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DATE: February 4, 2013

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

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

SUMMARY

We have analyzed the comments of the interested parties in the antidumping duty administrative review of polyethylene terephthalate film, sheet, and strip (PET Film) from Taiwan. Based on the results of our analysis of the comments received, we have made changes to the preliminary results.[1] We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

BACKGROUND

Since the Preliminary Results, the following events have taken place. Between August and October 2012, the Department requested additional information in several post-preliminary supplemental questionnaires issued to Shinkong Synthetic Fibers Corporation and its subsidiary, Shinkong Material Technology Co. Ltd. (collectively, Shinkong), as well as Nan Ya Plastics Corporation (Nan Ya). All responses were timely submitted.

As explained in the memorandum from the Assistant Secretary for Import Administration, the Department of Commerce (Department) has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 29, through October 30, 2012. Thus all deadlines in this segment of the proceeding have been extended by two days.[2] On November 8, 2012, the Department further extended the deadline of the final results from

[1] See Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Preliminary Results of Antidumping Duty Administrative Review, 77 FR 46704 (August 6, 2012) (Preliminary Results).
[2] See Memorandum to the Record from Paul Piquado, Assistant Secretary for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During Hurricane Sandy" dated October 31, 2012.

December 6, 2012, to February 4, 2013.[3]

On December 19, 2012, Shinkong and Mitsubishi Polyester Film, Inc. (Mitsubishi), SKC, Inc. (SKC), and Toray Plastics (America), Inc. (Toray) (collectively, Petitioners) filed comments on Nan Ya's supplemental questionnaire responses.

The Department issued its post-preliminary analysis for both Shinkong and Nan Ya on December 20, 2012.[4]

Petitioners timely filed case briefs on January 3, 2013. Nan Ya also filed a case brief at that time; however, the Department rejected Nan Ya's case brief for containing new information. Nan Ya re-filed its case brief without such information on January 9, 2013. Petitioners and Nan Ya timely filed their rebuttal briefs on January 10, 2013.

LIST OF COMMENTS

Comment 1: Whether to Apply an Alternative Comparison Method to Nan Ya and Shinkong

Comment 2: Whether the Department Should Modify the Calculations of Certain Adjustments for Shinkong

Comment 3: Whether the Department Should Use Nan Ya's Revised U.S. Sales Database

Comment 4: Whether the Department Should Change Nan Ya's Date of Sale from Invoice Date to Sales Confirmation Date

Comment 5: Whether the Department Should Use Entry Date To Define Nan Ya's Universe of Sales and Consequently To Exclude Nan Ya Sales That Are Outside The POR

[3] See Memorandum from Barbara Tillman, Antidumping and Countervailing Duty Operations Office 6 Director to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Polyethylene Terephthalate Film from Taiwan: Extension of Deadline for Final Results of Antidumping Duty Administrative Review," dated November 8, 2012.

[4] Memorandum to Paul Piquado, Assistant Secretary, Import Administration,"2010-2011 Administrative Review of the Antidumping Duty Order on Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Post-Preliminary Analysis and Calculation Memorandum of Nan Ya Plastics Corporation, Ltd. and Shinkong Synthetic Fibers Corporation and its subsidiary Shinkong Materials Technology Co. Ltd." dated December 20, 2012 (Post-Preliminary Analysis).

DISCUSSION OF THE ISSUES

Comment 1: Whether to Apply an Alternative Comparison Method to Nan Ya and Shinkong

A) Whether The Department Is Permitted By Statute To Consider an Alternative Comparison Method

Respondents' Arguments

- The Department stated in Final Modification for Reviews[5] that the average-to-average comparison methodology is the default "normal" calculation to be used in administrative reviews. Section 777A(d)(2) of the Tariff Act of 1930, as amended (the Act), details how calculations for administrative reviews will be conducted. It contains no reference to comparison methods exceptions as provided for investigations in section 777A(d)(1)(B) of the Act.

- A basic canon of statutory interpretation is that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[6] This presumption is even stronger when the provisions were considered by Congress and enacted at the same time, as is the case with these provisions.[7] Therefore, it is unreasonable for the Department to interpret the clear statute contrary to the text and absent any evidence of contrary legislative intent.[8]

- The statute, in its silence, does not give the Department authority to apply a targeted dumping analysis in administrative reviews. The Federal Circuit, in FAG Italia,[9] stated that "the statutory silence as to Commerce's power to initiate duty absorption inquiries for transition orders does not give Commerce authority to conduct such inquiries."

- Neither the statute nor legislative history defines what is meant by a "pattern," thus under the rules of statutory interpretation, the word must be defined by its commonly understood meaning.[10] The word "pattern" is defined as a "mode of behavior or series of acts that are recognizably consistent."[11] Accordingly, the Department must articulate why the pattern of significant price differences cannot be taken into account using either the average-to-average,

[5] See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101 (February 14, 2012) (Final Modification for Reviews).
[6] See, e.g., Niken v. Holder, 129 S. Ct. 1749, 1759 (2009).
[7] See Lindh v. Murphy, 521 US 320 (1997).
[8] See Andrus v. Glover Constr. Co., 446 U.S. 608, 616-617 (1980).
[9] See FAG Italia S.p.A. v. United States, 291 F.3d 806 (Fed. Cir. 2002) (FAG Italia).
[10] See, e.g., Witex, USA, Inc. v. United States, 577 F. Supp. 2d 1353, 1356 (CIT 2008).
[11] See, e.g., Black's Law Dictionary at 1164 (8th ed. 2004).

or transaction-to-transaction methodologies before resorting to the exception, the average-to-transaction method.[12]

Petitioners' Argument

- The Department correctly concluded that the average-to-average method cannot take into account the observed price differences because there is a meaningful difference in the weighted-average dumping margins calculated with the average-to-average and the average-to-transaction methods.

