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MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the 2001-2003 Administrative Review of the Antidumping Duty Order on Certain Polyethylene Terephthalate Film, Sheet and Strip from India: Final Results

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Summary

We have analyzed the comments that interested parties submitted in the 2001-2003 administrative review of the antidumping duty order on certain polyethylene terephthalate film, sheet and strip (PET film) from India. As a result of our analysis, we have made changes, including corrections of certain inadvertent clerical errors, to the preliminary dumping margin calculation. We recommend that you approve the positions that we have developed in the "Discussion of the Issues" section of this memorandum.

Below is a complete list of the issues raised by interested parties in their comments:

Comment 1: Whether Jindal Polyester Limited and Valencia Specialty Films Were Affiliated During the First Three Months of the Period of Review
Comment 2: Whether Jindal and Valencia Were Affiliated During the Remainder of the Period of Review
Comment 3: Whether it is Appropriate to Apply Partial Adverse Facts Available
Comment 4: Whether the Department Applied the Appropriate Adverse Facts Available Rate
Comment 5: Whether Jindal Polyester Limited Properly Classified Certain Merchandise as Non-prime Merchandise
Comment 6: Whether the Department Incorrectly Converted the Currency of Certain Movement Expenses
Comment 7: Whether the Department Incorrectly Calculated Home Market Billing Adjustments
Comment 8: Whether the Department Incorrectly Calculated the Net Home Market Price

Comment 9: Whether the Department Should Offset its Calculations for Negative Dumping Margins

Comment 10: Whether to Increase the Price of Certain U.S. Sales by Countervailing Duties Imposed to Offset Export Subsidies

Background

This review covers PET film exported to the United States by Jindal Polyester Ltd. (Jindal). The period of review (POR) is December 21, 2001, through June 30, 2003. The Department of Commerce (the Department) issued its preliminary results of review on July 30, 2004. See Certain Polyethylene Terephthalate Film, Sheet and Strip From India: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 69 FR 49872 (August 12, 2004) (Preliminary Results). In response to the Department's invitation to comment on the preliminary results of this review, Jindal, the sole respondent, Valencia Specialty Films (Valencia), a U.S. importer, and petitioners[1] filed case briefs on September 13, 2004. Jindal, Valencia, and petitioners filed rebuttal briefs on September 23, 2004. In response to requests from Valencia and Jindal, a hearing was held on September 30, 2004.

On October 15, 2004, the Department solicited comments from interested parties concerning the adjustment of U.S. price by countervailing duties. Interested parties submitted timely comments and rebuttal comments.

Discussion of the Issues

Comment 1: Whether Jindal Polyester Limited and Valencia Specialty Films Were Affiliated During the First Three Months of the Period of Review

Jindal disagrees with the Department's preliminary finding of affiliation. In the Preliminary Results, the Department found that Jindal was affiliated with its U.S. customer, Valencia, because Jindal employed Valencia's sole owner, Mr. Hotmer, during a three-month period during the POR. Specifically, the Department noted that when Jindal engaged in business dealings with Valencia, (a small company for which Mr. Hotmer performed all of the principal selling functions), "it was essentially dealing with its employee," during this three-month period. See Preliminary Results at 49873. Section 771(33)(D) of the Tariff Act of 1930, as amended, (the Act) notes that employers are affiliated with their employees. Thus, the Department considered Jindal's sales to Valencia

[1] The petitioners in this review are Dupont Teijin Films, Mitsubishi Polyester Film of America, Toray Plastics (America), and SKC America, Inc.

during the three-month period (May 2002 through June 2002), when Jindal employed Mr. Hotmer, to be sales to an affiliated party.

According to Jindal, the fact that it may have employed Mr. Hotmer does not make Valencia its employee. Jindal contends that the intent of section 771(33) (D) of the Act is to recognize true employer-employee relationships rather than "essentially employee" relationships. Moreover, Jindal maintains that the Department acknowledged that Valencia was not an employee of Jindal by relying on the Court of International Trade's (CIT's) opinion in Ferro Union to extend the term "employee" to Valencia. Specifically, the Department stated:

> Although the word "employee" denotes a single person, the Court of International Trade has recognized that "words importing the singular may {not} extend and be applied to several persons or things ... *except where it is necessary to carry out the evident intent of the statute* (emphasis added)." See Ferro Union v. United States, 44 F. Supp. 2d 1310, 1325 (CIT, March 23, 1999) (Ferro Union) citing First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640, 657 44 S. Ct. 213, 68 L. Ed. 486 (1924).

See Preliminary Results, 69 FR 49872, 49873.

Furthermore, Jindal argues that the Department's reliance on Ferro Union is misplaced. Specifically, Jindal claims that Ferro Union stands for the proposition that the Department may only extend the meaning of statutory terms in limited circumstances to carry out the intent of the statute. Jindal notes that in Ferro Union, the CIT held that the term "person" could be extended to encompass a family, which is not analogous to extending the term "employee" to include an unrelated company. Therefore, Jindal contends that the Department's interpretation of 771(33)(D) in this case, exceeds the limits on statutory construction imposed by Ferro Union.

Finally, Jindal points out that it did not even consider Mr. Hotmer an employee during the three-month period in question, and neither did Mr. Hotmer.

Valencia also disagrees with the Department's preliminary finding of affiliation. While noting that the Act does not define "employee," Valencia contends that Mr. Hotmer was not an employee within the spirit of the Act during the period that it purchased subject merchandise from Jindal. Valencia notes that Mr. Hotmer had been employed by Jindal's U.S. affiliate, Jindal America. However, by the time that Jindal began selling subject merchandise to Valencia, Jindal had already notified Mr. Hotmer that it intended to close Jindal America, and Mr. Hotmer had already given his notice. Valencia notes that Jindal did ask Mr. Hotmer to sell Jindal America's remaining inventory, however, Valencia claims that this amount was only a fraction of what he was paid before his termination to make these sales and he was stripped of his authority to negotiate prices or conclude sales without Jindal's approval. Moreover, Valencia claims that Jindal told Mr. Hotmer that if he wanted to sell other PET film, he would have to import it himself and bear the costs and risks. Valencia submits that all of these considerations support a finding that it was dealing at arm's length with Jindal, rather than interacting with the company as an affiliate.

Petitioners, agree, in part, with the Department's preliminary finding of affiliation. Petitioners note that Black's Law Dictionary defines employee as:

> a person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.

Petitioners contend that Mr. Hotmer meets the definition of an employee, given that Jindal paid him a salary to sell the PET film remaining in Jindal America's inventory and Jindal retained the right to control and direct how those sales were made. Next, petitioners argue that Mr. Hotmer and Valencia are one and the same person. Specifically, petitioners point out that Mr. Hotmer owns 100 percent of Valencia; he apparently is its only non-clerical employee; he has the ability to control all of Valencia's affairs; he alone negotiated Valencia's purchases and sales and determined who would be Valencia's suppliers and customers; and he apparently operates Valencia from his home. As such, petitioners contend that it would do violence to the intent of the statute's affiliation provision if the Department made an artificial distinction between Mr. Hotmer and Valencia for purposes of its analysis. If Jindal is in a position to control Mr. Hotmer through an employer-employee relationship, petitioners contend that Jindal is equally in a position to control Valencia. Thus, petitioners assert that Jindal and Valencia are affiliated through Jindal's employment of Mr. Hotmer.

In the alternative, petitioners also argue that Jindal and Valencia are affiliated pursuant to section 771(33)(G) of the Act, which provides that any person who controls another person is affiliated with that person. According to petitioners, in determining whether control exists, the Department looks at various factors, including the existence of close supplier relationships and joint venture agreements. Petitioners maintain that Jindal and Valencia had a close supplier relationship. Given that Jindal supplied almost all of the PET film that Valencia sold during the POR, petitioners assert that Valencia's success rested in Jindal's hands. Thus, petitioners contend that Jindal was in a position to exercise restraint or direction over Valencia.

Moreover, petitioners maintain that Valencia, as Jindal's sole distributor of non-subject, metallized PET film, was in a position to exercise restraint or direction over Jindal. Jindal's annual report indicates that it sought to consolidate its position in the export market by selling products not subject to antidumping duties in the United States. Thus, petitioners contend that Valencia was in a position to control Jindal by virtue of the vital role it played in Jindal's export strategy.

Furthermore, petitioners contend that Valencia is simply a continuation of Jindal America in the form of a *de facto* joint venture which Jindal controls. Specifically, petitioners note that in addition to Mr. Hotmer's contributions to Valencia, Jindal supplied Valencia with customers, goodwill, office space, and office equipment. Petitioners also note that Jindal supported the venture through joint sales efforts and by granting Valencia favorable sales terms. See the pricing analysis in petitioners' September 14, 2004 proprietary case brief at 13-16. In fact, based on circumstantial evidence, petitioners suggest that during a trip to Boston, Mr. Hotmer and a Jindal board member conducted a joint sales mission during which they arranged the transition of Jindal America's customers to Valencia. According to petitioners, the fact that Valencia apparently serviced one of its customers out of Jindal America's inventory also serves as evidence of a continuation of Jindal America and a blurring of the distinction between the two companies. Additionally, petitioners argue that Mr. Hotmer's dual role as owner of Valencia and sales representative/manager of Jindal America, as well as the fact that the two companies shared office space and equipment, make the independent operation of the two companies impossible. Lastly, petitioners assert that Jindal had much to gain by continuing Jindal America in the form of an unaffiliated U.S. importer/customer. Specifically, petitioners contend that after establishing Valencia, Jindal could lower its dumping margin by reporting export price (EP) sales rather than constructed export price (CEP) sales and their associated expenses.

