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August 6, 2004

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

FROM: Jeff May
Deputy Assistant Secretary
for Import Administration, Group I

SUBJECT: Issues and Decision Memorandum for the Final Results of Antidumping Administrative Review of Polyethylene Terephthalate Film, Sheet and Strip ("PET film") from Taiwan- December 21, 2001, through June 30, 2003

SUMMARY

The Department of Commerce ("the Department") has analyzed the case briefs and rebuttal briefs of interested parties in this administrative review. As a result of our analysis, we have made changes from the preliminary results of review for Nan Ya Plastics Corporation, Ltd., ("Nan Ya"). These changes can be found in the Memorandum from Zev Primor and Thomas Martin to the File, "Calculation Memorandum for the Final Results of Review for Nan Ya Plastics Corporation, Ltd.," dated August 8, 2004 ("Nan Ya Calculation Memorandum"). We received no comments regarding the preliminary results with respect to Shinkong Synthetic Fibers Corporation ("Skinkong"), the other respondent in this administrative review. Therefore, there are no changes to the weighted-average margin for Shinkong. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below, in the "List of Issues for Discussion" section of this memorandum, is the complete list of the issues in this administrative review that were raised in the case and rebuttal briefs submitted by interested parties.

BACKGROUND

On April 8, 2004, the Department published in the Federal Register the preliminary results of its administrative review of the antidumping duty order on PET film from Taiwan. See Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Preliminary Results of Antidumping Duty

Administrative Review, 69 FR 18531 (April 8, 2004) ("Preliminary Results").

The merchandise covered by this order is PET film as described in the "Scope of the Review" section of the accompanying Federal Register notice. The period of review ("POR") is December 21, 2001, through June 30, 2003. We invited interested parties to comment on our Preliminary Results. We received written comments addressing our preliminary analysis on May 10, 2004, from Nan Ya, and separate comments from certain U.S. customers of Nan Ya that the Department deemed to be affiliated with Nan Ya in the Preliminary Results. We received a rebuttal brief from the petitioners[1] on May 17, 2004.

LIST OF ISSUES FOR DISCUSSION

Comment 1: The Department should determine that certain of Nan Ya's U.S. customers are unaffiliated with Nan Ya.

Comment 2: Nan Ya's pricing to U.S. customers does not support a finding that certain U.S. customers are affiliated.

Comment 3: The Department cannot find affiliation between members of a family when there is no blood relationship.

Comment 4: The Department should grant Nan Ya a constructed export price ("CEP") offset.

Comment 5: The Department should not double count profit on sales in the CEP profit calculation.

Comment 6: The Department should correct the margin calculation for ministerial errors.

MARGIN CALCULATIONS

We calculated export price ("EP"), CEP, and normal value ("NV") using the same methodology stated in the Preliminary Results, except as follows:

- The Department revised its conversion of dollars per pound to dollars per kilogram for converting U.S. gross prices and their respective expenses. See Comment 6, below. See also Nan Ya Calculation Memorandum, at 2.

- The Department has corrected minor discrepancies in the U.S. sales databases submitted by

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

the U.S. customers that the Department has deemed to be affiliated with Nan Ya. See Nan Ya Calculation Memorandum, at 3.

DISCUSSION OF ISSUES

Comment 1: The Department should determine that certain of Nan Ya's U.S. customers are unaffiliated with Nan Ya.

The respondent Nan Ya states that in the Preliminary Results, the Department erred in determining that certain members of a family grouping have the potential to act in concert or out of common interest, and argues that the Department should determine that Nan Ya is not affiliated with certain U.S. customers which are controlled by certain members of this family. Nan Ya states that the Department's affiliation analysis emphasizes the control group's ability or potential to act in concert or act out of common interest to exert restraint or direction over a company's activities, under section 771(33) of the Tariff Act of 1930, as amended ("the Act"). Further, Nan Ya states that the Department found that the members of the family at issue constitute a "family grouping" which acts in concert to produce and export PET film from Nan Ya to certain customers in the United States. While Nan Ya admits that Nan Ya's Chairman and Vice-Chairman, who are brothers, own Nan Ya shares, and are related by a family grouping to individuals who control certain U.S. customers, neither owns any shares in the said U.S. customers, and none of the officers or board members of Nan Ya serve as officers or board members of the U.S. customers or vice versa. Thus, according to Nan Ya, the Department's affiliation determination is strictly based on the fact that the owners are members of the same family.