- The Department's use of targeted dumping is supported by law. Section 777A(d)(1)(A) of the Act "does not require or prohibit the Department from adopting a similar or different framework for choosing a comparison method in administrative reviews as compared to the framework required by the statues in investigations."

- The Department's new regulations were issued after consultations with Congress and the Administration and are consistent with the Act.

B) Whether the Department Can Zero When Using an Alternative Comparison Method

Nan Ya's arguments

- Zeroing is impermissible under any comparison methodology, including the average-to-transaction methodology. Section 777(35) of the Act only permits the use of the alternative methodology to unmask dumping and does not authorize the Department to zero. The Department has no authority to zero and cannot do so based only on employing the "average-to-transaction methodology" in administrative reviews. Doing so inconsistently interprets the same statutory provision to mean different things depending on the type of comparison method employed.

C) Whether Applying an Alternative Comparison Method is Duplicative and Already Accounted for in the Quarterly Cost Analysis

Nan Ya's Arguments

- The Department's quarterly cost findings noted that prices fluctuated considerably during the period of review (POR) due to changes in the costs of the main production inputs, most likely in excess of 25 percent. This means the lowest-priced quarter is almost certain to match the Nails test[13] developed by the Department. As a result, the Department is impermissibly adjusting twice for the same situation.

[12] See Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011) (Wood Flooring from China) and accompanying Issues and Decision Memorandum at 31.

[13] See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) and Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008) (collectively, "Nails"), as modified in more recent investigations, e.g., Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR

- The U.S. International Trade Commission's sunset review of PET Film from Korea analyzed the U.S. market for the POR and found similar price trends were tied to a strong increase in demand and significant increases in raw material costs.[14]

- The Department has recognized that it may take into account other factors that may be responsible for any pricing pattern that are not related to targeting.[15] The Department should utilize its discretion and not apply its targeted dumping analysis.

- Quarterly targeted dumping findings should not be made in administrative reviews because by using a month-to-month comparison in conjunction with quarterly cost, it is not possible to level-off dumping margins by averaging substantially high price and substantially low price sales as would have been the case under a POR-based average price comparison. The difference in price between the high and low price quarters has already been detected and fully accounted for in the monthly average-to-average comparison adopted in the Preliminary Results.

Petitioners' Arguments

- The Department's decision to apply the targeted dumping analysis is separate from its analysis of cost of production and based on a separate legal requirement. In Circular Welded Steel Pipes from Turkey,[16] the Department rejected the proposition that targeted dumping allegations could be rebutted with evidence that rising costs were responsible for rising prices.

- In Multilayered Wood Flooring,[17] the Department found it may be appropriate to examine other factors not related to targeted dumping, such as level of trade, but that the governing statute does not require it.

D) Whether the Department Should Apply the Nails Test to Nan Ya With Respect to Customer

Petitioners' Argument

- The Department should analyze targeted dumping with respect to customer and time and not just time as it did in the Post-Preliminary Analysis. While Petitioners' initial allegation of targeted dumping with respect to customer was originally based on Nan Ya's constructed export price (CEP) database, the allegation still remains supportable on the basis of the Nan Ya's new export price (EP) database for one of the reclassified EP customers.

64318 (October 18, 2011); see also Mid Continent Nail Corp. v. United States, Slip. Op. 2010-47 (Ct. Int'l Trade May 4, 2010) and Mid Continent Nail Corp. v. United States, Slip. Op. 2010-48 (Ct. Int'l Trade May 4, 2010).

[14] See, e.g., Polyethylene Terephthalate (PET) Film from Korea, Inv. No. 731-TA-459 (Third Review), Publication 4254 (August 2011) at 12, 14, IV-11, and V-2.

[15] See, e.g., Wood Flooring from China, and accompanying Issues and Decision Memorandum at 33.

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

[17] See Wood Flooring from China.

Nan Ya's Argument

- The Department was correct to reject the targeted dumping allegation based on the CEP customers. The Department should reject Petitioners' allegation, revised in the case brief, for the EP customer. Nan Ya sold PET Film at the same unit price to all customers. The customer allegedly targeted purchased more subject merchandise earlier in the POR, when prices were lower, than other U.S. customers. Petitioners' analysis is flawed in that it does not use contemporaneous prices.

Department's Position: In these final results, and consistent with the Post-Preliminary Analysis, we continue to find for Nan Ya that a pattern of EPs for comparable merchandise that differ significantly among time periods and purchasers exists. As for Shinkong, we continue to find that a pattern of EPs for comparable merchandise that differ significantly among time periods and regions exists. Further, we find that the average-to-average comparison method cannot account for the observed price differences and, thus, we have used the average-to-transaction comparison method to calculate Nan Ya's and Shinkong's weighted-average dumping margins. We address interested parties' comments below.

A. Whether The Department Is Permitted By Statute To Consider an Alternative Comparison Method

Petitioners submitted an allegation of targeted dumping by Nan Ya and Shinkong shortly before the Preliminary Results.[18] Petitioners argued that there are patterns of U.S. sales prices for comparable merchandise that differ significantly among time periods, purchasers, and regions.[19] As a consequence, Petitioners asked the Department to employ an alternative comparison method to calculate Shinkong's and Nan Ya's dumping margins in this review.[20] The Department noted in the Preliminary Results its intention to consider whether another method is appropriate to use in administrative reviews.[21]

Section 771(35)(A) of Act, defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." The definition of "dumping margin" calls for a comparison of normal value and export price or constructed export price. Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act describes three methods by which the Department may compare normal value and EP (or CEP) and places certain restrictions on the Department's selection of a comparison method in antidumping investigations. The statute places no such restrictions on the Department's selection of a comparison method in reviews. The methods by which normal value may be compared to EP or CEP in administrative reviews are described in 19 CFR 351.414: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from one another. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States.