According to Jindal, petitioners are mistaken. Jindal rebuts petitioners' allegation of a close supplier relationship by noting that it sold PET film to other companies in the United States. Moreover, Jindal notes that it was not the only company to supply Valencia with PET film. Further, Jindal dismisses petitioners' argument that Valencia's purchases of non-subject metallized PET film demonstrate control, noting that Jindal does not need Valencia to sell this film because it can sell metallized PET film to any customer in the United States.

Also, Jindal questions how Valencia could be a joint venture when Mr. Hotmer is solely responsible for Valencia and bears all of the associated risks. Moreover, Jindal contends that its sales terms to Valencia do not demonstrate the existence of a joint venture, given that the sales terms are not favorable compared to the sales terms that it offers to other U.S. customers. Specifically, Jindal notes that, unlike other customers, Valencia had to pay for PET film before receiving the film. Jindal also argues that petitioners' pricing analysis, which indicates that Valencia received favorable sales terms, is flawed because petitioners compared CEP sales to EP sales. See Jindal's September 23, 2004 proprietary rebuttal brief at 9-11. Jindal notes that CEP prices are customs cleared, duty paid prices whereas EP sales require the customer to pay the duty and clear the goods. Additionally, Jindal claims that although Mr. Hotmer contacted Jindal America's customers to advise them that he was forming his own company, he did not engage in joint sales efforts. Moreover, Jindal points out that even the Department found Jindal and Valencia to be independent operations, rather than a *de facto* joint venture. Jindal cites the Department's verification report which notes that "The records viewed by the verifiers demonstrate that Mr. Hotmer has sole authority to act for Valencia." See memorandum to the file from Jeffrey Pedersen and Drew Jackson, concerning Constructed Export

Price Sales Verification Report for Jindal Polyester Limited, dated July 30, 2004, (CEP Verification Report) at 20. Thus, Jindal maintains that the record is devoid of any evidence that Jindal or Valencia controlled one another.

Nonetheless, Jindal agrees that the focus of the Department's analysis should be on control, rather than the "employer-employee" label. Focusing on control takes into account the reality of the situation, and the reality, according to Jindal is as follows: Jindal America was closing. Jindal notified Mr. Hotmer that his services were no longer needed but he was asked to "help out" during the three-month period at issue by selling Jindal America's remaining inventory. During this time period, he was free to pursue any other activities he chose. After losing his job with Jindal America, Mr. Hotmer decided to establish *his own* company so that he could continue to sell PET film, the product that he knew best. Jindal claims that it had no meaningful control over Mr. Hotmer, much less Valencia, given that it was closing Jindal America, terminating Mr. Hotmer, and stopping his salary. Moreover, Jindal observes that Valencia independently stated that it was not controlled by Jindal. <u>See</u> Jindal's September 13, 2004 case brief at 11 (citing Valencia's February 19, 2004 submission to the Department).

Finally, Jindal contends that there is nothing on the record to suggest that it replaced Jindal America with Valencia in order to avoid dumping margins. In fact, according to Jindal, petitioners' own argument that Valencia received favorable (low) prices is inconsistent with the alleged scheme to avoid dumping margins. Sales to Valencia at low prices can only increase the dumping margin. Furthermore, Jindal maintains that Valencia did not replace Jindal America. Jindal claims that it closed Jindal America because it was not profitable and Mr. Hotmer established Valencia because he lost his job at Jindal America. Jindal contends that if Valencia had been set up to replace Jindal America, the volume of sales to Valencia should have remained the same as the volume of sales to Jindal America. This did not happen. In addition, Jindal notes that it did not finance Valencia's start-up, nor did it provide Valencia with more favorable sales terms than the terms that it granted to other U.S. customers (in fact, they were less favorable). Finally, Jindal notes that while Valencia took some of Jindal America's customers, many of Jindal America's former customers now buy directly from Jindal. Thus, Jindal urges the Department to reject petitioners' notion that Valencia was established as a scheme to avoid antidumping and countervailing duties.

Valencia also believes that petitioners are mistaken. According to Valencia, there is no record evidence to support petitioners' claim that Jindal and Valencia could control one another. Valencia believes that its relationship with Jindal, where it purchased PET film from a supplier other than Jindal and Jindal sold PET film to other customers in the United States, is not a close supplier relationship given that the relationship is not so significant that it could not be replaced (<u>e.g.</u>, it is not a exclusive relationship without alternative sources of supply). <u>See</u> <u>Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea</u>, 62 FR 18404, 18417 (April 15, 1997) (<u>Cold-Rolled Products from Korea</u>). Further, Valencia claims that there is no evidence that its relationship with Jindal provided either company with the potential to impact the other's pricing of subject merchandise (a requirement for finding control). In fact, Valencia argues that the sales data on the record do not reveal a pricing pattern that suggests that it is affiliated with Jindal. See Valencia's September 13, 2004 proprietary case brief at 7. Valencia also contends that it is apparent from the record that it was in no position to exercise any restraint or direction over Jindal given that Jindal did not help finance its start-up and offered it worse than normal sales terms. Thus, Valencia concludes that there is no basis for finding control.

Additionally, Valencia maintains that petitioners have neither a legal basis, nor a factual basis, for claiming that it is a *de facto* joint venture. First, Valencia notes that petitioners do not cite any legal authority for the creation of a *de facto* joint venture or for its relevance to the issue of control. Valencia further argues that even if a joint venture existed, the Department requires additional evidence to find control in a joint venture context. See Valencia's September 23, 2004 rebuttal brief at 16-17 (citing Mitsubishi Heavy Indus., Ltd. v. United States, 54 F. Supp. 2d (CIT 1999) at 26 and Hontex Enters., Inc. v. United States et. al., Slip. Op. 04-55 (May 21, 2004) (Hontex) at 47. Second, Valencia claims that it was Mr. Hotmer, not Jindal, that provided it with financing, office space, equipment, and customers. According to Valencia, the Department verified that Mr. Hotmer alone funded Valencia and Valencia, not Jindal, began paying office rent in June 2002. Valencia also points out that the Department stated in its verification report that Mr. Hotmer obtained purchase commitments from certain customers before establishing Valencia. Moreover, Valencia claims that the record does not contain any evidence regarding Valencia's office equipment or any indication that the Boston trip was a joint sales effort.

Finally, Valencia contends that there are no signs that the events that transpired were part of a scheme in which the parties sought to gain by reducing antidumping duties. First, Valencia asserts that the sales data do not demonstrate that Valencia and Jindal worked together to obtain a favorable antidumping margin (in fact, Valencia claims the sales data reinforces the conclusion that it is not affiliated with Jindal). See Valencia's September 23, 2004 proprietary rebuttal brief at 17-18. Second, according to Valencia, the record shows that Mr. Hotmer has not gained much by leaving Jindal America and starting Valencia. In particular, Valencia notes that Mr. Hotmer did not receive a salary from Jindal after his termination, Mr. Hotmer had to invest his own money in his company (Valencia), his company did not receive favorable sales terms from Jindal, his company had to pay all of the antidumping and countervailing duty cash deposits on its imports of PET film, and it had to assume all of the risks associated with those imports. See also Valencia's May-December 2002 financial statements. Thus, Valencia contends that the evidence does not support the scheme alleged by petitioners.

Department's Position:

We continue to find that Jindal and Valencia were affiliated by virtue of an employer-employee relationship that existed from April 2002 through June 2002. Specifically, we find that: 1) Jindal employed Mr. Hotmer from April 2002 through June 2002, and 2) Mr. Hotmer should not be distinguished from his wholly owned business, Valencia, when applying the affiliation provision in section 771(33)(D) of the Act (which states that an employer and an employee *shall* be considered to be affiliated).

Although the Act specifically identifies employers and employees as affiliated persons, it does not define the terms "employer" and "employee." Where the statute is silent, it is the general rule of statutory construction that the ordinary meaning of that term governs. The ordinary meaning of employee is "a person who works for another in return for financial or other compensation." See The American Heritage Dictionary of the English Language (Houghton Mifflin Company: 2000, 4th Edition). We recognize that this definition, however, is not specific enough for our purposes, given that persons working for others may be engaged in independent entrepreneurial dealings rather than an employer-employee relationship. As Jindal and Valencia have pointed out, sometimes the facts of a case may not warrant a finding of affiliation under this definition. For example, a company might be hired to audit an exporter's books, package its cargo, or label its merchandise. However, although the exporter might "employ" the auditor, the packager, or the labeling contractor, the nature of the employment might not be considered an "employee" for purposes of section 771(33)(D) of the Act. The question, therefore, before the agency is not one merely of compensation and the provision of a service. It is also whether a person or company has, or has the potential to have, control over another person or company under its employ, with regard to the material details of how the work is to be performed with an important emphasis on the ability to control the employee's selling and pricing behavior. Accordingly, it is necessary to look to the economic reality of the relationship in deciding whether an employer-employee relationship exists for purposes of the antidumping law.

In the case at hand, from April 2002 through June 2002, Mr. Hotmer received a salary from Jindal to sell Jindal America's PET film from an office paid for by Jindal with the help of an administrative assistant who was compensated by Jindal. During the period April 2002 through June 2002, Mr. Hotmer was required to obtain Jindal's approval of the terms of any sales that he initiated. These facts are consistent with the ordinary understanding of an employer-employee relationship where one party pays another party a salary, has the authority to control details with respect to the work to be accomplished, is responsible for the cost of the operation, and furnishes the equipment, facilities, and material with the intention that they be used for the employer's benefit. Furthermore, as he continued to receive a salary (although diminished) and Jindal continued to furnish an office, assistant and equipment, and had authority over all aspects of Mr. Hotmer's work, we note that there is little meaningful distinction between Mr. Hotmer's earlier period of undisputed employment with Jindal and the three-month period in question. Thus, we find that Mr. Hotmer was Jindal's employee from April 2002 through June 2002, in accordance with how the term is used in section 771(33)(D) of the Act.