Nan Ya states that there is no potential or ability for the family to act in concert to control production, pricing, or cost information. Accordingly, Nan Ya argues that the Department's affiliation determination is in error. Nan Ya states that the Department found Nan Ya to be affiliated with these U.S. customers pursuant to sections 771(33)(A) and 771(33)(F) of the Act, and 19 C.F.R. §351.102(b). Yet, according to Nan Ya, in its final rulemaking notice for 19 C.F.R. §351.102(b), the Department specifically indicated that it would not find that control existed on the basis of "corporate or family groupings ... unless the relationship has the potential to impact decisions concerning the production, pricing or cost of the subject merchandise." See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27380 (May 19, 1997). Nan Ya states that the Department repeated this mandate in its definition of "affiliated persons" in 19 C.F.R. §351.102(b). In the Preliminary Results, however, Nan Ya claims that the Department presumptively determined that Nan Ya was affiliated with certain U.S. customers based on the existence of a family grouping alone, without identifying any record evidence that would support its conclusion that there is potential among this family to control the production, pricing or cost of the subject merchandise.

Nan Ya states that the Department relies upon the potential for the family to act in concert. Nan Ya argues that the Department erroneously diminishes the fact that Nan Ya's final business decisions on the manufacture, sale and development of the subject merchandise are made by the manager and

department heads of Nan Ya's Polyester Fiber Division, without the involvement of the Chairman and Vice-Chairman. Nan Ya states that it holds monthly meetings to make decisions on the manufacture, marketing, and sale of the subject merchandise, and neither the Chairman nor the Vice-Chairman attend these meetings. According to Nan Ya, decisions are made on the basis of available market information, and the division managers are responsible for the business performance of each division, making sales-related and production-related decisions without any input from either the Chairman or the Vice-Chairman of the company. Nan Ya states that the responsibilities of the Chairman and Vice-Chairman of Nan Ya strictly relate to Nan Ya's overall business performance and major investment plans, and there is no potential for either the Chairman or the Vice-Chairman to influence decisions regarding production, pricing or costs for Nan Ya, and neither would they have the potential to influence buying or selling decisions of Nan Ya's U.S. customers. Nan Ya and, by extension, the Chairman and Vice-Chairman, have no information regarding where the downstream sales are shipped, or at what prices its products are sold after entering the inventory of the U.S. customers at issue.

Nan Ya notes that the U.S. customers in question refused to provide downstream sales information to Nan Ya, and refused to participate in this administrative review, at least initially, and only reluctantly agreed to cooperate after realizing that the Department's potential use of adverse facts available for non-participation would dramatically increase the duty liability they would face as importers of the subject merchandise. Nan Ya states that these companies agreed to submit information to the Department but refused to submit a single unitary sales file covering sales by Nan Ya and the U.S. customers, both because of antitrust concerns, and also so that pricing and sales data would not be disclosed to Nan Ya. Nan Ya states that it has no knowledge of the total volume and value of U.S. sales that the Department used to calculate its preliminary antidumping margin because the CEP sales information submitted by the alleged affiliates is business proprietary information under administrative protective order. Thus, under the Department's affiliation scenario, even if the Chairman and Vice-Chairman had the ability to control prices at Nan Ya and sought to eliminate dumping on U.S. sales, their efforts would be futile because they have no potential to control the prices for the downstream sales by the U.S. customers. Nan Ya states that a comparison of Nan Ya's pricing to each of its U.S. customers demonstrates that the Chairman and Vice-Chairman have no ability to influence prices.

The U.S. customers that the Department found to be Nan Ya's affiliates in the Preliminary Results made the same arguments made by Nan Ya, on their own behalf, in their own case briefs. In addition, these U.S. customers argue that the Department ignored the fact that their corporate heads are not equity holders in Nan Ya, and Nan Ya's Chairman and Vice-Chairman are not equity holders in the U.S. customers at issue. The U.S. companies alleged to be affiliated state that the U.S. Court of International Trade ("CIT") has long recognized that equity ownership remains a highly relevant consideration in determining whether parties are affiliated through common control, citing Corus Staal BV v. United States, 259 F. Supp. 2d 1253, 1266 (Ct. Int'l Trade, 2003). The U.S. companies alleged to be affiliated state that, because only the Chairman and Vice-Chairman of Nan Ya, and no other family members, have equity ownership in Nan Ya, and the Chairman and Vice-Chairman of Nan Ya have no equity ownership in these U.S. companies, there is no potential for the family group to

influence decisions regarding the production, pricing, or cost of the subject merchandise through ownership interests.