[18] See Letter from Petitioners to the Department, dated July 17, 2012.
[19] See id. at 6.
[20] See id. at 8-9.
[21] See Preliminary Results, 77 FR at 46705.

When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the export prices or constructed export prices have been averaged together (i.e., averaging group). The Department's regulation at 19 CFR 351.414(c)(1) fills the silence in the statute on the choice of comparison method in the context of administrative reviews. In particular, the Department has determined that in both antidumping investigations and administrative reviews, the average-to-average method will be used "unless the Secretary determines another method is appropriate in a particular case."

The statute, the Statement of Administrative Action (SAA),[22] and the Department's regulations do not directly address whether the Department should use an alternative comparison method in an administrative review based upon a targeted dumping analysis conducted pursuant to section 777A(d)(1)(B) of the Act.[23] In light of the statute's silence on this issue, the Department recently indicated that it would consider whether to use an alternative comparison method in administrative reviews on a case-by-case basis, but declined to "speculate as to either the case-specific circumstances that would warrant the use of an alternative methodology in future reviews, or what type of alternative methodology might be employed."[24] At that time, the Department also indicated that it would look to practices employed by the agency in antidumping investigations for guidance on this issue.[25]

In antidumping investigations, the Department examines whether to use an average-to-transaction method by using a targeted dumping analysis consistent with section 777A(d)(1)(B) of the Act:

> The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if
> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
> (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

Although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in an administrative review is, in fact, mostly analogous to the issue in antidumping investigations. Accordingly, the Department finds the analysis that has been used in antidumping investigations may be instructive for purposes of examining whether to apply an alternative comparison method in this administrative review.

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[22] See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316 (1994) (SAA).
[23] See section 777A(d)(1)(B) of the Act; SAA, H.R. Rep. No. 103-316 at 842-43; 19 CFR 351.414.
[24] See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101, 8106-07 (February 14, 2012) (Final Modification for Reviews).
[25] See id., 77 FR at 8102.

We disagree with the respondents' arguments that certain language in the statute demonstrates that the Department should apply an alternative comparison method in investigations only. The language cited discusses only section 777A(d)(1)(A)(i) of the Act, which concerns the types of comparison methods that the Department may use in investigations. That provision is silent on the question of the selection of a comparison method in administrative reviews. Section 777A(d)(1)(A) of the Act does not require the Department to or prohibit the Department from adopting a similar or different framework for choosing a comparison method in administrative reviews as compared to the framework required by the statute in investigations. The SAA states that "section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods."[26] Like the statute, the SAA does not limit the proceedings in which the Department may undertake such an examination.[27]

Indeed, the court has stated that the "court must, as we do, defer to Commerce's reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the agency's generally conferred authority and other statutory circumstances."[28] Further, the court has stated that this "silence has been interpreted as 'an invitation' for an agency administering unfair trade law to 'perform its duties in the way it believes most suitable' and courts will uphold these decisions '{s}o long as the {agency}'s analysis does not violate any statute and is not otherwise arbitrary and capricious.'"[29] We find that the above discussion of the extension of the statute with respect to investigations is a logical, reasonable and deliberative method to fill the silence with regard to administrative reviews.

The respondents' reliance upon FAG Italia is misplaced. In that case, the Federal Circuit examined whether the Department could conduct duty absorption inquiries in certain contexts when the statute had limited the application of this inquiry.[30] In contrast, the targeted dumping analysis deals with Commerce's selection of a type of comparison methodology contemplated by the statute in a proceeding or inquiry it already has the authority to conduct. It is not necessary to examine duty absorption to calculate a weighted-average dumping margin, but it is necessary to apply some comparison method to calculate a weighted-average dumping margin. As explained above, the Act does not answer which comparison method the Department must use to calculate weighted-average dumping margins in the context of reviews. The Department reasonably filled this statutory gap when it announced in the Final Modification for Reviews that it would use the average-to-average comparison as the default method and that, under appropriate circumstances, it may apply the average-to-transaction method.[31]

[26] See SAA, H.R. Rep. No. 103-316 at 843.
[27] See id.
[28] See U.S. Steel Corp. v. United States, 621 F.3d 1351, 1357 (Fed. Cir. 2010) (citations omitted).
[29] See Mid Continent Nail Corp. v. United States, 712 F. Supp. 2d 1370,1376 (CIT 2010), citing U.S. Steel Group v. United States, 96 F.3d 1352, 1362 (Fed. Cir. 1996).
[30] See generally FAG Italia, 291 F.3d 806.
[31] See 77 FR at 8106-07.

Finally, we reject Nan Ya's argument that we must define the term "pattern" using the legal dictionary to which they cite. The Department has interpreted this provision in a reasonable manner and consistent with the Act by adopting the Nails test, as explained below in Subsection C. The Nails test demonstrates the existence of a pattern of U.S. sales prices that differ significantly among time periods, regions, and/or purchasers.

