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Investigation
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MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Jeff May
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Polyethylene Retail Carrier Bags From Malaysia

Summary

We have analyzed the case and rebuttal briefs of interested parties in the investigation of sales at less than fair value of Polyethylene Retail Carrier Bags (PRCBs) from Malaysia. As a result of our analysis, we have made changes in the margin calculations for the final determination. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments and rebuttal comments by parties:

1. All-Others Rate
2. Rejection of Bee Lian's Response and Application of Total Adverse Facts Available
3. Determination of Production and Sales Quantities
4. Offset to Cost of Manufacturing (COM) for the Sale of Scrap and Misprinted Bags
5. Value of Recycled Resin Used in Production
6. Average Resin Cost by Type
7. Application of Auditors Year-End Adjustments
8. General, Administrative and Financial Expenses of Affiliated Companies
9. Treatment of Cost of Glue Spots as Cost of Materials Instead of Packing Cost
10. Billing Adjustments
11. Affiliation of Bee Lian and Certain U.S. Customers

Background

On January 26, 2004, the Department of Commerce (the Department) published its preliminary determination in the above-captioned antidumping duty investigation. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination; Polyethylene Retail Carrier Bags from Malaysia, 69 FR 3557 (Preliminary Determination). See also Notice of Initiation of Antidumping Duty Investigations: Polyethylene Retail Carrier Bags from the People's Republic of China, Malaysia, and Thailand, 68 FR 42002 (July 16, 2003) (Initiation Notice).

We gave interested parties an opportunity to comment on the Preliminary Determination. On April 14, 2004, the petitioners[1] submitted their case brief. Bee Lian Plastics Industries Sdn. Bhd. (the production facility) and its affiliate, Bee Lian Plastic Marketing Pte. Ltd. (BLPM) (the Singaporean marketing and sales office)[2] (collectively,

[1] The petitioners in the concurrent antidumping duty investigations are the Polyethylene Retail Carrier Bag ("PRCB") Committee and its individual members, PCL Packaging, Inc., Hilex Poly Co., LLC, Superbag Corp., Vanguard Plastics, Inc., and Inteplast Group, Ltd. (collectively, "the petitioners").

[2] BLPM is a successor to Bee Lian Plastic Industries Pte. Ltd. (BLPI), effective October 5, 2002.

Bee Lian), respondent in this investigation, also submitted its case brief on April 14, 2004. The petitioners and Bee Lian submitted their rebuttal briefs on April 19, 2004. Pursuant to the petitioners' February 24, 2004, request, we held a public hearing on April 23, 2004.

Discussion of the Issues

Comment 1: All-Others Rate

The Malaysian Plastics Manufacturers Association (MPMA) states that it does not challenge the Department's findings regarding the dumping rates assigned to Bee Lian and the non-responsive mandatory respondents but argues that the Department did not calculate the all-others rate in a manner consistent with U.S. international obligations and in a manner fair to other Malaysian companies, many of which are MPMA members. Citing United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/R (28 February 2001, Panel Report), WT/DS184/AB/R (July 24, 2001, Appellate Body Report) (Hot-Rolled Steel), the MPMA contends that Article 9.4 of the WTO Antidumping Agreement has been interpreted as providing for the exclusion of any rate even partially based on facts available and that the all-others rate should not be based on either de minimis rates or rates based on facts available. Yet, the MPMA argues, by basing the all-others rate of a simple average of a de minimis rate and five rates based on facts available, the Department's calculation of the all-others rate does just that. The MPMA contends that an alternate methodology for the calculation of the all-others rate would be to base its calculation on information from the companion antidumping proceeding on PRCBs from Thailand, as it involves the same products and similar markets and its all-others rate is not based on facts available.

In rebuttal, the petitioners argue that the Department's calculation of the all-others rate is consistent with section 735(c)(5)(B) of the Tariff Act of 1930, as amended (the Act). The petitioners contend that, although the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. 1 (1994) (SAA) suggests the use of a weighted-average rate based on zero or de minimis margins and margins determined pursuant to facts available, it states further that, if a weighted-average calculation is not feasible, the Department may use other reasonable methods. The petitioners state that, in this investigation, the Department could not use a weighted-average methodology because it lacked necessary data regarding the quantity of exports and sales. Furthermore, the petitioners argue, the Hot-Rolled Steel WTO decision cited by MPMA is inapposite to the facts of this investigation as none of the exporters and producers examined individually in that case had a rate which was zero, de minimis or determined entirely on the basis of facts available, citing Antidumping Measures on Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan, 67 FR 71936, 71938 (December 3, 2002). The petitioners also argue that the MPMA cites no statutory authority, judicial precedent, or administrative precedent that would permit the Department to apply the all-others rate from the preliminary determination in the concurrent investigation of PRCBs from Thailand as the all-others rate in this investigation. Finally, the petitioners contend that there is no need for the Department to adopt MPMA's proposed alternative because the Department's established practice provides a reasonable method to calculate the all-others rate and is consistent with the statute.