Additionally, Mr. Hotmer should not be distinguished from his wholly owned business, Valencia, when applying the employer-employee affiliation provision. This section of the Act is used to identify transactions that, because of the relationship between the parties, are (or may be) inappropriate for use in determining whether there is dumping. If transactions between an employer and its employees should be closely scrutinized, or disregarded for purposes of determining whether there is dumping, it is logical to conclude that transactions between an employer and its employee's wholly owned, essentially owner-operated, company should be treated similarly. To do otherwise would be to favor form over substance and provide parties with an opportunity to deal with affiliates without triggering the application of section 771(33) of the Act.

In this case, Jindal sold subject merchandise to Valencia, a company wholly owned and primarily operated by Mr. Hotmer. In selling subject merchandise to Valencia between April 2002 through June 2002, Jindal was dealing with its employee, Mr. Hotmer. Because Mr. Hotmer and Valencia are essentially one in the same, we have not distinguished Mr. Hotmer from Valencia, when applying the employer-employee affiliation provision. Consequently, we continue to find that Jindal and Valencia were affiliated by virtue of an employer-employee relationship that existed from April 2002 through June 2002.

With respect to the various "control" arguments pursuant to section 771(33)(G) of the Act argued by the petitioners and disputed by Jindal and Valencia, it is important to note that even if we were to agree with Jindal and Valencia that the formal relationship between Mr. Hotmer/Valencia and Jindal was not one of employee/employer, we would still find that these parties were affiliated under the "control" provision of the Act. Congress, in the Statement of Administrative Action, URAA, H. Doc. 316, Vol. 1, 103d Cong. (1994)(SAA) at 838, explained that it amended the definition of "affiliated persons" (including retitling the term itself) in 1994 by adding subparagraph (G) to section 771(33) of the Act to provide that any person who is controlled by any other person would be considered affiliated under the antidumping law. It explained that a focus on the element of "control" (defined as the legal or operational ability for a person to exercise restraint or direction over another person) would "permit a more sophisticated analysis which better reflects the realities of the market place." Id. As we have explained, Jindal was in a position to exercise direction over Mr. Hotmer's/Valencia's commercial activities during the three-month period in question; most notably Mr. Hotmer's/Valencia's purchase of Jindal's subject merchandise. The nature of Jindal's relationship with Mr. Hotmer had the potential during the three-month period to impact pricing of the subject merchandise for all transactions in which Mr. Hotmer was involved.

In the Preamble to the Department's proposed regulations, the Department stated that the business and economic reality of control relationships in the context of section 771(33)(G) of the Act "suggest(s) that these relationships must be significant and not easily replaced." See Antidumping Duties; Countervailing Duties; Proposed Rules, 61 FR 7308, 7310 (February 27, 1996). Here, the length of Mr. Hotmer's employment with Jindal/Jindal America (almost four years) and the amount of salary that he was paid, both before and during the three-month period in question, indicate that Mr. Hotmer's relationship with Jindal was significant. See Jindal's February 19, 2004 supplemental questionnaire response at 7; see also Jindal's April 14, 2004 supplemental questionnaire response at

2 and Exhibits 2(a) and 2(b). Moreover, the record indicates that Mr. Hotmer's income from Jindal was not easily replaced through Valencia's operations at that time. See Valencia's February 19, 2004 supplemental questionnaire response at Exhibit 1. Furthermore, Valencia is, for all intents and purposes, Mr. Hotmer. Thus, for purposes of section 771(33)(D) and (G) of the Act, Jindal, Valencia, and Mr. Hotmer were all affiliated from April 2002 to June 2002.

Such an interpretation of the facts on the record is not only reasonable, but the alternative, as argued by Valencia and Jindal, would allow parties to circumvent the antidumping law merely by changing the formal designation of an employment relationship, but not the substance of that relationship. As noted above, Congress intended the antidumping law to reflect the "realities" of the market place. This understanding of the facts on the record recognizes the realities of the various parties' affiliations during the three-month period.

On the other hand, we are not convinced by petitioners' arguments and the record evidence that Jindal and Valencia had a close supplier relationship or that Valencia replaced Jindal America as a *de facto* joint venture between Jindal and Mr. Hotmer.

The Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act indicates that a close supplier relationship is one where "the supplier or buyer becomes reliant upon the other." See H.R. Doc. No. 103-616, vol 1 at 838. Moreover, in Cold-Rolled Products from Korea, the Department noted, with respect to affiliation through close supplier relationships, that "{t}he standard is not ... whether one company might be in a position to become reliant upon another by means of their supplier-buyer relationship; rather the Department must find that a situation exists where the buyer has, in fact, become reliant on the seller, or vice versa. Only if we make such a finding can we address the issue of whether one of the parties is in a position to exercise restraint or direction over the other." See Cold-Rolled Products from Korea, at 18417. In determining whether reliance exists, the Department may consider, among other things, whether the inputs being supplied could be obtained from other parties. See, e.g., Ta Chen Stainless Steel Pipe, Ltd. v. United States, Slip Op. 99-117 (October 28, 1999) at 7 (in considering whether a close supplier relationship existed, the CIT stated that "there is no suggestion in this case that {the U.S. distributor} would have had difficulty obtaining {subject merchandise} from other suppliers. Nonetheless, this is one factor that may be considered by Commerce."). The record of this proceeding shows that there are other Indian suppliers of PET film. See Preliminary Results, 69 FR 49872; see also Notice of Initiation of Antidumping Duty Investigations: Polyethylene Terephthalate Film, Sheet and Strip (PET Film) From India and Taiwan, 66 FR 31888, 31890 (June 13, 2001). In addition, there is no record evidence indicating that Valencia could not purchase PET film from other suppliers. In fact, the evidence shows that Valencia did so. See CEP Verification Report at 20. Furthermore, during the POR, Jindal sold subject merchandise to other U.S. customers. Accordingly, we find no basis in this case for determining that Jindal and Valencia are affiliated by way of a close supplier relationship. See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Malaysia, 69 FR 34128 (June 18, 2004) (record evidence of alternative suppliers of subject merchandise in the home market militated against a finding of control through a close supplier relationship); see also AK Steel Corporation, et al. v. United States, 34 F. Supp. 2d 756, 769 (December 22, 1998) in which the CIT stated that "Commerce has declined to find affiliation where a producer supplied 100 percent of its U.S. sales through a single, unrelated U.S. importer but where the parties are free to seek other business partners" (citing Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Melamine Institutional Dinnerware Products From Indonesia, 61 FR 43333, 43335 (August 22, 1996)).

Additionally, we find no evidence that Valencia replaced Jindal America as a *de facto* joint venture between Jindal and Mr. Hotmer. There is nothing on the record to indicate that Jindal had an interest in Valencia or that it was to share in Valencia's profits, or bear a portion of Valencia's losses (common characteristics of joint business undertakings). We note that Mr. Hotmer provided all the start-up and operating capital for Valencia. See CEP Verification Report at 20-21. Also, contrary to petitioners' claim that Jindal contributed customers and office space to Valencia, the record shows that Mr. Hotmer (not Jindal) obtained purchase commitments from certain customers before establishing Valencia[2] and Valencia (not Jindal) paid for its office space beginning in June 2002 (shortly after Valencia was established). See id. Furthermore, any evidence that Valencia used facsimile equipment that had been used by Jindal America, or that goodwill associated with Jindal's products may have transferred to Valencia, does not, by itself, indicate that Jindal contributed these assets to Valencia as part of a joint venture arrangement. See Petitioners' September 14, 2004 case brief at 8 (stating that Mr. Hotmer used Jindal America's facsimile machine after June 2002). Further, petitioners' pricing analysis does not indicate that Jindal supported the venture by granting Valencia favorable sales terms. The price differences observed by petitioners are primarily due to the fact that petitioners compared the prices of duty paid, customs cleared, CEP sales to the prices of EP sales for which the customer was to pay duties and clear the goods.

Furthermore, it does not appear that Jindal treated Valencia as if it were simply a continuation of Jindal America. The record shows that Jindal required Valencia to pay for PET film before receiving the film; there is no record evidence that Jindal America or any other U.S. customer was required to do so. See CEP Verification Report at 5-8. In addition, the record does not show that Valencia serviced one of its customers out of Jindal America's inventory. Rather, the evidence indicates that the sale in question was one of Jindal America's sales. See id. at Exhibit 14. Finally, there is nothing on the record to indicate that Jindal replaced Jindal America with Valencia in order to lower its dumping margin.

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[2] Based on information reported in Jindal's April 14, 2004 supplemental questionnaire response at 7, petitioners speculate that Mr. Hotmer and a Jindal board member traveled to Boston on a joint sales mission to transition customers from Jindal America to Valencia. Petitioners, however, provided no evidence to support this claim.

Thus, there is no basis for concluding that Jindal potentially controlled Valencia by virtue of a close supplier relationship or a common business undertaking.