B) Whether the Department Can Zero When Applying an Alternative Comparison Method

We disagree with Nan Ya that the application of an alternative comparison method calls into question the Department's use of zeroing (i.e., not granting offsets) in the context of administrative reviews. While it is true that in recent opinions the Federal Circuit has asked for an explanation about the differing practices between investigations and administrative reviews, those decisions did not find that the Department lacks authority to use the zeroing methodology in the context of administrative reviews.[32] To the contrary, the Federal Circuit repeatedly has upheld the Department's use of zeroing in the context of administrative reviews.[33] Moreover, in light of Dongbu and JTEKT, the Department has provided additional explanations about our zeroing practice, which the Court of International Trade has affirmed in several cases.[34]

Additionally, and contrary to Nan Ya's arguments, the Department has not abandoned the use of zeroing in the context of average-to-transaction comparisons. In the Final Modification for Reviews, the Department stated only that it was adopting the offsetting methodology when using average-to-average comparisons.[35] The Department declined to adopt a rule that extends the offsetting methodology to average-to-transaction comparisons. Doing so could hamper the Department's ability to account for masked dumping.[36] Specifically, the Department stated

> {w}ith respect to the potential for masked dumping as a reason not to prefer the use of {average-to-average} comparisons in reviews, the Department does not agree that the potential for masked dumping means that {average-to-average} comparisons are unsuitable as the default basis for determining the weighted-average dumping margins and antidumping duty assessment rates in reviews. Similar to the conduct of original investigations, when conducting reviews under the modified methodology, the Department will determine, on a case-by-case basis, whether it is appropriate to use an alternative comparison methodology by

[32] See JTEKT Corp. v. United States, 642 F.2d 1378, 1384-85 (Fed. Cir. 2011) (JTEKT); Dongbu Steel Co. v. United States, 635 F.2d 1363, 1373 (Fed. Cir. 2011) (Dongbu).
[33] See SKF USA, Inc. v. United States, 630 F.3d 1365, 1375 (Fed. Cir. 2011); Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008); NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007); Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005); Timken Co. v. United States, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004).
[34] See Fisher S.A. Comercio, Industria & Agricultura v. United States, No. 11-00321, 2012 WL 6062563, at *9-11 (Ct. Int'l Trade Dec. 6, 2012); Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States, No. 11-00399, 2012 WL 5519636, at *2-4 (Ct. Int'l Trade Nov. 15, 2012); Far Eastern New Century Corp. v. United States, 867 F. Supp. 2d 1309, 1312 (Ct. Int'l Trade 2012); Grobest & I-Mei Indus. (Vietnam) Co. v. United States, 853 F. Supp. 2d 1352, 1357-1362 (Ct. Int'l Trade 2012); Union Steel v. United States, 823 F. Supp. 2d 1346, 1355-60 (Ct. Int'l Trade 2012).
[35] See 77 FR at 8104.
[36] See id.

> examining the same criteria the Department examines in original investigations pursuant to sections 777A(d)(1)(A) and (B) of the Act.[37]

As a result, the Department reasonably applies the average-to-transaction method and, consequently, uses zeroing in certain contexts to account for, inter alia, masked dumping. The Federal Circuit has recognized that masked dumping has been a proper concern of the Department's and that those concerns provide the Department with sufficient reason to use zeroing when using average-to-transaction comparisons. Specifically, the Federal Circuit has stated

> the exception contained in {section 777A(d)(1)(B) of the Act} indicates that Congress gave Commerce a tool for combating targeted or masked dumping by allowing Commerce to compare weighted average normal value to individual transaction values when there is a pattern of prices that differs significantly among purchasers, regions, or periods of time. Commerce has indicated that it likely intends to continue its zeroing methodology in those situations, thus alleviating concerns of targeted or masked dumping. That threat has been one of the most consistent rationales for Commerce's zeroing methodology in the past. By enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do not exist. In sum, we find it improbable that Congress chose to manifest its clear intent through subtle implication.[38]

Thus, we reject Nan Ya's arguments that the Department does not have the authority to use zeroing in certain contexts.

C) Whether Applying an Alternative Comparison Method is Duplicative and Already Accounted for in the Quarterly Cost Analysis

In recent antidumping investigations where the Department has addressed targeted dumping allegations, the Department has employed the Nails test[39] for each respondent subject to an allegation to determine whether a pattern of export prices or constructed export prices for comparable merchandise that differ significantly among purchasers, regions or time periods existed within the U.S. market.[40] The Nails test is a two-step process, as described below, that determines whether the Department should consider whether the average-to-average method is appropriate in a particular situation. For Shinkong, Petitioners have alleged targeted dumping

[37] See id.
[38] See U.S. Steel Corp. v. United States, 621 F.3d at 1363 (internal citations omitted).
[39] See Nails, as modified in more recent investigations, e.g., Wood Flooring from China; see also Mid Continent Nail Corp. v. United States, Slip. Op. 2010-47, and Mid Continent Nail Corp. v. United States, Slip. Op. 2010-48.
[40] See, e.g., Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value, 75 FR 14569 (March 26, 2010); Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 75 FR 59217 (September 27, 2010).

with respect to time and region, and for Nan Ya, Petitioners have alleged targeted dumping with respect to time and purchaser.

In the first stage of the test, the "standard-deviation test," we determined the volume of the allegedly targeted group's (i.e., time period or purchaser) sales of subject merchandise that are at prices more than one standard deviation below the weighted-average price of all sales under review, both the allegedly targeted sales and the sales not alleged to be targeted. We calculated the standard deviation on a product-specific basis (i.e., by control number (CONNUM)) using the weighted-average prices for the alleged targeted group and the groups not alleged to have been targeted. If that volume did not exceed 33 percent of the total volume of the respondent's sales of subject merchandise for the allegedly targeted group, then we did not conduct the second stage of the Nails test. If that volume exceeded 33 percent of the total volume of the respondent's sales of subject merchandise for the allegedly targeted group, then we proceeded to the second stage of the Nails test.

