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AD/CVD Operations, Office 7/ MJH

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

FROM: Edward M. Yang
Senior Executive Coordinator,
China/NME Unit

SUBJECT: Issues and Decision Memorandum for the Final Results of the October 2, 2007 through May 31, 2008 Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea.

SUMMARY:

We have analyzed the comments of interested parties in the October 2, 2007 through May 31, 2008, administrative review of the antidumping duty order covering polyethylene terephthalate film, sheet, and strip (PET film) from the Republic of Korea. We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum.

Below is the complete list of the issues in this administrative review for which we received comments by parties:

Comment 1: Inland Freight incurred by Kolon from plant to warehouse

Comment 2: Calculation of a single, importer-specific assessment rate for Kolon's CEP sales

Comment 3: Zeroing

BACKGROUND:

This review covers one manufacturer/exporter of the subject merchandise, Kolon Industries, Inc. (Kolon). On July 6, 2009, the Department published in the *Federal Register* the preliminary results of the October 2, 2007, through May 31, 2008, administrative review of the antidumping order on PET film from Korea. *See Polythylene Terephthalate, Film, Sheet, and Strip from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review* 74 FR 31922 (July 6, 2009).

We invited interested parties to comment on the preliminary results of review. On August 5, 2009, we received comments from Kolon. We received no rebuttal comments. The Department has conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

CHANGES FROM THE PRELIMINARY RESULTS

Based upon our analysis of comments received, we made the following changes in the margin calculations for Kolon:

1) We have deducted from Normal Value (NV) the inland freight expenses incurred by Kolon in shipping PET film from its plant to its warehouse.

2) We have calculated a single, importer-specific assessment rate for Kolon's constructed export price (CEP) sales.

DISCUSSION OF THE ISSUES

Comment 1: Inland Freight incurred by Kolon from plant to warehouse

Kolon contends that the Department should make a home market price deduction for the inland freight expenses that Kolon incurred in shipping PET film from its plant to its warehouse. Kolon notes that it reported these movement expenses in the variable INLFTWH.

Department's Position:

We agree with Kolon. The inland freight expenses incurred by Kolon from its plant to its warehouse were incidental to delivering the merchandise to Kolon's home market customer. Therefore, pursuant to section 773(a)(6)(B)(ii) of the Act, in these final results we have made a deduction from NV for the home market inland freight expenses that Kolon incurred from its plant to its warehouse.

Comment 2: Calculation of a single, importer-specific assessment rate for Kolon's CEP sales

Kolon notes that for all of the CEP transactions listed in its U.S. sales database, it inadvertently listed the individual customer code in the IMPORTER field. As such, Kolon notes the Department calculated individual assessment rates for each CEP customer in Kolon's U.S. sales file. Kolon notes that for CEP transactions, it should have listed its U.S. subsidiary, Kolon USA as the importer of record. Kolon asserts that the Department should remedy this error in its final results by setting the IMPORTER field equal to "KUSA" for all CEP transactions.

Department's Position:

We agree with Kolon. In these final results, we have set the IMPORTER field equal to "KUSA" for all CEP transactions. By so doing, we have calculated a single, importer specific assessment rate which is applicable to all of Kolon's appropriate CEP transactions.

Comment 3 Zeroing

Kolon asserts the Department should eliminate its "zeroing" methodology in this administrative review. Kolon asserts that while the Department has declined to offset margins of dumping to account for sales sold above NV, the World Trade Organization (WTO) Dispute Settlement Body has consistently held that zeroing is inconsistent with the WTO antidumping agreement. Kolon cites to *United States-Final Anti-Dumping Measures on Stainless Steel from Mexico, Report of the Appellate Body, WT/DS344/AB/R* (April 30, 2008), to *United States Measures Relating to Zeroing and Sunset Reviews, Report of the Appellate Body* WT/DS322/AB/R (January 9, 2007), to *United States Measures Relating to Zeroing and Sunset Reviews, Report of the Appellate Body, WT/DS294/AB/R* (April 18, 2006), and to *United States-Continued Existence and Application of Zeroing Methodology, Report of the Panel*, WT/DS350/R (October 1, 2008) to support its assertion that the WTO has held that zeroing in administrative reviews is inconsistent with the United States' WTO obligations. Kolon notes that in response to a WTO ruling, the Department has eliminated zeroing in fair value investigations. Kolon asserts that in light of the WTO decisions that it cited, the Department should eliminate its zeroing practice in this administrative review.

Department's Position:

We have not changed our calculation of the weighted-average dumping margin as suggested by Kolon for these final results of review.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Outside the context of antidumping investigations involving average-to average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export price or constructed export price. As no dumping margins

exist with respect to sales where normal value is equal to or less than export price 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 U.S. Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. *See, e.g., Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004); *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), *cert. denied*; 126 S. Ct. 1023, 163 L. Ed. 2d 853 (Jan. 9, 2006) (*Corus I*).

Section 771(35)(B) of the Act defines weighted-average dumping margin as the "percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and dividing this amount by the value of all sales. The use of the term aggregate dumping margins in section 771(35)(B) is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which export price or constructed export price exceeds the normal value permitted to offset or cancel out the dumping margins found on other sales.

This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the POR: the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

The respondent has cited WTO dispute-settlement reports finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement. As an initial matter, the U.S. Court of Appeals for the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a [report] has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements Act ("URAA"). *Corus I*, 395 F.3d at 1347-49; *accord Corus II*¸502 F.3d at 1375; *NSK*, 510 F.3d 1375. Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. *See, e.g.*, 19 USC 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. *See* 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. *See* 19 USC 3533(g); *see, e.g., Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (Dec. 27, 2006) (*Zeroing Notice*). With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure.

With respect to *United States-Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/AB/R (Apr. 18, 2006) (US-Zeroing (EC)), the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. *See Zeroing Notice.* In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. *See id.* 71 FR at 77724.

With respect to *United States-Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007), *United States-Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (Apr. 30, 2008), *United States-Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R (Feb. 9 2009), the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review.

For all these reasons, the various WTO Appellate Body reports regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the export transactions examined in this review are found to exceed normal value, the amount by which the price exceeds normal value will not offset the dumping found in respect of other transactions.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the positions set

forth above and adjusting the related margin calculation accordingly. If these recommendations are accepted, we will publish the final results and the final weighted-average dumping margin for Kolon in the *Federal Register*.

Agree_____ Disagree_____

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Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

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Date