In rebuttal, the petitioners state that Nan Ya and the U.S. customers that the Department found to be affiliated are in fact affiliated according to the plain language of section 771(33) of the Act, and to find them unaffiliated would not be consistent with the Department's practice or its determination during the investigation. See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from Taiwan, 67 FR 35474 (May 20, 2002) (Final Determination). The petitioners state that, in the Final Determination, the Department found two U.S. customers to be affiliates and required Nan Ya to treat sales to these customers as CEP sales. The petitioners continue, stating that Nan Ya attempted to report all of its sales as EP sales, despite the Department's findings in the Final Determination. The petitioners state that, after being ordered to file sales data for its U.S. affiliates, it filed separate sales files for each affiliate, making work more difficult for the Department and the petitioners.

The petitioners argue that the facts of the relationships between Nan Ya and the U.S. customers at issue provide conclusive evidence of affiliation. The petitioners cite Nan Ya's statements about the Chairman and Vice-Chairman's family relationships with certain U.S. customers, and argue that the affiliation sections of the statute and regulations are intended to capture relationships that place one person or entity in a position to "exercise restraint or direction over the other person" or have a potential to impact decisions under 19 C.F.R. §351.102(b). According to the petitioners, the family relations clauses of the affiliation provision are intended to reach those control relationships that are not formal business relationships. The petitioners argue that the lack of equity ownership or non-attendance at decision-making meetings does not alter the potential ability of family members to impact decisions concerning the production, pricing, or cost of the subject merchandise, or control of other family members. According to the petitioners, if a finding of affiliation could only be made by identifying a formal business relationship, the family relationship provisions of the Act would be worthless.

Department's Position:

We agree with the petitioners. In the Preliminary Results and in the Final Determination, we found that Nan Ya is affiliated with certain U.S. customers through a family grouping. See Memorandum from Thomas F. Futtner, Acting Office Director, to Holly A. Kuga, Acting Deputy Assistant Secretary, "Affiliation of Nan Ya Plastics Corporation, Ltd., with Certain U.S Customers," dated April 1, 2004 ("Preliminary Affiliation Memorandum"); see also Final Determination and the accompanying Decision Memorandum, at Comment 4. The only substantive change in this issue from the Final Determination is that the Department found in the instant review the existence of a U.S. customer that is affiliated with Nan Ya via a step relationship. This U.S. customer was not involved in the affiliation decision made in the Final Determination. See the Department's position statement in Comment 3 for further details regarding Nan Ya's affiliation with this customer.

Upon review of the comments submitted by the interested parties, we find that the family members at issue are affiliated because, under section 771(33)(A) of the Act, members of a family may be viewed as a unit, i.e., a family grouping can be considered a "person" under the statute. We find that Nan Ya is affiliated with the U.S. customers in question, under section 771(33)(F) of the Act by virtue of common control by members of the same family involved in the ownership and management of Nan Ya and the U.S. customers in question. We continue to find that this family grouping has the potential to influence the decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.

While Nan Ya's claim that routine business decisions on the manufacture, sale, and development of the subject merchandise are made by the managers and department heads of the Polyester Fiber Division may generally be accurate, it is also true that managers and department heads are ultimately held accountable to the board of directors. Evidence on the record indicates that the managers and department heads of the Polyester Fiber Division must report to Nan Ya's board of directors, and that the Chairman and Vice-Chairman of Nan Ya have legal and operational control of Nan Ya. See Nan Ya's September 22, 2003, Section A response at Exhibits A-3 and A-9. Therefore, we find that the family's position as Chairman and Vice-Chairman of the board of directors allows the family to exercise restraint and direction over Nan Ya's business decisions. Regarding the U.S. customers at issue, we note that the family holds substantial ownership and leadership positions at these companies. See Preliminary Affiliation Memorandum. The ownership and leadership positions allow the family to have legal and operational control of these companies. See Nan Ya's November 10, 2003, supplemental Section A response at 1-2.