In the second stage, the "gap test," we examined all sales of identical merchandise (i.e., by CONNUM) sold to the allegedly targeted group that passed the standard-deviation test. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales for allegedly targeted group and the next higher weighted-average price of sales for the non-targeted groups exceeds the average price gap (weighted by sales volume) for the non-targeted groups. We weighted each of the price gaps between the non-targeted groups by the combined sales volume associated with the pair of prices for the non-targeted groups that defined the price gap. In doing this analysis, the allegedly targeted group's sales were not included in the non-targeted groups; the allegedly targeted group's average price was compared only to the average prices for the non-targeted groups. If the volume of the sales that met this test exceeded five percent of the total sales volume of subject merchandise to the allegedly targeted group, then we determined that targeting occurred and these sales passed the Nails test.

As explained in the Post-Preliminary Analysis, if the Department determined that a sufficient volume of U.S. sales were found to have passed the Nails test, then the Department considered whether the average-to-average method could take into account the observed price differences. To do this, the Department evaluated the difference between the weighted-average dumping margin calculated using the average-to-average method and the weighted-average dumping margin calculated using the average-to-transaction method. Where there was a meaningful difference between the results of the average-to-average method and the average-to-transaction method, the average-to-average method would not be able to take into account the observed price differences, and the average-to-transaction method would be used to calculate the weighted-average dumping margin for the respondent in question. Where there was not a meaningful difference in the results, the average-to-average method would be able to take into account the observed price differences, and the average-to-average method would be used to calculate the weighted-average dumping margin for the respondent in question.

With respect to Shinkong, the Department continues to find that a pattern of EPs for comparable merchandise that differ significantly among region and time periods does exists, and has considered whether the average-to-average method can account for the observed price

differences. Further, the Department continues to find that there is a meaningful difference between the weighted-average dumping margins calculated using the average-to-average method and the average-to-transaction method. As a result, the Department has used the average-to-transaction method to calculate the weighted-average dumping margin for Shinkong in these final results.[41]

With respect to Nan Ya, the Department continues to find that a pattern of EPs for comparable merchandise that differ significantly among purchasers and time periods does exists, and has considered whether the average-to-average method can account for the observed price differences. Further, the Department continues to find that there is a meaningful difference between the weighted-average dumping margins calculated using the average-to-average method and the average-to-transaction method. As a result, the Department has used the average-to-transaction method to calculate the weighted-average dumping margin for Nan Ya in these final results.[42]

We reject Nan Ya's arguments that the above findings are undermined by the observation that movements in the costs of raw material account for differences in Nan Ya's pricing of subject merchandise over time. The Act and the regulations do not provide detailed guidance on comparing different sets of U.S. prices for purposes of determining the existence of targeted dumping or a pattern of significant price differences. The only obligations imposed on the Department in its analysis appear in section 777A(d)(1)(B) of the Act. Section 777A(d)(1)(B) of the Act requires the Department (1) to examine whether there is a pattern of EPs for comparable merchandise that differ significantly among purchasers, regions, or time periods and, if such a pattern exists, (2) to explain why such differences cannot be taken into account using the average-to-average or transaction-to-transaction comparison methods. The Act does not require the Department to discern why such patterns arise. Instead, the Act asks the Department to focus on U.S. sales alone – i.e., EP or CEP. Despite Nan Ya's claims to the contrary, the SAA does not suggest otherwise.[43] Thus, contrary to Nan Ya's claim, neither the Act nor the SAA require the Department to consider whether changes in raw material costs caused the pattern of U.S. prices that differ among periods of time. The Department consistently has reached the same conclusion in various investigations.[44]

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[41] See Memorandum to Dana S. Mermelstein, Program Manager, AD/CVD Operations, Office 6, "2010-2011 Administrative Review of Polyethylene Terephthalate Film Sheet and Strip from Taiwan: Post-Preliminary Calculations for Shinkong Synthetic Fibers Corporation and its subsidiary Shinkong Materials Technology Co. Ltd.," dated December 20, 2012 and the Memorandum to Dana S. Mermelstein, Program Manager, AD/CVD Operations, Office 6, "Final Results of the 2010-2011 Administrative Review of Polyethylene Terephthalate Film Sheet and Strip from Taiwan: Calculations for Shinkong Synthetic Fibers Corporation and its subsidiary Shinkong Materials Technology Co. Ltd.," dated February 4, 2013 (Shinkong Final Calculation Memorandum).

[42] See Memorandum to Dana S. Mermelstein, Program Manager, AD/CVD Operations, Office 6, "Final Results of the 2010-2011 Administrative Review of Polyethylene Terephthalate Film Sheet and Strip from Taiwan: Calculations for Nan Ya Plastics Corporation," dated February 4, 2013(Nan Ya Final Calculation Memorandum).

[43] See SAA, H.R. Rep. No. 103-316 at 842-43.

[44] See Certain Steel Nails from the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 77 FR 17029 (March 23, 2012), and accompanying Issues and Decision Memorandum at Comment 1; see also Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea, 77 FR 17413 (March 26, 2012), and accompanying Issues and Decision Memorandum at Comment 1.