Department's Position: Pursuant to section 735(c)(5)(A) of the Act, our normal methodology for determining the all-others rate is to calculate the average of the weighted-average dumping margins established for exporters and producers investigated individually, excluding any zero and de minimis margins and any adverse facts-available (AFA) margins determined entirely under section 776 of the Act.

Although in this instance we have no qualifying rates for use in the calculation of the all-others rate, we find that there is no statutory authority, judicial precedent, or administrative precedent that would allow us to apply the all-others rate from a final determination in a concurrent investigation of merchandise from another country. Section 735(c)(5)(B) of the Act permits the use of "any reasonable method" for the calculation of the all-others rate in a situation such as is present here. Although the SAA at 873 suggests the use of a weighted-average rate based on the zero or de minimis margins and margins determined pursuant to the facts available, it states that, if this method is not feasible, the Department may use other reasonable methods. In this instance, due to data constraints regarding the quantity of exports or sales resulting from the failure of five mandatory respondents to respond to our requests for information, we have determined that a simple average of the six margins comes closest to the suggestion in the SAA.

Comment 2: Rejection of Bee Lian's Response and Application of Total Adverse Facts Available

The petitioners argue that, because Bee Lian overstated its production of finished goods deliberately, the Department should reject Bee Lian's response and base the firm's margin on total adverse facts available. The petitioners assert that Bee Lian overstated its finished-goods production during the period of investigation (POI) by including inappropriately the quantity of waste and scrap that it recycled as well as scrap and misprints that it sold. As a result, the petitioners assert, Bee Lian understated its per-unit cost of manufacture, including the amounts for materials, variable overhead, fixed overhead, and labor. The petitioners argue further that the distinction between finished- goods production and work in process is so elementary that it is impossible that Bee Lian could have actually neglected to appreciate this basic difference when preparing the data that it submitted to the Department and of which it certified the accuracy. The petitioners conclude that, due to Bee Lian's deliberate misrepresentations and its failure to cooperate to the best of its ability, the Department calculated a de minimis margin and did not instruct U.S. Customs and Border Protection to suspend liquidation of entries of merchandise exported by Bee Lian, thus denying petitioners critical protection from dumped imports.

Bee Lian argues that it based its reported costs on the production quantities that it maintained in its production and accounting records in the ordinary course of business. Bee Lian argues further that it reported its cost information on the same basis as its sales information and that comparisons must be done as reported by Bee Lian to ensure that the Department performs a fair and accurate calculation in the final determination. Bee Lian asserts that the Department should not penalize Bee Lian for its full cooperation based on the records available to the firm.

Department's Position: Section 776(a)(2) of the Act provides that, if an interested party withholds information that has been requested by the Department, fails to provide such information in a timely manner or in the form or manner requested, significantly impedes a proceeding under the antidumping statute, or provides such information but the information cannot be verified, the Department shall, subject to sections 782(d) and (e) of the Act, use facts otherwise available in reaching the applicable determination. Pursuant to section 782(e) of the Act, the Department shall not decline to consider submitted information if that information is necessary to the determination but does not meet all of the requirements established by the Department provided that all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; (5) the information can be used without undue difficulties.

We do not find that Bee Lian misrepresented its production of finished goods deliberately. We have determined that the information that Bee Lian submitted on the record is based on its accounting records. With the firm's information as well as that which we obtained at the sales and cost verifications (see Memorandum to the File from David Dirstine and Catherine Cartsos, dated March 29, 2004, Verification of the Bee Lian Plastics Industries Sdn. Bhd. Questionnaire Responses (Sales Verification Report), and Memorandum to Neal M. Halper, Director, Office of Accounting, from Mark J. Todd, dated April 6, 2004, Verification Report on the Cost of Production and Constructed Value Data Submitted by Bee Lian Plastics Industries Sdn. (Cost Verification Report)), we have sufficient data for calculating an accurate dumping margin. Therefore, we consider it inappropriate to reject Bee Lian's response and apply total adverse facts available. With respect to the petitioners' allegations that Bee Lian has overstated its finished-goods production quantity by including waste that the firm recycled, as well as scrap (damaged bags) and misprints that it sold, we cover these items in the following comments.

