrant a departure from our past practice. Therefore, we will continue to use the commercial invoice date as the date of Jindal's U.S. sales.

Comment 4: Jindal's Export Quantities

Jindal's Arguments

- Because the Department stated in the *Preliminary Results* that serious issues exist concerning the reconciliation with the quantities of subject merchandise suspended versus the quantities reported exported, Jindal tabulated and submitted POR entries of subject

⁵³ See Jindal's First Supplemental, at Exhibit S-34(a).

⁵⁴ *Id.* Note that Jindal in this Exhibit reported the overall net change in quantity from the PO to the commercial invoice, however further analysis of the change in quantities for the individual line items per invoice that the Department conducted, indicated those changes discussed above.

⁵⁵ *Id.*; see also Petitioners' Rebuttal Brief, at 4-5.

⁵⁶ See *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 FR 7244, 7251 (February 18, 2010), unchanged in the final determination, 75 FR 41808 (July 19, 2010).

⁵⁷ See Jindal's First Supplemental, at 53.

⁵⁸ See *Cinsa*, 966 F. Supp. at 1238.

merchandise using information from its U.S. customers' CVD deposits, as Jindal's AD rate during the POR was zero.⁵⁹

- Jindal states that it was able to obtain copies of almost all (82 percent) of the entry summaries from its customers or importers of its sales of subject merchandise during the POR, demonstrating that CVD duties were deposited. According to Jindal, that demonstrates that those entries were properly entered as "subject merchandise."⁶⁰
- The information Jindal submitted to the Department provided the U.S. customer, observation number, whether the entry summary was available, and the CVD deposit. Jindal was willing to provide copies of the entry summaries upon request.⁶¹
- The information in Jindal's submission demonstrates that there is no "serious issue" with regards to its reported exports of subject merchandise for the POR.⁶²
- Any discrepancies relating to Jindal's entries of subject merchandise during the POR are likely the result of incomplete U.S. Customs and Border Protection (CBP) records and not because Jindal's importers failed to declare the imports as subject merchandise.⁶³

Department Position: Based on Jindal's efforts to collect and tabulate entry data from its U.S. customers in order to reconcile the differences with the CBP data on the record, Jindal has cooperated with the Department to the best of its abilities. It appears that neither Jindal nor its importers are purposely misidentifying subject merchandise on U.S. entry documentation. Therefore, for the final results, we will continue to calculate Jindal's margin based on the company's reported quantities for U.S. sales during the POR. However, we will refer this matter to CBP for further examination.

⁵⁹ See Letter from Jindal to the Department Re: Issue Related to Quantities of Subject Merchandise Suspended and the Quantities Reported Exported (September 10, 2012).

⁶⁰ See *id.* at 2-4; see also Jindal's Case Brief, at 9-11.

⁶¹ See *id.*

⁶² See Jindal's Case Brief, at 11.

⁶³ See *id.*

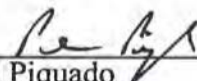
CONCLUSION

We recommend applying the above methodology for these final results.

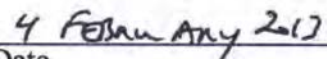


Agree

Disagree



Paul Piquado
Assistant Secretary
for Import Administration



Date