Comment 2: Whether Jindal and Valencia Were Affiliated During the Remainder of the Period of Review

While petitioners agree with the Department's preliminary finding of affiliation, they contend that the relationship upon which the Department based its finding did not end in June 2002 but continued throughout the POR. Specifically, petitioners argue that the evidence of control, cited above, relates not only to the period May 2002 through June 2002, but to the entire POR.
Moreover, petitioners contend that Mr. Hotmer continued to act as an employee of Jindal throughout the POR. In support of this contention, petitioners note that Jindal America's financial records show that it continued to operate after June 2002 (in fact, its independent auditors make no mention of its closing and Jindal reported that it did not file tax documents terminating Jindal America). Petitioners maintain that there is no evidence of anyone other than Mr. Hotmer managing Jindal America after June 2002. Petitioners note that the Department's verifiers stated that they "found no evidence that Jindal or any other entity became more active in the operations of Jindal America after March 1, 2002." See CEP Verification Report at 5. Also, petitioners note that Mr. Hotmer occupied Jindal America's office and used its equipment well beyond June 2002. Further, petitioners point out that at the May 2004 verification, Mr. Hotmer possessed, and was familiar with, Jindal America's records and, as the Department noted, he " was able to describe the details of Jindal America's operations throughout the POR." See id. at 6. Whether he collected a salary or received sales commissions for his services after June 2002 (as the record indicates), petitioners contend that Mr. Hotmer was employed by Jindal throughout the POR. Thus, petitioners submit that the Department must find that Jindal and Valencia were affiliated throughout the POR.

Jindal asserts that for the same reasons that there was no affiliation for the three-month period in question, there was no affiliation during the POR. Furthermore, Jindal contends that Mr. Hotmer cannot be considered an employee of Jindal America simply because he helped with winding down the company's operations after June 2002 or possessed its financial records after that date. Additionally, Jindal asserts that there is nothing on the record to suggest that Mr. Hotmer ran Jindal America after June 2002, and, in fact, the company's volume of sales demonstrates that it was effectively closed after June 2002.

Valencia notes that an employee is defined as a person hired for a wage or fixed payment in exchange for personal services where the employer has the right to control the details of the work performance. See Lectric Law Library's Lexicon at http://www.lectlaw.com/def/e009.htm, and Black's Law Dictionary, 7th ed., 543 (1999). Given that there is no evidence that Jindal America paid Mr. Hotmer a salary or commissions after June 2002, or that it paid his health or unemployment insurance, Valencia dismisses petitioners' claim that Mr. Hotmer was employed by Jindal throughout the POR.

Additionally, Valencia notes that it is common for employees to be terminated by employers who continue to exist. Thus, Valencia states that the evidence that Jindal America continued to exist throughout the POR does not prove that Mr. Hotmer remained an employee during this period. With respect to petitioners' claim that Mr. Hotmer remained an employee throughout the POR because he managed Jindal America's affairs during this period, Valencia points out that there were no affairs to manage since Jindal America's operations only consisted of selling what inventory remained. Valencia points to the Department's verification report, which notes that the quantity of PET film sold by Jindal America after June 2002 was much less than the quantity sold before that date. Valencia contends that this fact supports its assertion that after June 2002, Jindal America was merely selling its remaining inventory.

While petitioners focus on the fact that Mr. Hotmer assisted Jindal during the Department's verification, and had access to Jindal America's records at that late date, Valencia maintains that if this were not the case, Jindal would have failed verification. Moreover, Valencia asserts that Mr. Hotmer's participation in verification does not support a finding of control. See Valencia's September 23, 2004 rebuttal brief at 9 (citing Hontex at 23 (the presence of an individual at verification, without more, does not support a conclusion of control). Further, Valencia states that the fact that after June 2002, Mr. Hotmer's company may have occupied office space formerly occupied by Jindal America is not meaningful given that the lease for that office was in Mr. Hotmer's name and Jindal America only reimbursed Mr. Hotmer for lease payments up until May 2002. Lastly, Valencia notes that Valencia kept its inventory of PET film segregated from Jindal America's PET film inventory. In summary, Valencia contends that Mr. Hotmer was nothing more than an independent contractor or consultant assisting Jindal America in closing its operations.

Department's Position:

We disagree with petitioners. As explained above, we have determined that Jindal was affiliated with Valencia during a three-month portion of the POR because it employed Valencia's sole owner, Mr. Hotmer, and the nature of Jindal's relationship with Mr. Hotmer placed it in a position to potentially control Valencia. Contrary to petitioners' allegations, the evidence demonstrates that, after June 2002, Mr. Hotmer's employment with Jindal ceased and the nature of his relationship with the company changed. Before July 2002, Mr. Hotmer received a salary from Jindal to sell Jindal America's PET film from an office paid for by Jindal with the help of an administrative assistant who was compensated by Jindal. After June 2002, Jindal neither paid Mr. Hotmer a salary, nor supplied him with an office[3] or administrative assistant. Further, while Mr. Hotmer could receive a commission if he sold any of Jindal America's remaining inventory after June 2002, the record

[3] Although Mr. Hotmer's company, Valencia, occupied Jindal America's former office after June 2002, the record indicates that the lease for that office was in Mr. Hotmer's name and Valencia paid the rent on the office until Mr. Hotmer terminated the lease.

indicates that the decrease in Jindal America's sales after June 2002 marked a decline in the economic significance of Mr. Hotmer's relationship with Jindal (to the extent that this relationship involved sales of Jindal America's remaining inventory). Thus, regardless of whether or not Jindal America legally terminated its corporation in June 2002, the record demonstrates that Jindal America had significantly curtailed its United States operations and, after June 2002, was focused only on disposing of its remaining inventory. After June 2002, to the extent that Mr. Hotmer sold any of this inventory, he received the commission of a sales agent. Hence, it would be incorrect to conclude, as petitioners have, that Mr. Hotmer's earlier role in managing Jindal America continued unchanged after June 2002. Furthermore, the fact that Mr. Hotmer was aware of Jindal America's activities after June 2002 and possessed records of its sales for that time period is not surprising given that he was Jindal's agent selling the remaining inventory. These facts do not demonstrate that he was employed by Jindal after June 2002. Rather, the record shows that Mr. Hotmer was no longer employed by Jindal after June 2002 and the nature of his role with the company had changed such that neither Jindal nor Mr. Hotmer/Valencia, were in a position to control the other. Given this change, and our finding that Jindal was not in a position to control Valencia through means other than the control relationship noted above, we have determined that Jindal and Valencia were not affiliated after June 2002 (see the discussion above regarding petitioners' claim that Jindal controls Valencia through a close supplier relationship or a *de facto* joint venture).

Comment 3: Whether it is Appropriate to Apply Partial Adverse Facts Available

After finding Jindal and Valencia to be affiliated from April 2002 through June 2002 (see Comment 1 above), the Department preliminarily assigned an adverse facts available (AFA) dumping margin to Jindal's sales to Valencia during this period because the record lacks Valencia's downstream sales information and Jindal did not cooperate by acting to the best of its ability to comply with requests for information regarding its relationship with Valencia.

Jindal contends that the Department erred in applying AFA because Jindal did disclose, to the best of its ability, its relationship with Mr. Hotmer/Valencia (although it argued that it is not affiliated with Mr. Hotmer's company, Valencia) and the Department never requested that Jindal supply Valencia's downstream sales data. Jindal maintains that, in its first supplemental questionnaire response, it stated that Mr. Hotmer was an employee of Jindal until June 2002 and that, during the POR, Mr. Hotmer was selling PET film through his own firm, Valencia. See Jindal's November 24, 2003 supplemental section A questionnaire response at 13 & 14. Jindal goes on to note that, in response to a subsequent supplemental questionnaire response, it reported further information regarding its relationship with Mr. Hotmer, including details concerning the work performed by, and compensation paid to, Mr. Hotmer from April 2002 through June 2002, a detailed history of Mr. Hotmer's relationship with Jindal and Jindal America, and information regarding its knowledge of Mr. Hotmer's activities with Valencia while he was employed by Jindal and Jindal America. See Jindal's February 19, 2004 supplemental questionnaire response at 5-9. Also, Jindal notes that Valencia fully responded to virtually identical questions from the Department and provided the

Department with answers that are consistent with the information provided by Jindal. Moreover, Jindal points out that Valencia stated that "if the Department requires more information, Valencia is willing to provide any information requested," but the Department never requested additional information from Valencia (e.g., downstream sales information). See Valencia's February 19, 2004 supplemental questionnaire response at 11. Thus, according to Jindal, the record demonstrates that it fully disclosed all relevant information regarding its relationship with Mr. Hotmer/Valencia and, contrary to the Department's claim, this information was disclosed prior to verification (also see the Department's memorandum regarding affiliation and the use of AFA, dated July 30, 2004, (AFA memorandum) in which the Department quoted Jindal as reporting, prior to verification, that Mr. Hotmer was employed by Jindal until June 2002).

While Jindal acknowledges that it did report certain inconsistent information regarding its relationship with Mr. Hotmer, it argues that these are minor inconsistencies which do not indicate that it attempted to conceal any information from the Department. Specifically, Jindal notes that at times, it stated that it employed Mr. Hotmer until March 2002, while at other times, it reported that it employed him until June 2002. Although these responses are at odds, Jindal claims that it was not attempting to mislead the Department given that it has consistently reported the essential elements of its relationship with Mr. Hotmer, namely that it paid Mr. Hotmer to dispose of Jindal America's remaining inventory from April 2002 through June 2002. Moreover, Jindal believes that this inconsistency demonstrates that it was not attempting to mislead the Department for if it had been attempting to mislead the Department, it would have reported March 2002 as the termination date for Mr. Hotmer throughout its questionnaire responses. Further, Jindal claims that it did not "trip up" by reporting that it was not aware of the ownership of Valencia but also noting that Valencia is a small company owned by Mr. Hotmer. See AFA memorandum at 6. Rather, Jindal claims it was making the point that while it believed that Mr. Hotmer established Valencia, it did not know who else was involved with the company.