Comment 3: Determination of Production and Sales Quantities

The petitioners argue that if the Department calculates a margin for Bee Lian it must correct Bee Lian's finished-goods production quantity. The petitioners assert that the record contradicts Bee Lian's claim that its accounting system treats misprints and waste as if they were finished goods. Citing various parts of Bee Lian's cost response, the petitioners claim that Bee Lian does not assign production costs to misprints. Furthermore, the petitioners claim, with respect to recycled resin which is produced from the scrap, misprints, and waste that are generated in the conversion of rolled film into finished bags, Bee Lian assigns a cost that is based only on the cost of processing the waste. The petitioners state that, because Bee Lian assigns no cost to the quantities of scrap material produced in the ordinary course of business, it is inappropriate for the Department to include the quantities of these materials in the total quantity which Bee Lian reported for finished goods. The petitioners conclude that all of Bee Lian's production costs should be allocated over the quantity of finished goods exiting the production process.

Bee Lian argues that the petitioners have misstated the firm's finished-goods production quantity. Bee Lian states that its total reported production quantity is net of misprinted bags and damaged scrapped bags but inclusive or gross of die cuts. Bee Lian states further that its reporting of costs based on production quantities before die cuts is consistent with the nature of Bee Lian's operations. Bee Lian considers the bags before the punch-out of the die cuts to be finished goods because it claims that is what its customers consider to be finished goods. Bee Lian argues that this quantity must be used as the basis for allocating costs as it is consistent with Bee Lian's cost accounting system and how Bee Lian quantifies its sales and production as well as ensures that the Department makes a correct apples-to-apples comparison for the final determination.

In their rebuttal brief the petitioners argue that Bee Lian asserts falsely that the Department has ample documentation that its sales weights were reported and verified gross of die cut. The petitioners state further that Bee Lian's invoices in both the U.S. and comparative markets provide the bag count, not the weight, of the quantity sold. In addition, the petitioners argue that, when Bee Lian describes its conversion methodology to report sales in a common unit of measure (i.e., weight per carton), Bee Lian never states this calculation generates a gross weight nor does the firm disclose the crucial fact that the quantities in kilograms reported in its sales listings do not represent the actual quantities in kilograms shipped to the customers. The petitioners also argue that the Department has no means by which to calculate an accurate dumping margin with the sales data that Bee Lian has provided. As an alternative remedy to the inaccuracies inherent in using gross weight-based sales data, the petitioners propose that the Department adjust COM so that it is based on the weight of net finished-goods production by reducing reported finished goods by the weight of recycled resin. The petitioners state that the amount of the reduction is the percentage the Department calculated for the Cost Verification Report at 2, 15-16. Finally, the petitioners argue that the Department should increase all above-cost comparison-market prices due to the unknown variability in cut-out loss and its potential effect on the dumping margin. The petitioners state that they calculated the additional adjustment by subtracting the product with the smallest cut-out loss from the product with the largest cut-out loss based on the seven products with reported cut-out losses on the record.

Department's Position: As the petitioners contend correctly, we cannot calculate accurate dumping margins based on quantities in kilograms as the sales values reported in kilograms for both the U.S. market and comparison market (the United Kingdom) were reported gross of the die cuts. We disagree, however, with the petitioners' alternative proposal. The cost data in the Cost Verification Report to which the petitioners refer are aggregate data and are not product-specific. Furthermore, the proposed additional increase is made only to comparison-market prices, is therefore an AFA adjustment, and is also not product-specific. Finally, the methodology of the petitioners' proposed increase to the comparison-market prices is misplaced. In order to calculate the maximum yield loss due to die cuts between the U.S. market and the comparison market, the petitioners calculate the difference between the largest and smallest cut-out losses on the record. Both of the products which the petitioners compare are from the comparison market, however, such that this methodology does not measure the differences in yield loss between markets but, rather, the difference in yield loss for the comparison market only.

Bee Lian also reported sales quantities in thousands of bags for both markets, however, so although the cost data were calculated based on kilograms, there is information on the record that allows us to convert cost data to a per-thousand-bag basis. Therefore, we have calculated dumping margins on a per-thousand-bag basis. Specifically, because Bee Lian reported for each transaction in the U.S. market and the comparison market the gross unit price, the quantity in kilograms, and the quantity in thousands of bags, we have converted all gross unit prices by multiplying the quantity in kilograms times the gross unit price and divided the result by the quantity of bags in thousands. We have applied this methodology for all adjustments to price in both markets. We have applied a similar methodology for converting costs in the calculation of dumping margins. For further details see the Cost of Production and Constructed Value Calculation Adjustments for the

Final Determination memorandum from Mark Todd to Neal M. Halper, dated June 9, 2004 (Cost Calculation Memorandum), and Final Determination Analysis Memorandum for Bee Lian Plastics Industries, Sdn. Bhd. (Bee Lian) - Polyethylene Carrier Bags from Malaysia from David Dirstine to the File, dated June 9, 2004 (Final Analysis Memorandum).