Additionally, in making home market to U.S. price comparisons, the Department attempts to make contemporaneous comparisons. However, in the context of a targeted dumping analysis, this is not possible, given that the analysis inherently involves a test that determines whether there is a pattern of prices that differ among different periods of time. If the Department observes that prices respond to cost changes as part of determining to apply quarterly costs, then it stands to reason that we may find that a pattern of prices that differ among time period exists in a period of review where costs are changing. Moreover, if an exporter such as Nan Ya changes U.S. prices in response to cost changes, it adds further support to the conclusion that the time periods represent distinct pricing decisions, some of which may exhibit dumping regardless of whether or not the pricing decisions of another distinct time period exhibit dumping. Thus, for these reasons, the Department rejects Nan Ya's claims.

Finally, the fact that the Department's comparisons are made using monthly averages in an administrative review does not mean that the average-to-average method will necessarily account for prices differences among time periods. The fact that the results of average-to-average comparisons are aggregated using the offsetting methodology means that results of those comparisons made using targeted and non-targeted prices would offset each other in the calculation of the weighted average dumping margin, thereby permitted dumped prices that reflect pricing decisions made during a distinct period to be masked by the non-dumping pricing behavior of a other distinct periods.

D. Whether the Department Should Apply the Nails Test to Nan Ya With Respect to Customer

The Department notes that neither section 777A(d)(1)(B) of the Act nor the SAA provide any deadline for filing a targeted dumping allegation in either an investigation or an administrative review.[45] Similarly, the Department's regulations do not provide for such a deadline in an investigation or an administrative review. Moreover, when the Department recently announced that it would consider whether to use an alternative comparison method in administrative reviews on a case-by-case basis, the announcement contained no guidelines on the filing of a request to apply an alternative comparison method.[46] Further, the Department's current practice regarding the submission of a targeted dumping allegation in the initiation notice for an antidumping investigation is limited to antidumping investigations and does not apply to administrative reviews.

However, Petitioners did not know how the Department would address both of their allegations until the Post-Preliminary Analysis was issued. Therefore, their only opportunity to comment was after the Post-Preliminary Analysis was issued. Further, the Department has established no deadlines in administrative reviews to submit an original targeted dumping allegation or to revise an existing allegation if the U.S. sales data is revised either by the respondent or the Department. Finally, given that Nan Ya extensively rebutted Petitioners' revised targeted dumping allegation in its January 9, 2013 rebuttal brief, the Department has not deprived it of an opportunity to

[45] SAA, H.R. Rep. No. 103-316 at 842-43.
[46] See generally Final Modification for Reviews, 77 FR 8101.

comment. Thus, we have addressed both of Petitioners' targeted dumping allegations and applied the Nails test with regard to both time period and purchaser.[47]

Comment 2: Whether the Department Should Modify the Calculations of Certain Adjustments for Shinkong

Shinkong's Arguments

- The Department should calculate Shinkong's U.S. credit expenses using the U.S. Dollar interest rate that Shinkong submitted on November 14, 2011, rather than a New Taiwan Dollar-denominated short term interest rate. In addition, the Department should correct a programming error for both U.S. and home market credit expenses.

- The Department should use quantity by customer to calculate the per-unit sample sales cost allocation, rather than a variable that is not customer-specific.

- The Department should divide Shinkong's home market direct selling expenses by sales quantity rather than total sales value.

Petitioners' Arguments

- The total cited by Shinkong for home market direct selling expenses is a typographical error; correcting the error will have no impact on the margin. The Department explained in the Shinkong Preliminary Calculation Memorandum[48] that total home market direct selling expenses were divided by the sales value, not by sales quantity, as Shinkong argues.

Department's Position: The Department stated its intention in the Shinkong Preliminary Calculation Memorandum that it would issue post-preliminary supplemental questionnaires and gather more information regarding these issues.[49] After taking into consideration the information received in the post-preliminary questionnaire responses and the comments submitted by all parties, the Department has modified the calculations of credit expenses, direct selling expenses, and the cost of providing samples where Shinkong provided sufficient evidence to warrant an adjustment. For a more detailed discussion of these changes, including the relevant business proprietary information, see Shinkong Final Calculation Memorandum, incorporated herein by reference.

Comment 3: Whether the Department Should Use Nan Ya's Revised U.S. Sales Database

Petitioners' Arguments

- The Department should use the sales values used in the Preliminary Results, rather than those reported in Nan Ya's August 28, 2012 sales database. Nan Ya appears to have reported the same price in the CEP and EP databases, which indicates that Nan Ya made a reporting error.

[47] See Nan Ya Final Calculation Memorandum.
[48] Memorandum to Dana S. Mermelstein, Program Manager, AD/CVD Operations, Office 6, "Analysis for the Preliminary Results of the 2010-2011 Administrative Review of the Antidumping Duty Order on Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Shinkong Synthetic Fibers Corporation and Shinkong Materials Technology Co. Ltd," dated July 30, 2012 (Shinkong Preliminary Calculation Memorandum).
[49] See Shinkong Preliminary Calculation Memorandum, at 8.

Nan Ya's Arguments

- The Department did not use the updated U.S. sales EP database in its Post-Preliminary Analysis, even though the Department received the database prior to the Post-Preliminary Analysis.

- The error identified by Petitioners was corrected in Nan Ya's October 9, 2012 submission.

Department's Position: For purposes of these final results, we are using the U.S. sales database submitted by Nan Ya on October 9, 2012, because this revised sales database includes the correct dates, prices, and adjustments for those U.S. sales reclassified from CEP to EP. As we explained earlier in this proceeding, the Department has reclassified these sales as EP sales because we continue to find that Nan Ya is not affiliated with the particular U.S. importers that imported the sales.[50] Thus, because Nan Ya made only EP sales in this review, we determine that the October 9, 2012 submission contains the most accurate information on Nan Ya's U.S. sales.