Finally, Jindal argues that it is not appropriate to apply AFA because neither Jindal, nor Valencia, could have anticipated that the Department would find affiliation by extending the term "employee" to include Valencia. Jindal states that in Ferro Union, the CIT rejected the Department's use of AFA noting that " in order to apply adverse facts available, Commerce must be explicit in its reasoning, and conclude that Saha Thai knew that {the} Companies ... could be considered affiliates and deliberately chose not to disclose them as such." See Ferro Union at 1331. Also, the CIT noted that "Commerce bears the responsibility of asking clear questions, and Saha Thai could not be expected to guess at the meaning and full scope of 'family'" (the Department concluded that an uncle and his nephews are family for purposes of the affiliation provision in the Act). See Ferro Union at 1325. According to Jindal, both it and Valencia are in the same situation as Saha Thai in that neither company could have been expected to guess at the full meaning and scope of the term "employee." In fact, Jindal contends that after fully responding to the Department's questionnaires, including providing reasons why it does not consider itself to be affiliated with Valencia, it thought the matter was resolved until the Department issued its Preliminary Results. In light of the fact that it did disclose its relationship with Mr. Hotmer, it fully responded to the Department's questionnaires and it could not have foreseen the extension of the term "employee," Jindal maintains that it did comply, to the best of its ability, with the Department's requests for information and, therefore, the Department should not apply partial AFA.

Valencia argues that the Department may not legally apply facts available, let alone AFA, because it never requested that Jindal or Valencia provide Valencia's downstream sales data despite that fact that there was ample time to request this information. Valencia notes that the facts available provision in section 776 of the Act is subject to section 782(d) of the Act which requires the Department to "promptly inform the person submitting the response of the nature of the deficiency" and "to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews ... ." Valencia contends that all of the facts relied upon by the Department in finding affiliation were provided in Jindal's and Valencia's first supplemental questionnaire responses, which they filed three months before verification. Although the Department subsequently requested additional information from both parties regarding Jindal's relationship with Valencia, Valencia points out that the Department never identified any deficiencies in either Jindal's or Valencia's questionnaire responses and never asked either party for Valencia's downstream sales data, as suggested by the petitioners. Given that neither Jindal nor Valencia, who stated that it was "willing to provide any requested information,"[4] were provided with an opportunity to provided the downstream sales data, Valencia contends that the Department may not base its decision on facts available.

Furthermore, Valencia argues that the use of adverse inferences is inappropriate because these inferences primarily harm Valencia, not Jindal, by increasing the antidumping duties that Valencia must pay[5], and yet the Department never found that Valencia failed to cooperate to the best of its ability. In fact, Valencia claims that the Department never identified one inconsistency in Valencia's responses. Rather, the Department appears to rest its AFA decision, and the fact that it did not request Valencia's downstream sales data, on supposed confusion created by inconsistencies in Jindal's responses, not Valencia's responses.

Valencia, however, does not find Jindal's responses to be confusing. First, Valencia argues that regardless of the fact that Jindal reported inconsistent information as to when Mr. Hotmer's employment ceased, Jindal carefully explained the details of its post-March 2002 compensation arrangements with Mr. Hotmer. Valencia adds that this inconsistency should not confuse the Department given that Mr. Hotmer was only selling Jindal America's remaining inventory after

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[4] See Valencia's February 19, 2004 supplemental questionnaire response at 11.

[5] Valencia notes that the AFA decision does not affect the assessment rate calculated in this review for Jindal's U.S. affiliate, Jindal America, nor will the AFA decision require Jindal to pay higher cash deposit rates because it is not the importer of record.

March 2002, and both Jindal and Valencia disagree with the Department as to whether Mr. Hotmer should be considered an employee after March 2002. Second, Valencia minimizes Jindal's differing statements regarding who owned Valencia (i.e., Jindal stated that it was not aware of the ownership of Valencia but also noted that Valencia was owned by Mr. Hotmer) by noting that one can be aware that someone owns a substantial percentage of a company but not be aware of the precise ownership structure of the company. Moreover, Valencia notes that it reported its ownership structure to the Department nearly two months before the Department issued its last supplemental questionnaire. Thus, inconsistencies regarding Valencia's ownership could not have delayed the Department. Finally, Valencia asserts that the Department should not have been confused as to who leased the office space used by Jindal America given that both Valencia and Jindal reported that the landlord required the lease to be in Mr. Hotmer's name (rather than the name of an Indian company) but Jindal America paid the office rent (and continued to pay the office while it used the office to sell its remaining inventory). Furthermore, Valencia notes that the Department did not rely upon the facts regarding the office rental to make its finding of affiliation. In summary, Valencia argues that the alleged confusion in the record should not have prevented the Department from requesting Valencia's downstream sales information.

Given that the Department did not notify Jindal or Valencia of a deficiency in its responses with respect to the missing sales data, Valencia contends that the Department cannot conclude that either Jindal or Valencia failed to act to the best of their abilities in responding to the Department's questionnaire responses. Therefore, it cannot base Jindal's dumping margin, in part, on AFA. See Nippon Steel v. United States, 337 F.3d 1373, 1383 (Fed. Cir. 2003)(Nippon Steel)(in which the Court of Appeals for the Federal Circuit (CAFC) ruled that the "{t}he statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of a respondent's ability, regardless of motive or intent.").

Petitioners, however, argue that the Department correctly based Jindal's dumping margin, in part, on AFA given that Jindal attempted to conceal the true nature of its relationship with Mr. Hotmer/Valencia. According to petitioners, instructions in section A of the questionnaire, requesting the respondent to identify any persons which the Department may consider to be affiliated with your company, together with examples of control relationships, were enough to put Jindal on notice that Mr. Hotmer/Valencia may be affiliated to Jindal. Jindal, however, did not identify either of these parties in its response to section A of the questionnaire. When Jindal did reveal information regarding Mr. Hotmer, in response to supplemental questions from the Department, petitioners maintain that Jindal attempted to conceal the true nature of its relationship with Mr. Hotmer/Valencia by claiming that Valencia did not start operating until Jindal America was shut down, reporting that Valencia did not exist before Jindal terminated Mr. Hotmer's employment in March 2002, stating that Valencia and Jindal did not share an office, and denying any knowledge of Valencia's ownership structure. On the other hand, petitioners maintain that in addition to containing no evidence that Jindal America ever shut down, the record indicates that Mr. Hotmer worked for, and received, a salary from Jindal through June 2002, during which time he ordered PET film for his company, Valencia, while operating out of Jindal America's office for which Jindal paid the rent.

Given respondents' attempts at concealment, petitioners claim that respondents should not now benefit simply because their actions caused the Department not to explicitly request Valencia's downstream sales information. In fact, petitioners note that it was only at verification that the Department was able to determine the full extent of the relationship between Jindal and Valencia.

Moreover, petitioners claim that it is irrelevant that the Department did not explicitly ask for Valencia's downstream sales information because both Jindal and Valencia were aware that they were required to report the sales of affiliated parties. Accordingly, petitioners urge the Department to continue to apply AFA in the final results of review. As noted above, however, petitioners contend that Jindal was affiliated with Valencia throughout the POR. Therefore, petitioners submit that, in the final results of review, the Department should base the dumping margin for all of Jindal's sales to Valencia on AFA.

Department's Position:

As explained below, we continue to find that it is appropriate to base Jindal's margin, in part, on AFA. Because we have determined that Jindal was affiliated with its U.S. customer, Valencia, during a portion of the POR, we must base Jindal's dumping margin, in part, on the first sale to unaffiliated parties (see section 772 of the Act). Yet, this information is not on the record of this review. When necessary information is missing from the record, the statute directs the Department to base its determination on the facts otherwise available (see section 776(a)(1) of the Act).