As discussed in the Preliminary Affiliation Memorandum and Final Determination, the Department is concerned with the potential of a group to act in concert or out of common interests. The Department is not required to find that a group actually acted in concert to any given effect. Although the family members controlling the U.S. customers at issue have never owned stock in Nan Ya or served on Nan Ya's board, we agree with the petitioners that the Department's test of affiliation does not focus solely on formal business relationships, such as stock ownership. While the record does not indicate that Nan Ya's Chairman and Vice-Chairman have any direct control over pricing or the behavior of the U.S. customers at issue, the petitioners are correct in stating that the Department's test of affiliation does not mandate a finding of actual or absolute control, but merely predicates that the persons in question be in a position to influence decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. To determine whether "control" exists, the Department's regulations direct the agency to consider the following factors, "among others: corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships." (Emphasis added.) 19 C.F.R. §351.102(b). The Department normally does not find "control" on the basis of those factors "unless the relationship has the potential to impact decisions concerning the ... pricing ... of the subject merchandise."

The family members are affiliated under section 771(33)(A) of the Act because they are members of

one family grouping, and under the Act, the members of the family are viewed as a unit, i.e., person. The family's positions in senior management at both Nan Ya and the U.S. customers at issue give it the capacity "to impact decisions concerning the production, pricing or cost of the subject merchandise." In recent decisions, the Department has equated family groupings, such as the family grouping at issue, with the term "person." See Steel Concrete Reinforcing Bar From The Republic of Korea: Final Results of Antidumping Duty Administrative Review, 69 FR 19399 (April 13, 2004) and the accompanying Decision Memorandum, at Comment 1; see also Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results and Rescission in Part of Antidumping Duty Administrative Review, 69 FR 26361 (May 12, 2004) and the accompanying Decision Memorandum, at Comment 1. We find that the family as a unit is in a position of legal and operational control of Nan Ya and the U.S. customers at issue, by virtue of the family's substantial ownership in all of the companies and the positions of family members as senior officers of these companies. Given that the family, as a unit, is legally and operationally in a position of control over Nan Ya and these U.S. customers, these companies are affiliated under section 771(33)(F) of the Act.

In sum, Nan Ya has provided no new information or proof to support its contention that it is not affiliated with certain U.S. customers. Its responses indicate that Nan Ya's Chairman and Vice-Chairman have family connections to the corporate heads of certain of its U.S. customers. See Nan Ya's Section A response, at A-3. Because we have concluded that Nan Ya is affiliated with certain U.S. customers, the appropriate sale for use in our analysis is the sale by these U.S. affiliates to their unaffiliated U.S. customers. Those sales are CEP transactions because they were made in the United States after the date of importation. See section 772(b) of the Act. For CEP sales, the Department deducts from the U.S. resale price to an independent purchaser all selling, distribution, and manufacturing expenses incurred in the United States and an amount for profit allocable to these expenses. See section 772(c) of the Act.

Comment 2: Nan Ya's pricing to U.S. customers does not support a finding that certain U.S. customers are affiliated.

Nan Ya states that the sales listing, submitted to the Department on December 17, 2003, demonstrates that Nan Ya's prices to the U.S. customers which the Department has found to be affiliated are not more favorable than prices for sales of the same models to U.S. customers that the Department has not found to be affiliated. Nan Ya claims that the submitted U.S. sales files are replete with examples that support a conclusion that Nan Ya sells its products to all U.S. customers at arm's-length prices.

Nan Ya also states that the U.S. customers are not vertically integrated with Nan Ya, and to Nan Ya's knowledge, Nan Ya is only one among several suppliers for each of these companies. Further, Nan Ya states that it has no contracts with these customers obligating it to supply subject merchandise to them or for these customers to purchase subject merchandise from Nan Ya. Nan Ya contends that the prices that Nan Ya offers the subject merchandise to them are subject to the same competition as that between Nan Ya and other customers. Nan Ya states that it is free to sell the subject merchandise to

all customers in the United States, provided that the purchase volumes meet Nan Ya's volume requirements in order to cover Nan Ya's internal costs for handling sales.

The U.S. customers that the Department found to be Nan Ya's affiliates in the Preliminary Results entered the same arguments on their own behalf, in their own case briefs.

In rebuttal, the petitioners argue that Nan Ya's assertion that there is no vertical integration between Nan Ya and certain U.S. customers is contradicted by public information on these U.S. customers' websites. Citing its October 16, 2003, comments, the petitioners state that one of the U.S. customers has a website that promotes its relationship with Nan Ya as one of vertical integration that insures a consistent source of supply.