Comment 4: Offset to COM for the Sale of Scrap (Damaged Bags) and Misprinted Bags

The petitioners assert that Bee Lian's reported COM "offset adjustment" for misprints and waste was calculated based on the quantity sold rather than on revenue actually earned by such sales. The petitioners argue that this methodology overstates the offset. Moreover, the petitioners continue to object to a quantity-based offset when the basis for the adjustment is sales of "off-spec" merchandise. The petitioners maintain that the Department should reject the claimed offset because Bee Lian did not report the data that would enable the Department to make the adjustment. The petitioners assert that, if the Department accepts Bee Lian's claimed COM offset, the Department should offset production costs for the actual revenue generated by sales of misprints and scrap.

Bee Lian maintains that misprinted bags are subject merchandise that customers can use to carry goods and that it reported the sales of misprinted bags in the comparison-market (the United Kingdom) sales database. Bee Lian argues that the Department's longstanding practice is to assign full costs to all subject merchandise, whether of first or second quality. Bee Lian maintains that misprints are not assigned a production cost in its accounting system. Additionally, Bee Lian claims that it is not possible to determine the product characteristics of misprints because they can be of varying sizes, resin concentrations, and ink usages that Bee Lian does not track in its sales and production records. Thus, Bee Lian explains that it assigned the POI average cost to the misprints. Bee Lian argues that, in order to avoid double-counting the production costs for misprinted bags, the misprinted bags should be valued at full cost and the Department should deduct this cost from the reported COM of first-quality products.

Bee Lian maintains that a full offset should be granted for the scrapped bags that were produced during the POI, converted into recycled resin, and sold. Bee Lian argues that the scrapped bags were not included in the production quantity it used to allocate costs. Yet, Bee Lian maintains it still incurred the costs associated with purchasing virgin resin and processing costs associated with recycling the waste into recycled resin. Bee Lian provides a formula for the offset that multiplies the kilograms of scrap generated during the POI by the average per-unit price received for the scrap sold during the POI less the grinding cost related to the scrap sold during the POI.

Department's Position: We find that an adjustment to costs for the sale of misprinted bags is warranted. Misprinted bags are foreign like product that Bee Lian reported in the comparison-market sales database. It is the Department's normal practice to assign full costs to second-quality merchandise that is produced in the same production process and used for the same general application as the prime merchandise. See Notice of Final Results of Antidumping Duty Administrative Review: Polyethylene Terephthalate Film, Sheet and Strip from Korea, 65 FR 55003 (September 12, 2000), and accompanying Issues and Decision memorandum at Comment 1 and the Federal Circuit's ruling in IPSCO v. United States, 965 F. 2d 1056 (Fed Cir. 1992). We noted that Bee Lian's accounting system does not assign a cost to misprinted bags and that the cost related to these bags is absorbed in the production process. See Cost Verification Report at IV.A.3.

Given that Bee Lian's normal accounting system does not assign a cost to misprinted bags and because there is no way to track the physical characteristics of the misprinted bags, it is a reasonable methodology to apply the average production costs for all prime bags to the misprinted second-quality bags.

We also find that an offset to costs for the scrap generated is warranted. While the Department has used the scrap revenue received during the period in other proceedings, using the value of the scrap generated during the period better matches the actual production results for the period. Bee Lian's normal books and records identify specifically the quantity of scrap generated and sold, the revenue received from the sale of scrap, and the additional cost incurred to further-process the scrap sold. See Cost Verification Exhibit (CVE) 12, Schedule of Processing Usage and Sales of Scrap. Thus, for the final determination we have offset the COM by the average production cost of the misprinted bags sold and by the market value of the scrap generated during the POI less the additional costs incurred in further-processing the scrap.

Comment 5: Value of Recycled Resin Used in Production

Bee Lian asserts that recycled resins are different physically from virgin resin in terms of density, color, and customer perceptions and thus it is reasonable to value it differently from virgin resin. Bee Lian claims that, by valuing recycled resin only on the incremental cost required to convert the recycled plastic into resin pellets, the cost associated with the virgin resin that is recycled remains with the virgin resin and there is no shifting of costs. Bee Lian asserts that this is a normal and accepted part of its accounting system and is consistent with Malaysian GAAP. Bee Lian cites Notice of Final Results of Antidumping Duty Administrative Review: Polyethylene Terephthalate Film, Sheet and

Strip from Korea, 61 FR 35177, 35179 (July 5, 1996) (PET Film), and E.I. duPont v. United States, 4 F. Supp.2d 1248, 1255 (CIT 1998), as support for its recycled-resin cost methodology. Bee Lian argues that the valuation of recycled resin at the same cost as virgin chips is unreasonable because the recycled chips are not entirely substitutable for virgin resin. Bee Lian claims that the Department and the Court of International Trade rejected this methodology in PET Film. Bee Lian maintains that assigning a market value to recycled resin would only be applicable if Bee Lian had no recycling plant and had to purchase the recycled resins. Bee Lian argues that it invested in a recycling plant to produce its own recycled resins and thereby is able to save on the additional cost that would be paid otherwise to an outside processor.