The facts available provision, however, is tempered by the requirement that the Department identify the nature of deficiencies in the record and seek remedies to those deficiencies (see section 782(d) of the Act). In this case, to the extent that the Department was aware of the nature of any deficiency in Jindal or Valencia's responses, it informed the parties of those deficiencies and afforded them an opportunity to correct the deficiencies. However, the nature and extent of the deficiency at issue here (Valencia's missing sales information) did not become fully apparent until late in the proceeding. In its initial section A questionnaire response, Jindal failed to provide any details regarding its relationship with Mr. Hotmer and his connection to its U.S. customer, Valencia. This was so, despite the fact that the statute specifically identifies employers and employees as affiliated parties and the Department's questionnaire requested such information. See section 771(33)(D) of the Act; see also section A of the Department's questionnaire at A-4 (requesting Jindal to list "persons affiliated with your company and provide a description of all such persons") and A-6 (instructing Jindal to identify any "(sub)contractor, lender, exporter, distributor, reseller, and *any other person* involved in the development, production, sale or distribution of the merchandise under review which the Department *may* also consider affiliated with your company" (emphasis added)). Based on information provided by petitioners, the Department sought information from Jindal regarding its relationship with Mr. Hotmer and Mr. Hotmer's involvement in selling PET film during the POR. See the Department's November 7, 2003 supplemental questionnaire at 6. In response to the Department's supplemental section A questionnaire, Jindal reported that it employed Mr. Hotmer until June 2002, and, during the POR, Mr. Hotmer sold PET film through his own firm, Valencia. See Jindal's November 24, 2003 supplemental questionnaire response at 13. However, in that same supplemental questionnaire response, Jindal indicated that Mr. Hotmer continued working for Jindal beyond June 2002, although in another capacity. See id. Jindal's supplemental section A questionnaire response was not sufficiently detailed to allow the Department to definitively determine Mr. Hotmer's employment status with Jindal throughout the entire POR. Thus, the Department sought additional information from Jindal and Valencia regarding this topic. In response to an additional supplemental questionnaire regarding Mr. Hotmer's relationship with Jindal and Valencia, Jindal reported that, during the period April through June 2002, Mr. Hotmer received a salary from Jindal to sell Jindal America's PET film. See Jindal's February 19, 2004 supplemental questionnaire response at 6. In that same response, however, Jindal reported that it employed Mr. Hotmer until March 2002. See id. at 7. Given these conflicting statements, and the importance of Mr. Hotmer's employment status to the issue of affiliation (and the ultimate question of whether, or how much of, Valencia's sales information was required), we issued additional supplemental questionnaires to Jindal and Valencia requesting further information regarding Mr. Hotmer's relationship with those companies. The parties' responses to these supplemental questionnaires contained further facts regarding Jindal's relationship with Mr. Hotmer during the POR that the Department has used in making its affiliation determination. See Jindal's April 14, 2004 supplemental questionnaire response at 1. Thus, the exact nature, and the full extent of the deficiency at issue here, did not become fully apparent until late in the review, despite the fact that the Department provided Jindal (and even Valencia) with numerous opportunities to fully explain the relationships under examination. Consequently, the Department has fulfilled its obligation under section 782(d) of the Act and has properly based Jindal's final dumping margin, in part, on facts available.

With respect to the use of adverse inferences, in selecting from among the facts otherwise available, section 776(b) of the Act provides for adverse inferences when the Department concludes that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information. The Court of Appeals for the Federal Circuit (CAFC) has stated that the Act "does not by its terms set a 'willfulness' or 'reasonable respondent' standard, nor does it require findings of motivation or intent. Simply put, there is no *mens rae* component to the section (776(b)) inquiry." See Nippon Steel v. United States, 337 F.3d 1373, 1383 (Fed. Cir. 2003). Instead, the CAFC held that the test is "the degree to which the respondent cooperates in investigating (its) records and in providing Commerce with the requested information." Id. Jindal seems to argue that because it did not intend to supply the Department with inconsistent, confusing and/or inadequate responses with respect to Jindal and Mr. Hotmer's employer/employee relationship, the Department cannot legally apply AFA. This assessment of the law is incorrect.

Jindal did not act to the best of its ability in providing the Department with the information it needed to determine whether, or how much of, Valencia's sales information was required. Each time Jindal responded to another of the Department's questionnaires, it had access to the information that from April 2002 through June 2002, Mr. Hotmer received a salary from Jindal to sell Jindal America's PET film, that Mr. Hotmer made these sales from an office paid for by Jindal, and that Mr. Hotmer made these sales with the help of an administrative assistant who was compensated by Jindal. Jindal also had access to the information that during this time period, Mr. Hotmer purchased subject merchandise from Jindal through Valencia. Nonetheless, although the company had all of this information, Jindal only placed these facts on the record after the Department issued to it numerous supplemental questionnaires in order to sort out the affiliation issue. Moreover, had the petitioners not initially investigated and inquired into Mr. Hotmer's relationship with Jindal, because of Jindal's failure to appropriately disclose the facts concerning the potential affiliation on the record of this case, the Department might not have learned in detail the specifics of Mr. Hotmer/Valencia's affiliation with Jindal.

We consider, therefore, that Jindal's failure to initially report information regarding its relationship with Mr. Hotmer and Valencia, and its subsequent inconsistent, inadequate and misleading responses with respect to this issue, demonstrate its failure to act to the best of its ability.

Furthermore, Valencia's importer-specific/fairness argument makes little sense with respect to the requirements of sections 776(a) and (b) of the Act. The respondent in this case is Jindal. The Department has found that Jindal did not act to the best of its ability in answering several questions throughout the proceeding pertaining to its affiliations with Mr. Hotmer and Valencia. Therefore, the Department is directed to use an adverse inference in applying the facts available and thus, the Department properly applied partial AFA in this case.

Comment 4: Whether the Department Applied the Appropriate Adverse Facts Available Rate

According to Valencia, if the Department continues to base Jindal's margin, in part, on AFA, it should use, as AFA, the highest dumping cash deposit rate applied in this case to date, 5.71 percent, which is the highest dumping margin from the investigation in this proceeding (24.14 percent), adjusted by the countervailing duty export subsidy rate. Valencia argues that it paid countervailing duties on all of its purchases of subject merchandise from Jindal during the POR and thus, applying an unadjusted 24.14 percent margin as partial AFA would be punitive and bear no relationship to Valencia's actual antidumping margin.

Citing De Cecco, Valencia argues that the unadjusted AFA rate violates the intent of the U.S. Congress that AFA rates be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase as a deterrent to non-compliance. See Valencia's September 13, 2004 case brief at 22 (citing De Cecco v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000)(De

Cecco)). Valencia argues that the increase in the AFA rate that is attributable to countervailing duties (18 percent) is entirely due to countervailing duties that it already paid. Hence, Valencia argues that applying the unadjusted AFA rate would be imposing a punitive, aberrational, and uncorroborated rate in violation of the Act.

Petitioners argue that the AFA rate used by the Department in the Preliminary Results is based on verified questionnaire responses of an Indian PET film producer examined during the investigative phase of this proceeding and thus, satisfies the requirement that the adverse margin has probative value. Petitioners further add that due to a long series of court challenges and remands (see Final Results of Redetermination Pursuant to Court Remand (March 3, 2004); upheld by Dupont Teijin Films v. United States, 2004 WL 1368838 (June 18, 2004)(CIT 2004)), the Department could not add countervailing duty rates to the U.S. price when calculating the dumping margins in the underlying PET film investigation. Thus, petitioners conclude that the countervailing duty adjustment to U.S. price was not made to calculate the investigation margin used here as AFA and cannot be applied now.

Lastly, petitioners claim that the record shows that the cash deposits for countervailing duties have not been paid on Jindal's sales. Thus, the countervailing duty adjustment at issue is not warranted.

Department's Position:

We disagree with Valencia. The AFA rate applied to sales from Jindal to Valencia during April, May, and June of 2002 was based on an actual antidumping rate calculated in the underlying investigation. This rate was based on verified questionnaire responses from an Indian PET film producer and thus reflects recent commercial activity of an Indian company that sold PET film to the United States. Therefore, we consider this rate to be both reliable and relevant. The Department notes that there were much higher margin rates on individual sales in the investigation and in this review. Rather than apply these higher rates, the Department believes the AFA rate applied in the Preliminary Results acts as a deterrent to non-compliance and yet is not aberrational.

Regarding petitioners' claim that the Department stated that cash deposits for countervailing duties were never paid on those sales to which the Department applied AFA, petitioners are incorrect. The Department did not state that Valencia failed to pay its proper cash deposits for countervailing duties, and so the Department has not considered this incorrect claim in its decision.

Comment 5: Whether Jindal Polyester Limited Properly Classified Certain Merchandise as Non-prime Merchandise

Jindal asserts that the Department mistakenly reclassified certain U.S. sales of shorter rolls of PET film as prime merchandise. Jindal states that these shorter rolls of PET film were excess test-length rolls which were too short for normal production runs and thus, they had to be sold as non-prime merchandise. While a buyer may be willing to purchase these shorter rolls of PET film, Jindal notes that the need to frequently change these rolls during production results in lower productivity and higher costs, thus reducing the value of these rolls to buyers. Hence, Jindal classified its sales of shorter rolls of PET film as sales non-prime merchandise.

Petitioners contend that the Department correctly reclassified these shorter rolls as prime merchandise because 1) with respect to all relevant physical characteristics, Jindal's shorter rolls of PET film are identical to prime merchandise (petitioners note that pursuant to section 771(16) of the Act, the Department determines whether merchandise is comparable based on commercially meaningful physical characteristics), and 2) there is no evidence that shorter rolls of PET film are purchased and used by customers for different applications than those rolls of PET film classified as prime merchandise. Petitioners also question whether the claimed shorter rolls of PET film are actually of shorter length, pointing out that the weight of two of the rolls classified by Jindal as test rolls is more than the weight reported in half of Jindal's U.S. sales observations.

Department's Position:

We disagree with Jindal. Jindal's sole reason for considering shorter rolls of PET film to be non-prime merchandise is that these rolls cannot be used by customers in normal production runs; hence, buyers consider shorter rolls of PET film to be less valuable than full rolls of PET film. The Department, however, finds that no evidence on the record supports the position that Jindal America consistently sold shorter rolls of PET film at prices lower than that charged for full rolls of identical PET film (identical with respect to the physical characteristics used for product comparison purposes, namely grade, thickness, surface qualities and application) during the POR. See memorandum from Jeff Pedersen, Senior International Trade Compliance Analyst, to the File, "Pricing analysis of sales of shorter roles and prime merchandise sold in the United States," dated concurrently with this memorandum.

Moreover, Jindal reported home market sales of shorter rolls of PET film (end balances of jumbo rolls) which it classified as sales of prime merchandise. Based on evidence on the record, the Department finds the end balances of jumbo rolls sold in the home market highly similar to the shorter rolls sold by Jindal America. See Jindal's March 11, 2004 supplemental questionnaire response at 2-3. The Department agrees with Jindal that the sales of end balances of jumbo rolls in the home market should be classified as prime merchandise. Likewise, we have determined that the shorter rolls sold by Jindal America should be classified as prime merchandise. In contrast to other merchandise which Jindal identified as non-prime, Jindal provided nothing on the record, or at verification to, substantiate that the shorter rolls were in any way defective.

