71 FR 47485, August 17, 2006

A-533-824
POR: 12/21/2001-06/30/2003
Public Document
AD/CVD Operations
O4:MZ/DEJ/KM

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

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Certain Polyethylene Terephthalate Film, Sheet and Strip from India: July 1, 2004, through June 30, 2005

Summary

The Department of Commerce (the Department) has analyzed the case briefs submitted by respondents in the 2004-2005 administrative review of the antidumping duty order on certain polyethylene terephthalate film, sheet and strip (PET film) from India. As a result of this analysis, the Department has made changes, including corrections of certain ministerial errors, to the preliminary dumping margin calculations. 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 case briefs:

Comment 1: Whether the Department Erroneously Employed Its Practice of Zeroing Negative Margins

Comment 2: Whether the Department Made a Currency Conversion Error in Calculating Jindal's Dumping Margin

Comment 3: Whether the Department Should Continue to Require MTZ to Submit Sales Data From the Window Periods Extending Beyond the Period of Review

Comment 4**:** Whether it is Necessary to Distinguish Between MTZ's Sales of Prime and Non-prime Merchandise in Calculating Normal Value

Comment 5: Whether the Department Should Adjust Polyplex's U.S. Prices for Duty Drawback

Comment 6: Whether the Department Should Have Compared PET Film Based on the Specific Thickness of the Film Rather Than Thickness Ranges

Background

This review covers PET film exported to the United States by the following producers/exporters: Garware Polyester Limited (Garware), MTZ Polyfilms, Ltd. (MTZ), Jindal Poly Films Limited[1] (Jindal), and Polyplex Corporation Ltd. (Polyplex). The period of review (POR) is July 1, 2004, through June 30, 2005. The Department issued its preliminary results of review on April 3, 2006. See Certain Polyethylene Terephthalate Film, Sheet and Strip From India: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 71 FR 18715 (April 12, 2006) (Preliminary Results). In the Preliminary Results, the Department rescinded the review with respect to Garware. See Preliminary Results, 71 FR 18715. In response to the Department's invitation to comment on the preliminary results of this review, respondents Jindal, MTZ and Polyplex submitted case briefs to the Department on May 12, 2006 (hereinafter, Jindal Case Brief, MTZ Case Brief, Polyplex Case Brief). Petitioners[2] did not submit case briefs. No interested parties submitted rebuttal briefs.

Discussion of the Issues

Comment 1: Whether the Department Erroneously Employed Its Practice of Zeroing Negative Margins

Both Jindal and Polyplex contend that the Department should not have employed its practice of setting negative transaction-specific dumping margins to zero in calculating overall weighted-average dumping margins, a practice commonly referred to as zeroing. See Jindal Case Brief at 2-3 and Polyplex Case Brief at 4-7. Because zeroing in administrative reviews is not required under U.S. law and has recently been found to be inconsistent with the Antidumping Agreement, Jindal argues that the Department must bring its practice into conformity with its international obligations and not zero negative dumping margins in this

[1] Formerly Jindal Polyester Limited.

[2] The petitioners are Dupont Teijin Films, Mitsubishi Polyester Film Of America, Toray Plastics (America), Inc., and SKC America, Inc.

case.[3] See Jindal Case Brief at 2-3. Echoing Jindal's concerns, Polyplex points out that the Court of Appeals for the Federal Circuit (CAFC) held that the statute was ambiguous as to the methodology required to calculate dumping margins, and thus, the Department has the discretion to change its methodology to meet its obligation under the Antidumping Agreement. See Polyplex Case Brief at 5 (citing Timken Co. v. U.S., 354 F.3d 1334, 1342 (Fed. Cir. 2004)). Therefore, Polyplex contends that the Department has the statutory authority to implement the WTO Appellate Body decision in Zeroing in the instant administrative review. See id.

Department's Position:

Section 771 (35)(A) of the Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise." (Emphasis added). The Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of the statute. Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir.), cert. denied sub nom., Koyo Seiko Co. v. United States, 543 U.S. 976 (2004). See also Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006).