Bee Lian argues that, if the Department revalues the recycled resin, it should use the market price. Bee Lian cites PET Film as support for its argument. Bee Lian maintains that, if the Department revalues the recycled resin, then a credit must be made to the material costs in order to not double-count the resin cost. Finally, Bee Lian maintains that the Department should follow the industry consensus represented by Bee Lian and the petitioners on the valuation of recycled resin and continue to use Bee Lian's valuation methodology for recycled resin in the final determination.

The petitioners agree with Bee Lian that its normal cost accounting system values recycled resin appropriately for a producer of PRCBs. Thus, the petitioners argue that the Department should not adjust Bee Lian's normal costing of recycled resin.

Department's Position: It is appropriate for the Department to rely on Bee Lian's normal books and records to value recycled resin in the cost of production (COP) and constructed value (CV) calculations. In determining the difference-in-merchandise (difmer) adjustment to make when comparing U.S. sales to similar merchandise in the comparison market, however, we consider it appropriate to adjust the reported raw material resin costs to reflect more accurately the variable cost differences associated with the differences in the physical characteristics of the finished products being compared. Bee Lian recycles waste generated in the production process for use as a raw material input in the production of subject merchandise. In its normal books and records, Bee Lian only assigns the incremental cost of converting the recycled waste into resin chips to the recycled resin chips consumed in production. This incremental cost differs significantly from the cost of virgin resin chips also consumed in production. For the most part, the recycled resin chips and virgin resin chips are substitutable inputs in producing subejct merchandise. All subject merchandise and the foreign like product produced by Bee Lian could be produced using the recycled resin chips. Bee Lian predominantly used the recycled resin chips for merchandise sold to the United States, however, while merchandise it sold to the comparison market was produced with virtually all virgin resin chips. The consumption of virgin versus recycled chip has no affect on the resulting physical characteristics of the finished product as defined for this investigation. There are no identical product matches in this case due to the fact that the company sold bags of metric dimensions in the comparison market while it sold bags of non-metric dimensions to the United States. While the difmer adjustment should be limited to cost differences associated with physical differences between similar products being compared (e.g., the differences in size of the bags), the calculated difmer based on Bee Lian's reported costs reflect cost differences due to differences in the source of the raw materials used in production.

Section 773(a)(6)(C)(ii) of the Act requires the Department to account for and adjust for any differences attributable to physical differences between merchandise exported to the United States and the merchandise sold in the comparison market where similar products are compared. Section 351.411(b) of the Department's regulations directs it to consider differences in variable costs associated with the physical differences in the merchandise. In this case, during the POI, Bee Lian sold PRCBs in the comparison market and U.S. market that differed in size, color, ink, percentage of high-density polyethylene, and percentage of low-linear density polyethylene. We find that a difmer adjustment is appropriate for these physical characteristics. Accordingly, the Department must determine the variable cost of manufacturing (VCOM) differences attributable to the differences in the physical characteristics of the similar products being compared. The SAA at 828 states that "Commerce will not make an adjustment under this section for cost differences attributable to: (1) the fact that the exporter is charged different prices for its inputs depending on the destination of the finished product; ..." Our practice of considering only costs attributable to physical differences is also reflected in Import Administration's Policy Bulletin Number 92.2 (July 29, 1992) which states that "...it is important in any consideration of a difmer to isolate the costs attributable to the difference, not just assume that all cost of production differences are caused by the physical differences. When it is impossible to isolate the cost differences, we should at least determine that conditions unrelated to the physical differences are not the source of the cost differences ..."

In this case, Bee Lian's accounting system assigned a negligible value to recycled resin, which resulted in the raw material cost of bags produced for the U.S. market being significantly lower than the cost of bags produced for the comparison market. These cost differences are not related to the physical differences in the finished bags but rather to the source of the raw material inputs used to produce them. That is, physically identical bags, as defined by the Department's product characteristics, will have different costs based on the source of the raw material inputs used to produce them (e.g., virgin or recycled resin). It is our practice to adjust the VCOM for the difmer calculation in cases where we determine that the cost differences are due to differences other than physical differences. See Notice of Final Results of Antidumping Duty Administrative Review: Gray Portland Cement and Clinker from Mexico, 65 FR 13943 (March 15, 2000), and accompanying Issues and Decision memorandum at Comment 8, and Notice of Final Determination of Sales at Less Than Fair Value: Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe from Brazil, 60 FR 31960, 31968 (June 19, 1995).