Department's Position:

We disagree with Nan Ya. Nan Ya's argument comparing sales prices to U.S. customers that the Department has found to be affiliated with those to U.S. customers that are not affiliated is incorrect. The Department only performs an arm's-length analysis in the context of sales in the home market ("HM"), pursuant to 19 CFR §351.403(c). This regulation clarifies the Department's authority to use sales to or through an affiliated party as a basis for calculating NV. Under 19 CFR §351.403(c), if an exporter or producer sells the foreign like product to an affiliated party in the HM, the Department may calculate NV based on that sale only if the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller. The regulation does not require the Department to perform this analysis on sales to the United States.

We also do not agree with the petitioners' contention that Nan Ya is "vertically integrated" with its U.S. customers. Nan Ya appears to be correct in stating that the family members controlling Nan Ya and the U.S. customers at issue have never owned stock in one another, and do not serve on each other's boards, as the term "vertically integrated" suggests. However, the Department's test of affiliation does not focus solely on formal business relationships, such as stock ownership. Furthermore, we find that the public statements on the website cited by the petitioners are merely an advertisement by Nan Ya's U.S. affiliates to unaffiliated customers that they can ensure a consistent source of supply. We therefore do not find the public statements on the website cited by the petitioners to be additional evidence of Nan Ya's affiliation with its U.S. customers.

Comment 3: The Department cannot find affiliation between members of a family when there is no blood relationship.

Nan Ya argues that the relationship between itself and one of the U.S. customers in question is not a blood relationship, but rather a relationship through marriage. The corporate head of one U.S. customer is related via a step-relationship (through marriage) to the chairman of Nan Ya, and neither the statute nor the Department's regulations provide a basis for establishing affiliation on such an

extended relationship. Nan Ya cites section 771(33)(A) of the Act, which defines affiliated persons as "(m)embers of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants." Nan Ya states that the Congress specifically excluded from the statute any provision for affiliation on the basis of step-relationships, and further maintains that the Department has never found step-relations to form the basis for corporate affiliation, and the Department did not make such a finding during the Final Determination. Nan Ya cites a canon of statutory interpretation, "expressio unius est exclusio alterius," meaning that if Congress included one thing (blood relation), it implies the exclusion of the alternative (step-relation). Thus, Nan Ya argues that for the Department to find affiliation based upon a step-relationship contravenes the statute.

The U.S. customer at issue entered the same argument on its own behalf, in its own case brief.

In rebuttal, the petitioners state that the ability or potential to exercise control exists in step-relationships, just as in blood relationships. The petitioners argue that the list of family relationships provided in section 771(33)(A) of the Act is illustrative rather than exhaustive, as evidenced by the use of the word "including," and Nan Ya's citation of the canon of statutory interpretation is misplaced in this context. The petitioners also point out that step-relationships logically require a spousal family relationship, which is specified in the statute. The petitioners also state that the Department did not find the U.S. customer at issue to be affiliated based upon a step-relationship in the Final Determination because Nan Ya failed to reveal its relationship with this particular U.S. customer during the investigation. The petitioners argue that the record was therefore incomplete due to this omission.

Department's Position:

We agree with the petitioners. In applying 19 CFR §351.102(b), the Department makes a case-by-case determination of whether the relationships have the potential to affect the subject merchandise. The involved family can be classified as a family grouping under the statute, precisely because it possesses the ability, or potential to act in concert or act out of common interest to exert restraint or direction over each company's activities. As we stated in the Department's position in Comment 1, we find that the family's position as Chairman and Vice-Chairman of the board of directors allows the family to exercise restraint and direction over Nan Ya's business decisions, and the family also holds substantial ownership and leadership positions in the involved U.S. customers. See Preliminary Affiliation Memorandum.

Furthermore, we find that a step-relationship fits within the description of members of a family described in section 771(33)(A) of the Act. The absence of a common blood lineage in this case is not determinative of whether this relationship could be properly characterized as a family grouping under the statute. The CIT in Ferro Union, Inc. v. United States, 44 F. Supp.2d 1310, 1324 (Ct. Int'l Trade 1999) (Ferro Union) stated:

> the word "including" in section (A) of 19 U.S.C. § 1677(33) is an indication that

> Congress did not intend to limit the definition of "family" to the members listed in this section. Had Congress intended this list to be definitive, it would have chosen different wording. The wording it did choose evinces an illustrative intent.