Comment 4: Whether The Department Should Change Nan Ya's Date of Sale from Invoice Date to Sales Confirmation Date

Nan Ya's Arguments

- The Department erroneously did not request information to change the date of sale from invoice date to purchase order date. The key terms of sale are set at the sales confirmation date; any changes made in quantities and product types after this date are extremely limited.

- Quantity is fixed at the purchase order date. Any change to quantity or product type results in a different and new order. Nan Ya notes that width and length changes do not affect unit price, which is fixed on a quarterly basis. Revisions to length and width of the product are only allowed if the order is less than 19,000 kg.

- Because the Department did not request sales confirmation date in its questionnaires, the Department should construct a sales confirmation date by subtracting 45 days from invoice date.

Petitioners' Arguments

- The Department should use the earlier of sales invoice date or shipment date, but should not use confirmation date as Nan Ya contends. The record indicates that changes can be made to the material terms of sales after the sales confirmation date. Specifically, the quantity ordered can later be revised upward by 30 to 50 percent.

- There is no need for the Department to construct a sales confirmation date because invoice date is the appropriate date of sale. Nan Ya submitted a new database after the Preliminary Results that includes the invoice date needed to establish the date of sale.

[50] See Memorandum to Barbara E. Tillman, Director, AD/CVD Operations, Office 6, "Affiliation of Nan Ya Plastics Corporation, Ltd. (Nan Ya) with Certain U.S. Customers," dated July 30, 2012.

Department's Position: Consistent with our determination in the Preliminary Results,[51] we continue to find that the invoice date should be used as the date of sale, and we have used the actual U.S. invoice date as reported in Nan Ya's revised U.S. sales database as the date of sale.[52]

The regulation governing date of sale determinations, 19 CFR 351.401(i), states the following:

> In identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

The regulation indicates that while the date of invoice is the preferred date of sale, the Department will consider a different date if it is satisfied that the material terms of sale are established on a date other than the invoice date. Importantly, "unless the party seeking to establish a date of sale other than the invoice date produces sufficient evidence to overcome this presumption, Commerce will use invoice date as the date of sale."[53] In determining the date of sale, the Department considers which date best reflects the date on which the exporter/producer establishes the material terms of sale (e.g., price and quantity).[54]

Nan Ya allows for product alterations after the sales confirmation for changes other than width and length.[55] Indeed, the record evidence demonstrates that all final alterations to the product and the actual weight are determined at the time of invoicing when the product is released to the customer.[56] As a consequence, and notwithstanding Nan Ya's claims to the contrary, we determine that the material terms of sale are not set until the invoice date. Thus, we continue to rely upon the invoice date as the appropriate date for Nan Ya's date of sale in accordance with 19 CFR 351.401(i).

Comment 5: Whether The Department Should Use Entry Date To Define Nan Ya's Universe of Sales and Consequently To Exclude Nan Ya Sales That Are Outside The POR

Petitioners' Arguments

- The Department should use entry date to determine the universe of sales subject to this review. Certain sales previously reported as CEP sales were within the POR based on the

[51] See Preliminary Results, 77 FR at 46706-07.
[52] See Nan Ya's database, submitted October 9, 2012.
[53] See Sahaviriya Steel Industries Public Company Limited v. United States, 714 F. Supp. 2d 1263, 1279-80 (CIT 2010) (SSI); see also Allied Tube & Conduit Corp. v. United States, 127 F. Supp. 2d 207, 220 (CIT 2000) ("Plaintiff, therefore, must demonstrate that it presented Commerce with evidence of sufficient weight and authority as to justify its factual conclusions as the only reasonable outcome. If, however, the record indicates that Commerce's decision to use the invoice date as the date of sale was reasonable and was supported by substantial evidence, Plaintiff's arguments must fail."); accord Yieh Phui Enterprise Co. v. United States, 791 F. Supp. 2d 1319, 1324 (CIT 2011).
[54] See SSI, 714 F. Supp. 2d at 1279-80.
[55] See Nan Ya's June 5, 2012 supplemental questionnaire response at Exhibit 15aQ.
[56] See Nan Ya's November 22, 2011 Section C Questionnaire Response at 15.

Department's derived invoice date in the Preliminary Results and Post-Preliminary Analysis; however, because the Department has correctly reclassified these sales as EP sales, these sales now fall outside of the POR. If entry date is unavailable, then the Department should use shipment date to determine the universe of sales.

Nan Ya's Arguments

- Nan Ya followed the Department's instructions in the questionnaire. For EP sales, Nan Ya is not aware of the actual entry date. In transitioning from CEP to EP sales, there is a risk of losing sales by redefining the universe of sales used in calculating a margin. Using the same U.S. sales database to calculate the margin avoids this problem.

Department's Position: Consistent with the Act, the Department's regulations, and our practice, we have determined Nan Ya's universe of sales based on entry date, when available, and shipment date when entry date was not available.

According to section 751(a)(2)(A) of the Act:

> the administering authority *shall* determine (i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry.[57]

This provision is clear – the Act directs the Department to determine the dumping margin for each entry of subject merchandise during the review period. This task is straightforward in cases where the respondent is the importer of record, the transactions under review are EP transactions, and there is a direct link between the entry of subject merchandise and the sale to the first unaffiliated customer. This task is less straightforward where sales to the first unaffiliated customer are CEP transactions. In CEP situations, although the respondent's affiliate is generally the importer of record and thus has in its possession specific information related to its entries of subject merchandise during the POR, the respondent often cannot link those entries to the ultimate sale, either because the respondent sells products from inventory and does not have records which permit it to link entries and sales, or because the merchandise which entered during the POR was placed in inventory and may not have yet been sold.