In order to isolate the variable cost differences due to the physical differences of the bags, we applied the average POI per-unit resin cost to all bags for the difmer calculation. By applying the average per-unit resin cost to all bags produced, variable cost differences in similar bags are limited to the physical differences (e.g., the quantity of material required to produce different sizes) rather than to the difference in cost due to the source of the raw material inputs. We found that physical differences due to colors and inks are not affected by the resin raw material inputs.

Comment 6: Average Resin Cost by Type

Bee Lian argues that its production records capture the actual quantity of each resin grade it used and that it calculated the resin costs for each grade and usage. Therefore, Bee Lian argues, it is not necessary to average the resins cost by type since this will be moving from a more specific costing methodology to one less specific.

Bee Lian maintains that averaging the resin costs will ignore the actual production and market conditions it experienced. Bee Lian argues that the firm uses a job-order costing system that allows Bee Lian to calculate costs on a product-specific basis for each job and set sale prices based on these costs in order to maximize profit. By imposing a POI-average resin cost, Bee Lian argues that the Department would be requiring the firm to evaluate sale prices on a cost average that is not known until after the completion of the POI.

The petitioners did not comment on this issue.

Department's Position: Bee Lian's normal accounting system assigns resin costs based on the average monthly purchase prices by resin type and vendor (or, as Bee Lian refers to it, grade). During the cost verification we found that resins from different vendors are interchangeable. See Cost Verification Report at IV.A.4. Thus, resins that are interchangeable with each other have different per-unit costs depending on the purchase month and vendor. For a respondent in a country that is not experiencing high inflation, it is the Department's normal practice to calculate a single weighted-average cost for the entire POI except in unusual cases where this preferred method would not yield an appropriate comparison. See Notice of Final Results of Antidumping Duty Administrative Review and Determination not to Revoke the Antidumping Duty Order: Brass Sheet and Strip from the Netherlands, 65 FR 742, 746 (January 6, 2000), Comment 2. Moreover, section 773(b)(1) of the Act directs the Department to determine if there are reasonable grounds to believe or suspect that sales of the foreign like product have been made at less than the cost of production within an extended period of time. Section 773(b)(2)(B) of the Act defines an extended period of time to be a period that is normally one year, but not less than six months.

Using an annual average levels quarterly or seasonal fluctuations in cost and supplier price differences. Cost differences for products that use interchangeable raw material inputs should be attributable to physical differences (e.g., size and color) and not purchase timing or supplying vendor. Thus, for the final determination we have used Bee Lian's POI-average resin cost by type of resin (i.e., high density, medium density, low density, low-linear density, and recycled).

Comment 7: Application of Auditors Year-End Adjustments

The petitioners maintain that Bee Lian's auditors increased manufacturing expenses for the fiscal year (FY) 2003 and that Bee Lian's total reported COM should be increased by the amount attributable to the POI.

Bee Lian maintains that the Department can either pro-rate both FY 2002 and 2003 year-end adjustments, because the POI overlaps both fiscal years, or absorb the full fiscal year 2002 year-end adjustments and not incorporate the FY 2003 year-end adjustments. Bee Lian argues that no change to the reported costs is necessary because the FY 2002 year-end adjustments are a greater reduction to COM than the increases to COM from the FY 2003 year-end adjustments.

Department's Position: The POI overlaps the last five months of Bee Lian's 2002 fiscal year and the first seven months of Bee Lian's 2003 fiscal year. Bee Lian calculated its reported COM based on the amounts in its trial balance. Bee Lian's independent auditor reclassified certain expenses between COM and other expenses for both FY 2002 and FY 2003. The auditor's FY 2002 adjustments reduced the COM, while the FY 2003 adjustments increased the COM. The net effect of both FY adjustments results in a minor decrease to the reported POI COM but an increase in other expenses. Because all costs were captured in the reported costs no further adjustment is necessary. See Cost Verification Report at 10.

Comment 8: General, Administrative, and Financial Expenses of Affiliated Companies

The petitioners maintain that Bee Lian did not include any of the administrative and financial expenses of its Singapore-based affiliate, BLPI, or its successor, BLPM, in the reported COP. The petitioners maintain that the record evidence establishes that BLPI's functions include administrative and financial functions incurred on behalf of Bee Lian in addition to selling functions. The petitioners assert that Bee Lian's explanation of these expenses indicates that BLPI is responsible for various financial, accounting, and banking functions for the entire company. The petitioners argue that there is no evidence on the record that all of the Singaporean affiliate's costs should be regarded as selling expenses and not included in Bee Lian's cost. Accordingly, in the final determination the petitioners urge the Department to include all of BLPI's and BLPM's administrative expenses incurred during the POI in Bee Lian's general and administrative (G&A) expenses.