Comment 6: Whether the Department Incorrectly Converted the Currency of Certain Movement Expenses

Jindal claims that the Department erred by mistakenly converting marine insurance and foreign inland freight expenses into rupee amounts when these expenses were already reported in rupees. Jindal requests that this error be corrected for the final results of review.

Petitioners agree that the Department failed to properly convert marine insurance and foreign inland freight expenses into U.S. dollar amounts before using them in an equation containing U.S. dollar denominated figures.

Department's Position:

We agree with Jindal and have made the necessary adjustments for the final results of review.

Comment 7: Whether the Department Incorrectly Calculated Home Market Billing Adjustments

Jindal asserts that the Department mistakenly included excise duties among home market billing adjustments and added, rather than deducted, other billing adjustments from the home market invoice price.

Petitioners did not comment on this issue.

Department's Position:

We agree with Jindal. For the final results of review, we have omitted excise duties from the home market billing adjustments and have subtracted other billing adjustments from the home market invoice price.

Comment 8: Whether the Department Incorrectly Calculated the Net Home Market Price

Jindal claims that in calculating the net home market price, the Department should have deducted from the gross unit price, home market indirect selling expenses and inventory carrying costs. Jindal contends that these expenses should have been deducted from the gross unit price because in comparing the net home market price to the U.S. price, the Department added an "offset" to the home market price which consists of indirect selling expenses and inventory carrying costs that were incurred in the home market on U.S. sales. Jindal requests that the Department correct this error for the final results of review.

Petitioners find Jindal's ministerial error allegation difficult to understand, but state that they can find no error by the Department with respect to home market indirect selling expenses. Petitioners note that simply because the Department adjusted the foreign unit price in dollars by a commission offset in order to calculate normal value, it should not subtract home market indirect selling expenses and inventory carrying costs from the gross home market price in calculating the net price.

Department's Position:

We disagree with Jindal. When the average commission expense of the home market comparison sales exceeds the commission expense on the U.S. sale, the Department's practice is to add to the foreign unit price the lesser of: 1) the difference between the home market and U.S. commission expenses or 2) the indirect selling expenses (including inventory carrying costs) incurred in the home market on U.S. sales. This adjustment is meant to offset differences between the commission expenses incurred on home market and U.S. sales and does not justify subtracting home market indirect selling expenses and inventory carrying costs from the gross home market price. The Department subtracts home market indirect selling expenses (including inventory carrying costs) from the gross home market price only when it has granted a CEP offset. In this case, the Department has not granted Jindal a CEP offset.

Comment 9: Whether the Department Should Offset its Calculations for Negative Dumping Margins

Jindal notes that the Appellate Body of the World Trade Organization (WTO) found the Department's practice of offsetting negative margins to be inconsistent with Article 2.4.2 of the Antidumping Agreement (ADA). See United States – Final Determination on Softwood Lumber from Canada, AB-2004-2, World Trade Organization, Report of the Appellate Body, WT/DS264/AB/R, 11 August 2004. Based on the Appellate Body's ruling, Jindal concludes that the Department should recalculate its margins without setting negative margins to zero.

Petitioners contend that Jindal's argument ignores two important facts. First, the WTO Appellate Body decision cited by Jindal addresses the calculation of dumping margins in antidumping investigations, not administrative reviews. Petitioners maintain that neither the WTO nor any WTO dispute panel has found the Department's practice of offsetting negative margins in an administrate review to be inconsistent with the ADA or any other U.S. international obligations. Furthermore, petitioners claim that even if the decision cited by Jindal could be applied to administrative reviews, the Department may not change its long-standing practices in response to a WTO decision without undertaking consultations with Congress, the U.S. Trade Representative (USTR) and the public. See Petitioners' rebuttal brief at 15 (citing 19 U.S.C. § 3533(g)(1)).

Second, petitioners state that despite the WTO decision cited by Jindal, the Department has continued its practice of offsetting negative margins in administrative reviews and this practice continues to be upheld by U.S. courts. See Petitioners' rebuttal brief at 16 (citing Timken Co. v. United States, 354 F.3d 1334, 1341 (Fed. Cir. 2004) (Timken 2004)). Also, petitioners note that the practice of offsetting negative margins is consistent with section 771(35)(B) of the Act, which requires the Department to calculate the average dumping margin by summing dumping margins and dividing by the total value of U.S. sales. Thus, comparisons where the U.S. price exceeds normal value are not entertained in calculating the average dumping margin.

Department's Position:

As we have discussed in prior cases, our methodology is consistent with our statutory obligations under the Act. See, e.g., Notice of Final Results of Antidumping Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada, 69 FR 75921 (December 20, 2004), and accompanying Issues and Decision Memorandum at Comment 4; Final Results of Administrative Antidumping Review: Certain Welded Carbon Steel Pipes and Tubes from Thailand 69 FR 61649 (October 20, 2004), and accompanying Issues and Decision Memorandum at Comment 7; and Notice of Final Results of Antidumping Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada 69 FR 68309 (November 24, 2004), and accompanying Issues and Decision Memorandum at Comment 8.

As the petitioners have argued, the CAFC has affirmed the Department's methodology as a reasonable interpretation of the statute. See Timken 2004 at 1342 - 43 (covering an antidumping administrative review of tapered roller bearings from Japan). More recently, the CAFC again affirmed the Department's methodology as consistent with the statute with respect to an antidumping investigation in Corus Staal BV and Corus Stall USA Inc. v. Department of Commerce et. al., 04-1107 (CAFC 2005) (Corus Staal), issued January 21, 2005, at 8-9, *publication pending*. The Court in Corus Staal held that the Department's interpretation of section {771(35) of the Act} to permit this methodology was permissible whether it be in the context of an administrative review or investigation. See id. at 7.

With respect to the respondent's arguments involving the WTO decision in United States – Final Determination on Softwood Lumber from Canada, the CAFC stated in Corus Staal that WTO decisions are in no way binding on United States law, absent the express implementation process provided for in the statute involving not only the Department, but also the United States Trade Representative and Congress. See id. At 8-9 (relying, in part, on U.S.C. 3512(a) and 2504(a) (2000) and Suramerica de Aleciones Lamindas, C.A. v. United States, 966 F. 2d 660, 688 (Fed. Cir. 1992)).

In implementing the URAA, Congress made clear that reports issued by WTO panels or the Appellate Body "will not have any power to change U.S. law or order such a change." See SAA at

660. The SAA emphasizes that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures . . . . " Id. To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 U.S.C. § 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary); see also, SAA at 354 ("After considering the views of the Committees and the agencies, the Trade Representative *may* require the agencies to make a new determination that is "not inconsistent" with the panel or Appellate Body recommendations..." (Emphasis added)).

Furthermore, with respect to United States – Final Determination on Softwood Lumber from Canada, we note that the CAFC in Corus Staal referenced the investigation, explicitly stating that "we reject Softwood Lumber as nonbinding because the finding therein was not adopted as per Congress's statutory scheme." Corus Staal at 10. Thus, for all the reasons stated herein, the Department has continued to calculate the dumping margin based on the total amount of duties owed and apply its standard methodology.

Comment 10: Whether to Increase the Price of Certain U.S. Sales by Countervailing Duties Imposed to Offset Export Subsidies

During the course of this administrative review, the Department discovered that certain U.S. importers of Jindal's PET film failed to declare their imports as being subject to antidumping or countervailing duties on PET film from India, and failed to deposit countervailing duties on those imports. On October 15, 2004, the Department issued a letter to all interested parties notifying them of its discovery and stating that "for the final results of the review, we do not intend to increase the U.S. prices of these sales by the countervailing duty that has been imposed by the Department to offset export subsidies."

Jindal contends that the Department's intended action is contrary to law, unfair, and inappropriate. Specifically, Jindal notes that the statute requires U.S. price to be increased by countervailing duty imposed on subject merchandise to offset an export subsidy and the Department has stated that countervailing duties are imposed upon the issuance of a countervailing duty order. See section 772(c)(1)(C) of the Act; see also Dupont Teijin Films v. United States, 2004 Ct. Intl. Trade LEXIS 65, Slip Op. 2004-70 (June 18, 2004)(Dupont III) at 6, n.3 ("Commerce considers countervailing duties to be imposed upon the issuance of a countervailing duty order."). Thus, Jindal contends that actual payment, or even deposit of a countervailing duty, is not required for the upward adjustment to U.S. price. In fact, Jindal claims that if payment or collection were necessary for the adjustment, the adjustment would likely never be made since actual payment usually occurs well after the dumping margins are calculated. Moreover, Jindal contends that "imposed" does not mean "paid," for if it did, Congress would have used the word "paid" in the statute. Further, Jindal points out that the upward adjustment to U.S. price is made for countervailing duties imposed on subject merchandise, not imposed on importers. Thus, the fact that some importers may have failed to deposit, or pay the duty owed, does not mean that a countervailing duty has not been imposed on the subject merchandise. Lastly, Jindal notes that even the Department recognized that countervailing duty has been imposed on imports of Jindal's merchandise since it stated, in its letter of October 15, that it does "not intend to increase the U.S. prices of these sales by the countervailing duty that has been imposed by the Department to offset export subsidies." Therefore, Jindal concludes that if the Department fails to increase the U.S. prices of its sales for countervailing duty, even though it recognizes that countervailing duty has been imposed on the subject merchandise, it is violating the statute.