Thus, the CIT in Ferro Union made clear that Congress's intent was to include within the definition of "family" individuals beyond the nuclear family. In making our affiliation determination, the Department looks to the potential of the family unit, however reasonably defined, to exercise actual or potential control.

We agree with the petitioner that Nan Ya's statutory interpretation argument is without merit since the express language of the statute is illustrative rather than exhaustive, as evidenced by the use of the word "including." As we found in the Preliminary Results and Final Determination, we continue to find that the Department has reason to believe that this family grouping has the potential to influence the decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.

Comment 4: The Department should grant Nan Ya a CEP offset.

If the Department determines that Nan Ya is affiliated with certain U.S. customers and applies a CEP methodology, Nan Ya argues that the Department should grant a CEP offset for these sales. Nan Ya claims that the Department erroneously determined in the Preliminary Results that Nan Ya's HM and U.S. sales were made at the same level of trade (LOT). Nan Ya states that, because of "insufficient qualitative differences" between the HM LOT and the U.S. market LOT, the Department declined to grant Nan Ya a CEP offset to NV pursuant to section 773(a)(7)(B) of the Act.

Nan Ya contends that the Department's determination that it performed substantially similar selling functions for U.S. sales as compared to HM sales contravenes the record evidence. Nan Ya states that the Department acknowledges that there are differences in the selling functions performed for U.S. and HM sales but refers to these differences as minor. Nan Ya contends that a complete examination of the information on the record indicates that there are significant qualitative differences in the selling functions performed by Nan Ya in making sales in the HM and United States. As an example, Nan Ya states that its sales promotion/customer solicitation activities are performed for its U.S. sales on an irregular basis while claiming that the same activities are regularly performed in the HM. With respect to U.S. sales, Nan Ya states that during the POR it did not engage in sales promotion/customer solicitation activities.

While Nan Ya admits that it cannot tie any selling functions in the HM to specific sales, it contends that there is no requirement in the Department's LOT analysis that selling activities be tied to specific sales. Nan Ya states that there are differences in selling functions between U.S. and HM customers regarding technical advice, as Nan Ya engages in general consultations with HM customers on the technological aspects of products, while Nan Ya did not provide any technical advice to U.S. customers during the POR. Nan Ya argues that it provided transportation services only from its factory to the port in Taiwan

for the vast majority of U.S. sales, but it always provided freight and delivery services for its HM sales. Nan Ya asserts that the only selling functions it provides for both HM and U.S. customers are warranty services, which are sales specific. Nan Ya contends that all other selling functions, including sales promotion/customer solicitation, technical advice, and freight and delivery arrangements, vary widely depending on whether the sale is to Nan Ya's HM customer or U.S. customer. Nan Ya contends that the Department should determine that Nan Ya's HM sales are sold at a different LOT than its U.S. sales, but since Nan Ya is unable to demonstrate that the differences in LOT affect price comparability, the Department should make a CEP offset.

In rebuttal, the petitioners argue that the Department correctly concluded in the Preliminary Results that Nan Ya's HM and U.S. sales were made at the same LOT, and therefore, no CEP offset should be granted. The petitioners state that Nan Ya has exaggerated minor differences in selling functions by selectively extracting language and numerical data from the record. The petitioners cite the Department's LOT memorandum, where the Department examined various selling functions for both HM and U.S. sales, and found only minor differences that were insufficient to find distinct LOTs. See Memorandum from Thomas Martin and Zev Primor, Import Compliance Specialists, to the File, "Level of Trade Analysis for Nan Ya Plastics Corporation, Ltd.," dated April 1, 2004 ("Nan Ya LOT Memorandum"). The petitioners state that Nan Ya only exaggerates differences in selling functions already noted by the Department. According to the petitioners, Nan Ya contradicts statements made in its original section A response in stating that it did not engage in U.S. sales promotion or customer solicitation during the POR. Nan Ya subsequently stated in its supplemental A response that it only contacted customers when necessary, and that it did not solicit any "new customers" during the POR. The petitioners state that this suggests that Nan Ya engaged in sales promotion and customer solicitation for some U.S. customers.