Bee Lian claims that it reported all of the costs of its Singapore affiliates as indirect selling expenses in the section B and C databases. Bee Lian argues that the petitioners' proposal to include the Singapore affiliates' expenses in the G&A and financial expenses would double-count these expenses by deducting them as indirect selling expenses from the gross unit price and including them as G&A and financial expenses for cost purposes.

Department's Position: We have not included all of BLPI's and BLPM's administrative expenses in the calculation of Bee Lian's G&A expenses. The administrative and operating expenses incurred by BLPI and BLPM were incurred on behalf of, and for the benefit of BLPI and BLPM. The record evidence does not establish that BLPI's and BLPM's functions include administrative and financial functions on behalf of Bee Lian in addition to selling functions. The record evidence cited by the petitioners simply establishes that a separate entity was set up in Singapore to segregate the sales operations from the production operations. The affiliated Singaporean companies are only engaged in resale operations and not the production of subject merchandise. This treatment is consistent with the Department's practice concerning such situations. See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Mexico, 68 FR 6889 (February 11, 2003), and accompanying Issues and Decision memorandum at Comment 11.

We have examined the petitioners' assertion that none of the affiliate's financial expenses are included in Bee Lian's report COP. We commented in our Cost Verification Report that Bee Lian calculated the financial-expense ratio based on the firm's audited financial statements rather than using the consolidated audited financial statements. See Cost Verification Report at VI.A. It is the Department's normal practice to calculate the financial expenses based on the consolidated entity. See Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium From France, 66 FR 65877, 65886 (December 21, 2001). Thus, for the final determination we have revised Bee Lian's financial-expense ratio based on its audited consolidated financial statements.

Comment 9: Treatment of Cost of Glue Spots as Cost of Materials Instead of Packing Cost

The petitioners argue that the cost of glue spots which are included as packing costs for certain comparison-market transactions should be removed from packing costs and added to the cost of materials. The petitioners contend that glue spots are apparently spots of glue added to the bags themselves to assist in dispensing.

Bee Lian did not comment on this issue.

Department's Position: We have evaluated the information on the record and determine that the cost of glue spots is a material cost and not a packing cost. Therefore, we calculated a simple average of the cost of the glue used for the glue spots on a per-thousand-bag basis during the POI. We deducted the average glue cost from the packing cost of all comparison-market transactions on a per-thousand-bag basis and added this amount to the cost of manufacturing on a per-thousand-bag basis. For further details see Final Analysis Memorandum at 4 and attachment 1, and Cost Calculation Memorandum at 2 and attachment 1.0.

Comment 10: Billing Adjustments

Bee Lian argues that the Department should deduct billing adjustments from gross unit price rather than add such adjustments as it did for the Preliminary Determination. Bee Lian states that the billing adjustments relate to credit notes issued to the customer that can be used in lieu of payments. In rebuttal, the petitioners agree with Bee Lian only with respect to the adjustments that were actually verified, but they argue that the Department should deduct billing adjustments from gross unit price only where the record shows that Bee Lian is entitled to the adjustment.

Department's Position: We deducted billing adjustments for the final determination. Prior to the comparison-market verification we reviewed the entire comparison-market sales database and selected certain transactions that had claims of billing adjustments. At verification we selected additional transactions with billing adjustments. Based on the transactions that we selected and examined, we were satisfied that Bee Lian had reported all of its billing adjustments correctly.

<u>Comment 11</u>: Affiliation of Bee Lian and Certain U.S. Customers

The petitioners argue that they submitted extensive evidence on the record in their February 23, 2004, and March 4, 2004, submissions demonstrating that Bee Lian is affiliated with certain of its U.S. customers and that the degree of affiliation represents control. The petitioners argue that Bee Lian should have reported its U.S. sales to these customers as constructed export-price (CEP) sales rather than treat such sales as export-price (EP) sales. Citing <u>Notice of Preliminary Determination of Sales at Less Than Fair Value: Solid Fertilizer Grade Ammonium From the Russian Federation</u>, 65 FR 1139, 1142 (January 7, 2000), the petitioners state that the Department has recognized that affiliation resulting from a close supplier relationship may occur when a majority of a supplier's sales are made to one customer. (The proprietary nature of the petitioners' February 23, 2004, and March 4, 2004, submissions regarding the degree of ownership and control preclude a discussion of the issue in this memorandum. For more detail, please refer to the <u>Sales Verification Report</u> at 2-3.)