Because problems may arise in gathering entry data in all situations, 19 CFR 351.213(e)(1)(i) permits the Department to define the universe of transactions examined during an administrative review using "entries, exports, or sales of the subject merchandise" during the review period. However, while the regulations reference all three bases during the POR, they are not, as a practical matter, equally preferable. As we have explained previously:

> Although the regulation lists entries, exports, and sales, it does so because the facts in some cases do not permit the linking of sales with exports or entries. When sales and entries can be linked, the Department prefers restricting the universe of sales encompassed in a review to entries in that period of review. In doing so, the Department is able to precisely quantify all expenses incurred in

[57] See section 751(a)(2)(A) of the Act (emphasis added).

> connection with each reviewed sale to the United States, which is not always possible when the universe of sales is not limited to actual entries. In addition, this methodology ensures the calculated rate will correspond to the merchandise on which the duties are collected.[58]

Given that section 751(a)(2)(A) of the Act requires the Department to determine dumping margins for entries during the POR, the Department's normal methodology is to define the universe of reviewed transactions using entry date for EP sales, where possible. This makes sense in light of the overall construction of the Act, which requires the Department to inevitably assess duties on "entries" that were reviewed in an administrative review.[59] This practice is reflected in the standard antidumping duty questionnaire, which instructs respondents to:

> Report each U.S. sale of merchandise entered for consumption during the POR, except: (1) for EP sales, if you do not know the entry dates, report each transaction involving merchandise shipped during the POR; and (2) for CEP sales made after importation, report each transaction that has a date of sale within the POR. Do not report canceled sales. If you believe there is a reason to report your U.S. sales on a different basis, please contact the official in charge before doing so.[60]

The rationale behind our practice is set forth in the preamble to the Department's regulations. Specifically, the preamble states the following:

> {B}ased on the results of each review, the Department generally will assess duties on entries made during the review period and will use assessment rates to effect those assessments. However, on a case-by-case basis, the Department may consider whether the ability to link sales with entries should cause the Department to base a review on sales of merchandise entered during the period of review, rather than on sales that occurred during the period of review. These two approaches differ, because, in the case of CEP sales, the delay between importation and resale to an unaffiliated customer means that merchandise entered during the review period often is different from the merchandise sold during that period. Because of the inability to tie entries to sales, the Department normally must base its review on sales made during the period of review. *Where a respondent can tie its entries to its sales, we potentially can trace each entry of subject merchandise made during a review period to the particular sale or sales of that same merchandise to unaffiliated customers, and we conduct the review on that basis*.[61]

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[58] See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part, 70 FR 67665 (November 8, 2005), and accompanying Issues and Decision Memorandum at Comment 5.
[59] See section 751(a)(2)(C) of the Act.
[60] See the Department's antidumping duty questionnaire issued to Nan Ya on September 9, 2011.
[61] See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27314 (May 19, 1997) (Preamble) (emphasis added).

The Preamble goes on to describe certain limited exceptions to the general rule outlined above. Specifically, the Preamble states:

> {T}he determination of whether to a {sic} review sales of merchandise entered during the period of review hinges on such case-specific factors as whether certain sales of subject merchandise may be missed because, for example, the preceding review covered sales made during that review period or sales may not have occurred in time to be captured by the review. Additionally, the Department must consider whether a respondent has been able to link sales and entries previously for prior review periods and whether it appears likely that the respondent will continue to be able to link sales and entries in future reviews.[62]

In this proceeding, the record contains entry dates for some of Nan Ya's EP sales, and the Department will use those dates to define Nan Ya's universe of sales, when they are available. Otherwise, the Department will use shipment date to define the universe of sales. Nan Ya's EP database submitted October 9, 2012, does not provide entry dates for any sales. However, the entry date for sales originally reported as CEP sales, which the Department has reclassified as EP sales, is on the record in the EP sales database that Nan Ya provided on October 9, 2012. Using this database, the Department has included in the U.S. sales database those sales that shipped prior to the POR and entered during the POR.[63] In so doing, the Department has defined Nan Ya's universe of sales consistent with the Act, our regulations, and Department practice.

For those sales included in the U.S. sales database that were shipped prior to the POR and entered during the POR, the record does not contain quarter-specific costs for those sales. When faced with missing cost data in the context of quarterly average costing, the Department's first preference would be to use the cost of the most similar CONNUM in the same quarter as a surrogate for the CONNUM with missing costs (i.e., cost data from the concurrent quarterly cost period), which represent the most contemporaneous data available on the record of the proceeding. If such data is not available, the Department would then look to the quarterly purchase data to construct a cost for the pre-POR quarters via indices, which take into account the changes in cost over the POR. However, CONNUM costs for quarters prior to the POR and pre-POR purchase data are not available on the record of this case. Therefore, lacking the requisite information for either the initial or secondary options for missing cost data, as neutral facts available the Department has used the costs from the closest quarter by time period (i.e., the first quarter) to determine the cost for the pre-POR EP sales. Based on these changes, the Department has reviewed all EP sales transactions reported by Nan Ya during the POR and calculated Nan Ya's dumping margin based on these EP sales that were entered during the POR. For a more detailed discussion of our application of neutral facts available for these costs, see Nan Ya Final Calculation Memorandum, incorporated herein by reference.

[62] Id.
[63] See Nan Ya Final Calculation Memorandum.

CONCLUSION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results in the Federal Register.

✓
Agree

Disagree

Paul Piquado
Assistant Secretary
for Import Administration

4 February 2013
Date