With regard to Nan Ya's statement that it engaged in general consultations with HM customers on technological aspects of products while the same selling function was not provided to the U.S. customers, the petitioners contend that the Department simply repeated Nan Ya's earlier explanation that technical services were not directly related to specific sales and, therefore, are not a selling activity or service. In regard to Nan Ya's statement that it does not provide significant freight and delivery services for its U.S. sales, the petitioners assert that this is not true for its CEP sales, as Nan Ya's affiliated U.S. customers paid international freight costs for nearly every sale. Since Nan Ya's selling activities are the same in both the HM and U.S. market, the petitioners state that an LOT adjustment or CEP offset is not warranted in this case.

Department's Position:

We agree with the petitioners. We reviewed information regarding the distribution systems in both the United States and Taiwan markets, including the selling functions, classes of customer, and selling expenses to determine whether a CEP offset was necessary, pursuant to section 773(a)(7)(B) of the Act. As we found in the Preliminary Results, we find that a complete examination of the information on

the record indicates that there is insufficient qualitative differences in the selling functions performed by Nan Ya in making sales in the HM and United States to find them to be distinct LOTs. See Nan Ya LOT Memorandum, at 4.

Specifically, with respect to Nan Ya's claim that it did not engage in U.S. sales promotion or customer solicitation during the POR, while performing such services in its HM, a review of Nan Ya's Section A response indicates that it engaged in "sales promotion" in both markets. See Nan Ya's Section A Response, at A-19. Nan Ya later "clarified" its statement that it only makes phone calls or visits to U.S. customers when Nan Ya deems it "necessary," and that it did not "solicit any new customers" during the POR. See Nan Ya's Supplemental Section A Response, at 9. While it may be possible that Nan Ya did not solicit any new customers during the POR, Nan Ya's response suggests that Nan Ya engaged in sales promotion activity with respect to U.S. customers with whom it had a prior business relationship. Id.

Similarly, with regard to Nan Ya's claim that it provided freight and delivery arrangements to a minimal number of U.S. customers while, at the same time, providing such services to all HM customers, our review of Nan Ya's response supports the contention that Nan Ya has reported delivery service expenses from factory to the Taiwan port for its U.S. sales, a service similar to delivery at Taiwan destinations for its HM customers. Nan Ya reported these expenses in its section B and C responses. See Na Ya's October 15, 2003, section B response at B-27; see also Na Ya's October 15, 2003, section C response at C-28.

Concerning technical services, the record indicates that Nan Ya provided no technical services to U.S. customers during the POR, while it provided such services to HM customers. See Na Ya's September 22, 2003, section A response at A-19. Nan Ya is correct in stating that the Act would not require that its HM technical services apply to specific sales for the Department to consider an LOT adjustment. However, Nan Ya did not provide enough details to indicate the frequency of provision of technical services in the HM, thus suggesting that this service activity is minor in nature. In sum, the record demonstrates that Nan Ya provides similar services in both the United States and Taiwan, and the lack of one specific service, i.e., technical service, would not amount to a different LOT. Id.

Considering the information provided by Nan Ya to the Department concerning its selling function in the HM and U.S. markets, we continue to find, for these final results, that Nan Ya makes home and U.S. sales at the same LOT, and therefore we have not granted Nan Ya a CEP offset to NV.

Comment 5: The Department should not double count profit on sales in the CEP profit calculation.

Nan Ya states that, if the Department continues to apply CEP methodology for the final results, it should revise the CEP profit calculation so as not to double count profit on sales from Nan Ya to its U.S. affiliates, and profit on sales from the U.S. affiliates to their unaffiliated customers. Nan Ya states

that, in the Preliminary Results, the Department calculated the CEP profit rate by subtracting total expenses from both markets (the cost of manufacturing (COM), general and administrative expenses, interest expenses, packing, selling expenses, and movement expenses) from total revenues from both markets (the gross unit price, minus discounts and rebates, multiplied by the reported quantity), and then dividing that profit amount by total expenses. Nan Ya contends that the Department is double counting the profit amount that Nan Ya earns on sales to the alleged affiliates, and the profit amount that the alleged affiliate earns on sales to its customer. Nan Ya argues that the Department should not double count these profit amounts because, if Nan Ya and its U.S. affiliates are truly related, then the sale from Nan Ya to its U.S. affiliate is simply an internal transfer and the profit amount within that price should not be considered as revenue to Nan Ya.