Respondents have cited to two WTO dispute settlement reports finding the denial of offsets by the United States in specific administrative determinations to be inconsistent with the Antidumping Agreement. With respect to US – Softwood Lumber, consistent with section 129 of the URAA, the United States' implementation of that WTO report affected only the specific administrative determination that was the subject of the WTO dispute: the antidumping duty investigation of softwood lumber form Canada. See 19 U.S.C. 3538. With respect to US – Zeroing (EC Complainant), the United States has not yet gone through the statutorily mandated process of determining how to implement the report. See 19 U.S.C. 3533 and 3538. As such, neither the implementation of US – Softwood Lumber, nor the Appellate Body's report in US – Zeroing (EC Complainant) has any bearing on whether the

---

[3] See Jindal case Brief at 3 and nn. 1-2 citing Timken Co. v. United States, 354 F.3d 1334, 1341 (Fed. Cir. 2004) ("the statute does not plainly require consideration of only those dumping margins with a positive value"); United States– Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), Report of the Appellate Body, WT/DS294/AB/R (April 18, 2006), at para. 135; Murray v. The Schooner Charming Betsy, 6 U.S. (Cranch) 64, 118 (1804); U.S. - Softwood Lumber, NAFTA Panel (June 9, 2005)(U.S.-Softwood Lumber) at p. 25 citing DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 US 568, 574-75 (1988) ("{a}n other wise permissible agency interpretation which conflicts with a U.S. international obligation is, absent a clear legislative command, contrary to law").

Department's denial of offsets in this administrative determination is consistent with U.S. law. See Corus Staal, 395 F.3d at 1347-49; Timken, 354 F.3d at 1342. Accordingly, the Department will continue in this case to deny offsets to dumping based on export transactions that exceed normal value.

Comment 2: Whether the Department Made a Currency Conversion Error in Calculating Jindal's Dumping Margin

Jindal alleges that the Department made a clerical error by treating domestic inventory carrying cost (DINVCARU) on merchandise sold to the United States as if it had been reported in U.S. dollars, when it was reported in rupees.[4] According to Jindal, the Department should have converted this cost from rupees to U.S. dollars in calculating the dumping margin.

Department's Position:

We agree with Jindal. Jindal reported DINVCARU in rupees;[5] however, we failed to convert this variable into U.S. dollars in calculating Jindal's preliminary dumping margin. See Memorandum to the File from Kavita Mohan, Case Analyst, AD/CVD Operations 4, concerning, "Analysis Memorandum for Jindal Poly Films Limited," dated August 10,2006. We have corrected this error for the final results of review.

Comment 3: Whether the Department Should Continue to Require MTZ to Submit Sales Data From the Window Periods Extending Beyond the Period of Review

MTZ requests that, in future segments of this proceeding, it no longer be required to submit home market sales data from the window periods extending beyond the POR.[6] MTZ points out that the Department did not use the requested pre- and post-POR window period data in this review and claims that it demonstrated that such data is unnecessary and needlessly complicates the reporting requirements. See MTZ's Case Brief at page 2.

---

[4] See Jindal's Case Brief at 2 (citing Jindal's November 28, 2005, and February 27, 2006, supplemental questionnaire responses).

[5] See Jindal's Case Brief at 2 (citing Jindal's November 28, 2005, supplemental questionnaire response at 58).

[6] Namely, data from the three months immediately preceding and two months immediately following the POR.

Department's Position:

Although not relevant to the outcome of this review, MTZ's argument is one that is likely to come up again in the future, yet evade review by never being relevant to the review in issue. Accordingly, we address it here. As noted in the Department's questionnaire, the reporting period for comparison market sales depends upon the dates of the respondent's U.S. sales. See the Department's August 9, 2005, questionnaire to MTZ. Thus, a decision as to whether MTZ must report window period data outside the POR in future administrative reviews would have to be made during those reviews because it would be based on the dates of MTZ's U.S. sales during the POR. Nevertheless, consistent with Act and the Department's regulations, in future administrative reviews we will continue to request that MTZ report comparison market sales for all months during the POR in which it made U.S. sales as well as three months immediately preceding the first, and two months immediately following the last, reported U.S. sale. See sections 773(a)(1) and 777A(d)(2) of the Act and 19 CFR 351.414(e)(2).