In rebuttal, Bee Lian states that the Department should reject completely the petitioners' allegations that Bee Lian and its U.S. customers are affiliated and that somehow the CEP methodology applies to this investigation. Bee Lian comments that the Department undertook extraordinary steps to verify that Bee Lian is unaffiliated with its U.S. customers during the on-site verification. First, Bee Lian states that the Department reviewed its sales documentation, correspondence files, daily journals, and other records and did not find any information that would suggest that Bee Lian is affiliated with its U.S. customers. Second, Bee Lian states that the Department examined corporate registration documents, financial statements, and other Bee Lian documents and did not find that its U.S. customers had any shareholdings or positions in Bee Lian and its affiliates. Third, Bee Lian states that the

Department reviewed highly sensitive personal information, including the marriage licenses and/or national identity cards of all shareholders, board members, and senior officials of Bee Lian and its affiliates. Bee Lian states that Department's review of this documentation included analysis of family relationships by marriage, including those of grandfathers, grandmothers, fathers, mothers, aunts, uncles, sons, daughters, cousins, and nephews and that the Department found nothing close to a relationship to U.S. customers by reason of blood relationship or marriage. Fourth, Bee Lian contends that its U.S. customers are direct competitors of each other which confirms that Bee Lian has no exclusive arrangement with any of its U.S. customers. Finally, Bee Lian observes that the petitioners have omitted the major aspect of the close-supplier affiliation test: control. Bee Lian asserts that the case cited by the petitioners involved some aspect of control by one party or the other. Citing Melamine Institutional Dinnerware from Indonesia, 62 FR 1719 (January 19, 1997), Bee Lian argues that the exporter in that investigation sold 100 percent of its subject merchandise to a single importer, yet the Department found that these companies were not affiliated because there was no control by one over the other, as evidenced by correspondence, sales documentation, and the fact that the exporter had sought other U.S. customers before and after the POI.

Bee Lian argues that a correct application of the affiliation test demonstrates that there was no control by Bee Lian over any of its U.S. customers or vice versa.

Department's Position: Section 771(33)(G) of the Act of defines affiliated persons as including "any person who controls any other person and such other person." Section 771(33) of the Act states further that "(f)or purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person."

The Department has stated that merely identifying "the presence of one or more of the other indicia of control (as per section 771(33) of the Act) does not end (the Department's) task." Antidumping Duties; Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments, 61 FR 7308, 7310 (February 27, 1996). The Department is compelled to examine all indicia, in light of business and economicreality, to determine whether they constitute evidence of control. In determining whether control over another person exists within the meaning of section 771(33) of the Act, the Department considers the following factors, among others: corporate or family groupings; franchise or joint venture agreements; debt financing; close supplier relationships. See 19 CFR 351.102(b). The Department will not find affiliation on the basis of these factors unless the relationship has the potential to affect decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. Id.

We do not find the existence of an affiliation, as defined by the statute or in the regulations, between Bee Lian or its affiliates and its U.S. customers. Bee Lian, including its affiliates, and its U.S. customers have no stock ownership in each other, they do not share managers, and there is no common familial ownership. See Sales Verification Report at 2-3.

Furthermore, we do not find that Bee Lian's relationship with its U.S. customers constitutes a "close supplier relationship" which would indicate control by either party over the other. The SAA defines a close supplier relationship as one where "the supplier or buyer becomes reliant upon the other. " SAA at 838; see also Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews, 62 FR 18404, 18417 (April 15, 1997) (Korean Steel). To establish a close supplier relationship, the party must demonstrate that the "relationship is so significant that it could not be replaced." Id.

In Korean Steel, the Department provided additional guidance regarding close supplier relationships. Specifically, the Department established a threshold requirement that, in order to find a close supplier relationship, actual reliance between the companies must be found: "Only if we make such a finding (of reliance) can we address the issue of whether one of the parties is in a position to exercise restraint or direction over the other. When the Preamble to our Proposed Regulations, in its definition of 'affiliated parties,' states that 'business and economic reality suggest that these relationships must be significant and not easily replaced,' it suggests that we must find significant indicia of control." Id. With regard to the Korean Steel concern that relationships are not "easily replaced", Exhibit 6 of the petition dated June 20, 2003, indicates that there are at least fourteen producers of PRCBs in Malaysia from which the U.S. and comparison-market customers can purchase PRCBs, thereby eliminating any notion of dependence on Bee Lian as a supplier of PRCBs. Thus, we do not find a sufficient basis for finding that reliance exists. We also do not find that other evidence combined with this supplier relationship suffices to establish any type of control that would lead to a finding of affiliation. Accordingly, we determine that Bee Lian, its affiliates, and its U.S. customers are not affiliated as defined by the statute. Consequently, we have calculated the margin for Bee Lian based on its EP sales to customers in the United States.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting the margin calculation accordingly. If these recommendations are accepted, we will publish the final determination in the Federal Register.

Agree __________ Disagree __________

____
James J. Jochum
Assistant Secretary for Import Administration

______________________Date