To avoid this double counting, Nan Ya states that the Department should calculate total expenses for U.S. sales starting with the "landed cost" for the subject merchandise, derived by taking the entered value for the subject merchandise and adding amounts for ocean freight and marine insurance, U.S. inland freight and brokerage, and U.S. duty, rather than Nan Ya's COM. According to Nan Ya, the "landed cost" then would be the same as the "acquisition cost" or "cost of goods sold" for the U.S. affiliate. Nan Ya states that using "landed cost" or "cost of goods sold" instead of COM as a starting point for the calculation of total U.S. expenses is appropriate in this case and has been the basis for similar calculations in other proceedings, citing Koyo Seiko Co., Ltd. v. United States, 186 F. Supp. 2d 1332 (CIT 2002); and Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Thereof, Whether Assembled or Unassembled, From Japan, 61 FR 38139, 38148 (July 23, 1996).

In rebuttal, the petitioners state that Nan Ya's contention with the Department's CEP profit calculation makes no sense either as an accounting matter or as a matter of Department procedure. The petitioners state that adding profits accruing to both a parent company and its sales subsidiary is not double counting. The petitioners state that the Department calculated the CEP profit rate in accordance with Department policy. According to the petitioners, Nan Ya's proposed alternative methodology would require the Department to ignore part of the profit from the manufacture and sale of subject merchandise that goes to the parent company by virtue of the sale to its sales subsidiary at a transfer price. The petitioners state that Nan Ya's "landed cost" is the invoice price plus certain expenses, and therefore it relies on a transfer price which is no more reliable for the CEP profit rate calculation than it is for dumping analysis. The petitioners state that the two citations provided by Nan Ya are not relevant to CEP profit rates, since one relates to U.S. inventory carrying cost calculation, and the other relates to general and administrative expense allocation for the U.S. affiliate of a foreign producer.

Department's Position:

We agree with the petitioners. The Department calculated the CEP profit rate in accordance with its normal practice, which is articulated in Policy Bulletin 97.1, "Calculation of Profit for Constructed Export Price Transactions" (September 4, 1997) (Policy Bulletin 97.1). Under section 772(f)(2)(A) of

the Act, CEP profit is determined by calculating the "total actual profit" for all sales of the subject merchandise and the foreign like product. We then allocate the "total actual profit" to individual CEP sales based on the "applicable percentage," which is computed as the ratio of total U.S. expenses to total expenses. The Department used its standard methodology for CEP profit calculation and did not alter any of the programming language for CEP profit. See Memorandum from Thomas Martin and Zev Primor, Case Analysts, to The File, "Calculation Memorandum for the Preliminary Results of the December 21, 2001 through June 30, 2003, Administrative Review of the Antidumping Duty Order on Polyethylene Terephthalate Film, Sheet, and Strip (PET film) from Taiwan (A-583-837), Nan Ya Plastics Corporation, Ltd.," dated April 1, 2004, at 7-8.

We disagree with Nan Ya's claim that the Department included a transfer price profit in total revenue that should appropriately have been included in total expenses for calculating the CEP profit ratio, were it reported as an expense. Transfer price profit is not found in the statutory provision that defines the "total expenses" to reduce "total revenue." Rather, Congress explicitly stated in section 772(f)(2)(D) of the Act that "total actual profits" for calculating the CEP profit ratio are "total profit earned by the foreign producer, exporter, and affiliated parties." Furthermore, section 772(f)(2)(B) of the Act provides that deductions to CEP used to compute CEP profit are limited to those appearing under section 772(d)(1) and (2) of the Act. Transfer price profit does not appear under either one of those subsections, but rather is plainly part of unadjusted CEP, defined as "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States . . . as adjusted under subsections (c) and (d) of this section." Therefore, in accordance with section 772(b) of the Act, we have not excluded, but rather have included, transfer price profit in total revenue for our calculation of CEP profit. Thus, we have made no change in our methodology from the Preliminary Results.

Comment 6: The Department should correct the margin calculation for ministerial errors.

Nan Ya states that the Department used an incorrect factor when converting U.S. gross prices and certain expenses from dollars-per-pound to dollars-per-kilogram.

The petitioners did not rebut this comment.

Department's Position:

We agree with Nan Ya. For the final results, we have corrected the error in converting the unit of measure for U.S. gross prices and certain expenses, with the exception of the quantity variable (QTYU) which was properly converted in the Preliminary Results. See Nan Ya Calculation Memorandum at 2.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If agreed, we will publish the final weighted-average dumping margins in the Federal Register.

AGREE_____ DISAGREE_____ LET'S DISCUSS_____

_____
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____
Date