Comment 4: Whether it is Necessary to Distinguish Between MTZ's Sales of Prime and Non-prime Merchandise in Calculating Normal Value

MTZ contends that there was no need to distinguish between its home market sales of prime and non-prime merchandise given that prices of prime and non-prime merchandise sold to the same customer at the same time were similar. Thus, MTZ requests that the Department not distinguish between sales of prime and non-prime merchandise in calculating NV. See MTZ's Case Brief at 2.

Department's Position:

Given the difference in the physical characteristics between prime and non-prime merchandise, as reflected in MTZ's own records,[7] and the potential distortion resulting from comparing sales of prime merchandise in the U.S. market to sales of non-prime merchandise sold in India, we continue to find that it was appropriate for the Department to distinguish between MTZ's sales of prime and non-prime merchandise. This approach is consistent with the Department's practice. See Stainless Steel Sheet and Strip in Coils From Germany; Notice of Final Results of Antidumping Duty Administrative Review, 70 FR 73729 (December 13, 2005), and accompanying Issues and Decision Memorandum at Comment 6, (noting that "{w}hether a sale is of prime or non-prime merchandise is critical to our analysis, because it is the Department's practice to match home market sales of prime merchandise to U.S. sales of prime merchandise and to match home market sales of non-prime merchandise to U.S. sales of non-prime merchandise." See also Stainless Steel Sheet and Strip in Coils From Mexico;

[7] MTZ explained that "A" grade film is ". . . film which meets all specifications, whereas, non-"A" grade film is film which has some physical defects and does not meet all of the specifications for the film." See MTZ's March 16, 2006, submission at 1.

Final Results of Antidumping Duty Administrative Review, 70 FR 3677 (January 26, 2005), and accompanying Issues and Decision Memorandum at Comment 12 (referencing a Departmental memorandum outlining the separate treatment of non-prime merchandise in matching products, when performing the arm's-length and cost tests, and in calculating NV).

Comment 5: Whether the Department Should Adjust Polyplex's U.S. Prices for Duty Drawback

Polyplex argues that despite stating in its initial questionnaire response that it was not claiming a duty drawback adjustment, information submitted subsequently in response to a supplemental questionnaire provides sufficient evidence to support a duty drawback adjustment to U.S. price. See Polyplex Case Brief at 1. Noting that it submitted the amount of the duties exempted under India's advance license scheme,[8] Polyplex claims that the record it established with respect to duty drawback is the same as the record established by Jindal, another respondent who received a duty drawback adjustment in this review. See id. Thus, Polyplex urges the Department to adjust its U.S. prices for duty drawback.

Department's Position:

We disagree with Polyplex. Section 772(c)(1)(B) of the Act directs the Department to increase U.S. prices by the amount of any import duties which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States. In determining whether a duty drawback adjustment is appropriate, the Department applies a two-prong test requiring[9] the respondent to demonstrate that: (1) the import duty paid and rebate payment are directly linked to, and dependent upon, one another, or in the context of a duty exemption, the exemption is linked to the exportation of subject merchandise; and (2) there were sufficient imports of the imported raw material to account for the drawback received on the exports of the manufactured product.[10] Polyplex did not link the

[8] The Department requested this information in order to adjust the production costs reported by Polyplex.

[9] See Allied Tube & Conduit Corp. v. United States, 132 F. Supp. 2d 1087, 1093 ("As with all favorable adjustments to normal value or export price, respondent bears the burden of establishing both prongs of the {duty drawback} test, and therefore, its entitlement to a duty drawback adjustment.") (citing Primary Steel, Inc. v. United States, 17 CIT 1080, 1090, 834 F. Supp. 1374, 1383 (CIT 1993) ("The burden of creating a record from which the ITA could determine whether {respondent} was entitled to a duty drawback adjustment rested with {respondent}, not Commerce.")).