While Jindal recognizes that the countervailing duties should have been deposited and paid,[6] it argues that it is unfair to penalize Jindal for the actions of importers over whom Jindal has no control. Jindal argues that the Department's intended action will result in an extremely high deposit rate on its future entries and thereby prohibit it from selling to all importers in the United States, not just to those who evaded the duties. Morever, Jindal states that it was under the impression that all U.S. importers of its PET film were properly depositing countervailing duties, and thus, it requested this administrative review to reduce its deposit rate by way of the countervailing duty adjustment allowed by the statute. By finding out extremely late in the process, after expending considerable time and resources on this review, that the Department intends to deny the U.S. price adjustment for countervailing duty, Jindal claims that it is prejudiced because it cannot now withdraw its review request.

Also, Jindal argues that it was denied due process because the Department's approach appears to be a new policy initiated for the first time in this review without prior notice to Jindal.[7] Further, Jindal claims the Department's intended action is tantamount to selective prosecution given that, on occasion, other importers must not have deposited countervailing duty and the exporter was not penalized, and yet now, for the first time, an exporter, namely Jindal, is being singled out and penalized.

Furthermore, Jindal contends that the Department's intended action is inappropriate for a number of reasons. First, the Department's intended action raises a number troubling questions. For example: 1) Will the Department request countervailing duty deposit information from Customs and Border Protection (CBP) in every antidumping duty proceeding in which an export subsidy adjustment is

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[6] Jindal attached to its comments written statements from one of its officials in which the official notes that he contacted the U.S. importers in question and instructed them to deposit the full amount of the applicable duties immediately.

[7] Jindal claims that had it known that the Department would review CBP's records, it would have contacted its importers, and instructed them to deposit countervailing duty, if they had not already done so, or refrained from requesting a review.

possible? 2) What will the Department do if an importer deposits some, but not all of the countervailing duty due? 3) How will the Department handle situations where an importer fails to deposit countervailing duty but later corrects its error and pays the countervailing duty due? and 4) Must companies canvass their U.S. importers before requesting a review? Next, Jindal points out that the Department's letter of October 15 seems to indicate that Jindal will be penalized for the U.S. importers' actions, while the importers will be given a free pass not to pay the duty deposits. Specifically, Jindal states that since the Department does not intend to make the countervailing duty adjustment to U.S. price, it appears that CBP does not intend to collect the countervailing duty deposits; for if the Department knew that CBP intended to ultimately collect the countervailing duty deposits, it would be inappropriately denying the countervailing duty adjustment here (the most inappropriate action that the Department could take under the circumstances).

Rather than penalizing Jindal, the respondent contends that the Department should instead require the offending parties to pay the duty due. However, if the Department insists on the proposed course of action, Jindal urges the Department, when calculating the cash deposit rate, to increase U.S. price by the countervailing duty on export subsidies, even though it will not make this adjustment when calculating the importer-specific assessment rates for importers who failed to deposit countervailing duties. By modifying the intended approach, Jindal maintains that it will not be unjustly penalized with a high cash deposit rate on its future sales of PET film.

Petitioners argue that the purpose of section 772(c)(1)(C) of the Act is to ensure that both antidumping and countervailing duties are not assessed to compensate for the same cause of unfairly priced imports. Since there is no risk of that happening when countervailing duties will not be paid, petitioners argue that it is inappropriate to apply the countervailing duty offset here. Moreover, petitioners contend that applying the offset when countervailing duties will not be paid will artificially lower the antidumping duties on Jindal's sales. Petitioners contend that the reasons why the duties have not been paid is irrelevant. What is important, according to petitioners, is that the Department calculate accurate dumping duties in the instant administrative review. While the cash deposit rate on future entries will not reflect the countervailing duty offset, petitioners point out that if importers pay the countervailing duties on those future entries, the Department will take this into account in future administrative reviews.

Petitioners also find Jindal's fairness argument to be specious. First, petitioners state that if the deposit of countervailing duties by Jindal's importers was a determining factor in its decision to request an administrative review, it could have inquired as to the payment of these deposits prior to requesting the review. Second, petitioners challenge Jindal's claim that the non-payment of countervailing duties was first raised on October 15, 2004. Petitioners maintain that they first raised this issue in their February 11, 2004 letter in which they challenged Jindal's assignment of a countervailing duty adjustment to all of its U.S. sales.

Lastly, petitioners assert that the Department may not calculate separate antidumping duty rates for Jindal. According to petitioners, the statute does not allow for multiple antidumping duty rates for one producer/exporter.

Department's Position:

We disagree with Jindal's position that the Department may not take into consideration the nonpayment of countervailing duties when deciding whether to adjust U.S. price by countervailing duties imposed on export subsidies. The purpose of section 772(c)(1)(C) of the Act, which provides that the Department will increase U.S. price by "the amount of any countervailing duty imposed on the subject merchandise under subtitle A to offset an export subsidy," is to prevent the double application of duties. As the CIT explained in Dupont Teijin Films v. United States, 273 F. Supp. 2d 1347, 1349 at n. 4 (CIT 2003)(Dupont I), "the basic economic theory behind these types of adjustments 'is that in parallel {antidumping} and countervailing duty investigations, if the Department finds that a respondent received the benefits of an export subsidy program, it is presumed the subsidy contributed to lower-priced sales of subject merchandise in the United States market by the amount of any such export subsidy.' (citing the Department's Issues and Decision Memorandum). The offset is designed to prevent the 'double application' of duties when the subsidies and dumping are related." Id. See also Dupont Teijin Films USA, LP, et. al. v. United States, 297 F. Supp. 2d. 1367,1368 at n.1 (CIT 2003). Here, however, there will be no double application of duties because the entries in question have been liquidated without regard to countervailing duties (or antidumping duties).

While it is true that the Department has interpreted the word "imposed" in section 772(c)(1)(C) of the Act to mean the issuance of a countervailing duty order if the final results of the first countervailing duty administrative review have not yet been issued, it is nonsensical to conclude that Congress intended for the Department to reduce dumping duties on certain entries to account for countervailing duties when, as a factual matter, there will be no countervailing duties assessed or paid on the entries in question. See Dupont Teijin Films USA, LP, et. al. v. United States, 297 F. Supp. 2d. 1367,1373 (CIT 2003); see also Serampore Industries v. United States, 675 F. Supp. 1354, 1360 (CIT 1987) (Commerce's interpretation of the word "imposed" to mean "actually imposed" or "assessed" is supported by the legislative history and is sufficiently reasonable). To increase U.S. price to account for duties on export subsidies when no such duties will ever be collected would allow foreign companies to benefit from export subsidies and sell their merchandise in the United States at less than fair prices; something the Act was designed to prevent. As the Court articulated in Tung Mung, "The ITA has been vested with authority to administer the antidumping laws in accordance with the legislative intent. To this end, the ITA has a certain amount of discretion {to act} ... with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law." See Tung Mung Dev. Co. v. United States, 219 F. Supp. 2d 1333, 1343 (CIT 2002) (citing Mitsubishi Elec. Corp. v. United States, 700 F. Supp. 538, 555 (1988), aff'd 898 F. 22d 1577 (Fed. Cir. 1990) (Tung Mung)). Consistent with the Department's discretion to act to prevent circumvention of the antidumping duty law, the Department will not adjust the U.S. price to account for countervailing duties on export subsidies where no such duties on the merchandise sold will ever be assessed or paid. Furthermore, the Department will notify the appropriate authorities to allow them to seek any available remedies against the importers now that duties cannot be applied to the entries in question.

Additionally, our approach to this matter does not constitute a new policy. The Department frequently uses information provided by CBP in administering antidumping duty proceedings. When it is administratively feasible to determine that duties will not be applied in accordance with the Department's instructions, the Department will act accordingly. In fact, we know of no prior administrative review in which the Department knew that countervailing duties would not be applied to certain entries and yet increased the U.S. price of related sales by duties on export subsidies. Furthermore, with respect to this issue, the Department informed parties of its intention not to increase the U.S. price to offset duties on export subsidies and solicited comments regarding its intentions from interested parties, including Jindal. In addition, Jindal was given the opportunity to comment on the information placed on the record and make its arguments known.

Also, we disagree with Jindal's suggestion that the Department take into account countervailing duties on the sales in question when calculating the cash deposit rate, but not the assessment rate. As noted above, for the sales in question, there are no countervailing duties to take into account. Moreover, section 751(a)(2)(C) of the Act states that "{t}he determination under this paragraph {referring to administrative review determinations} shall be the basis ... for deposits of estimated duties." In calculating the weighted-average dumping margin in this review, we did not adjust the U.S. price of the sales in question to offset countervailing duties. Hence, we have not made this adjustment in calculating the cash deposit rate.[8] If, in future administrative reviews, the facts on the record indicate that it is appropriate to offset countervailing duties on export subsidies, the Department will do so and both the assessment and cash deposit rates established in those reviews will reflect the offset to countervailing duties.

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[8] The Department notes that in this instance, the facts regarding payment of certain countervailing duties were on the record and clearly demonstrated that the action described above was necessary and proper. The Department notes that in many cases, CBP records are either unobtainable and/or do not clearly demonstrate whether respondents accurately paid the applicable antidumping/countervailing duties.

Recommendation

Based upon our analysis of the comments received, we recommend adopting the above positions. If you agree, we will publish the final results of review and the final weighted-average dumping margin in the Federal Register.

Agree ____________ Disagree ____________

____
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

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Date