[10] See Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 68 FR 6889 (February 11, 2003), and accompanying Issues and Decision Memorandum at Comment 5; and Steel Wire Rope From the Republic of Korea; Final Results of

exempted duties to its exports of subject merchandise, nor did it link the quantity of imported raw materials to the quantity of exported merchandise (which would have demonstrated that there were sufficient imports to account for the drawback received). See Polyplex's March 7, 2006, supplemental questionnaire response at section entitled "Requested Revison to Cost of Production for Unpaid Duties." Moreover, contrary to Polyplex's assertion, it did not establish the same record as Jindal, which supported its drawback claim with documentation linking specific exemption amounts to exports of subject merchandise to the United States. Compare Polyplex's March 7, 2006, supplemental questionnaire response at section entitled "Requested Revison to Cost of Production for Unpaid Duties," with Jindal's October 11, 2005, section C response at Exhibit C-8(i). Additionally, unlike Polyplex, Jindal provided information which allowed the Department to reconcile specific quantities of imported raw materials to the quantities of exported merchandise. See Jindal's October 11, 2005, section C response at Exhibit C-8(i). Thus, we have denied Polyplex's request to increase its U.S. prices for duty drawback.

Comment 6: Whether the Department Should Have Compared PET Film Based on the Specific Thickness of the Film Rather Than Thickness Ranges

Polyplex argues that, in comparing products, the Department should have followed the methodology used in the investigation and compared PET film based on the specific thickness of the film rather than the thickness range in which the film was classified. See Polyplex Case Brief at 2-3. Because the Department failed to use the specific thickness of PET film in its comparisons, Polyplex contends the Department did not select truly identical foreign-like product to compare to subject merchandise. See id. Moreover, Polyplex objects to the Department using thickness ranges in this review without informing Polyplex of its decision,[11] explaining why ranges were used, and allowing Polyplex to comment on the inappropriateness of such a decision. See id. Accordingly, Polyplex asks the Department to revise its calculation by comparing film on a micron-specific basis as it did in the investigation. See id.

Department's Position:

We disagree with Polyplex. In the 2001-2003 administrative review in this proceeding, the Department refined its model matching methodology. See Certain Polyethylene Terephthalate Film, Sheet and Strip From India: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 69 FR 49872, 49874 n.1 (August 12, 2004) (unchanged in final, 70 FR 8072 (February 17, 2005)). In that review, the Department explained that it based the

---

Antidumping Duty Administrative Review, 61 FR 55965, 55968 (October 30, 1996).

[11] While Polyplex acknowledges that it was aware that the Department began using thickness ranges in the first administrative review (in which Polyplex was not a party), Polyplex finds it problematic that the reason for the change was not explained here and the Department never explained why it selected the particular thickness ranges used. See Polyplex Case Brief at 2-3.

thickness ranges used in model matching on variations in the cost used to produce different thicknesses of film. See Polyplex's Case Brief at Attachment 1. Parties in the 2001-2003 administrative review did not file briefs objecting to the use of thickness ranges.

Although Polyplex argued that it was not provided an opportunity to place information on the record of this review regarding this issue, after the parties filed their briefs in the instant administrative review, the Department invited all interested parties in this proceeding to submit comments and new factual information on the Department's model matching methodology. See Letter from Howard Smith, Program Manager, Office 4, AD/CVD Operations, to all interested parties, dated July 7, 2006. No party submitted comments. In the absence of information calling into question the thickness ranges used by the Department for model matching purposes, we find it appropriate to continue to apply the model match methodology used in the preliminary results of review.

Recommendation:

Based on our analysis of the comments received, we recommend adopting the above positions. We will publish the final results of review and the final weighted-average dumping margin for the reviewed company in the Federal Register.

_____ _____
Agree Disagree

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
Date