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Investigation
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March 14, 2005

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

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Determination of
the Antidumping Duty Investigation of Bottle-Grade Polyethylene
Terephthalate Resin from Thailand

SUMMARY

We have analyzed the briefs submitted by the United States PET Resin Producers Coalition (“petitioner”) and Bangkok Polyester Public Company Limited (“Bangkok Polyester” or “respondent”) for the antidumping duty investigation of bottle-grade polyethylene terephthalate (“PET”) resin from Thailand. As a result of our analysis, we have made changes to the margin calculations from the Preliminary Determination.¹ We recommend that you approve the positions we have developed in the Discussion of Issues section of this memorandum. Below is a complete list of the issues in this investigation for which we received comments:

- Comment 1: Cost Verification Minor Correction.
- Comment 2: Capitalized Asset Costs.
- Comment 3: Cost Reconciliation Items.
- Comment 4: General and Administrative Expense Ratio (“G&A”).
- Comment 5: Financial Expense Ratio.
- Comment 6: Direct Selling Expenses for Sample United States Sale.
- Comment 7: Bank Charges for Export Sales.
- Comment 8: Duty Drawback.
- Comment 9: United States Packing.

¹See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin from Thailand, 69 FR 62850 (October 28, 2004) (“Preliminary Determination”).

- Comment 10: Unreported United States Sale.
Comment 11: Dumping Margin Program and Printout for the Preliminary Determination.
Comment 12: Home Market Packing.
Comment 13: Indirect Selling Expense.
Comment 14: Brokerage and Handling.
Comment 15: Offsets for Non-Dumped Sales.

BACKGROUND

On October 28, 2004, the Department of Commerce (“the Department”) published in the Federal Register the Preliminary Determination in its investigation of PET resin from Thailand.

The period of investigation (“POI”) is January 1, 2003, through December 31, 2003. We invited parties to comment on the Preliminary Determination. We received case and rebuttal briefs on February 1 and 7, 2005, from petitioner and the respondent. A hearing was not held because petitioner withdrew its request for a hearing.

MARGIN CALCULATIONS

We calculated export price (“EP”) and normal value (“NV”) for Bangkok Polyester using the same methodology described in the Preliminary Determination except as follows below:

- We performed our calculations using the revised sales data submitted by Bangkok Polyester on December 14, 2004, and January 4, 2005 and the cost data submitted on October 13, 2004.
- We included a minor correction submitted by Bangkok Polyester at the cost verification that decreases Bangkok Polyester’s scrap offset and, therefore, increases the total cost of manufacturing (“TOTCOM”) for each control number. See Comment 1 below.
- We have revised the reported costs of manufacturing to include the following reconciliation differences: repaid excess purchase rebate, annual shutdown costs, and repairs and maintenance adjustments. See Comment 3 below and the March 14, 2005 “Final Determination Cost Calculation Memorandum for Bangkok Polyester” (“Final Cost Calculation Memorandum”) at 1.
- We adjusted the G&A expense ratio by including certain expenses and excluding Bangkok Polyester’s packing expenses from the cost of goods (“COGS”) sold denominator. See Comment 4 below and the Final Cost Calculation Memorandum at 1.
- We revised the financial expense ratio to include the reported net exchange gain on monetary position in the numerator of the ratio. In addition, we subtracted Bangkok

Polyester's packing expenses from the denominator. See Comment 5 below and the Final Cost Calculation Memorandum at 2.

- We are treating the reported duty drawback amount as a rebate from the bag supplier to Bangkok Polyester. Therefore, we are reducing the packing expenses by the amount of the duty drawback reported on United States sales. See Comment 8 below and the Final Sales Calculation Memorandum at 4.
- We included an additional United States sale which was identified at verification. See Comment 10 below.
- We revised the per-unit packing cost for home market sales of PET resin with and without the U1 additive. See Comment 12 below and the March 14, 2005 "Final Determination Calculation Memorandum for Bangkok Polyester Public Company Ltd." ("Final Sales Calculation Memorandum") at 3.
- We revised the home market indirect selling expense percentage. See Comment 13 below and the Final Sales Calculation Memorandum at 3.
- We used the revised brokerage and handling expenses which were net of value added tax ("VAT"). See Comment 14 below and the Final Sales Calculation Memorandum at 4.
- We revised the "PRODCODU", "INTRINSIC VISCOSITY", "CONNUMU", and "PRODUCT NAME" fields for one United States sale to reflect our findings at verification. See the January 25, 2005 "Bangkok Polyester Public Company, Ltd. Verification Report" ("Sales Verification Report") at 13 and Verification Exhibit 16 and the Final Sales Calculation Memorandum at 5.
- We used the Federal Reserve Board prime ratio for 2003 as the interest ratio to calculate credit for all United States sales. See Final Sales Calculation Memorandum at 5.

DISCUSSION OF ISSUES

Comment 1: Cost Verification Minor Correction.

Petitioner's Argument:

Petitioner asserts that, in the Department's cost verification report, Bangkok Polyester noted to the Department an error in its scrap offset calculation and, therefore, presented this as a minor correction at the beginning of its cost verification. According to petitioner, the error in Bangkok Polyester's scrap offset calculation resulted in an overstatement of the scrap offset adjustment percentage. Petitioner notes that the correction decreases Bangkok Polyester's scrap offset and,

therefore, would increase the TOTCOM for each control number.

Respondent's Argument:

Bangkok Polyester did not comment on this issue.

Department's Position:

We accepted Bangkok Polyester's correction and have made this correction in our calculations for the final determination. See Final Cost Calculation Memorandum at 1.

Comment 2: Capitalized Asset Costs.

Petitioner's Argument:

Petitioner asserts that the Department should disregard the alternate cost database that Bangkok Polyester submitted prior to verification. Petitioner explains that the alternate cost database revises Bangkok Polyester's depreciation expenses to be based on fixed asset values which are not maintained in its normal books and records. The fixed asset values recorded in Bangkok Polyester's normal books and records include capitalized costs related to acquiring the assets. Petitioner points out that Bangkok Polyester specifically capitalized those costs and has been recognizing depreciation based on the capitalized equipment costs in its financial statements since 1997. Petitioner references to the Department's Cost Verification Report at 4-5, as well as Bangkok Polyester's annual report, which both state that the company's normal books and records recognize depreciation based on the capitalized assets values. See Memorandum from Gina K. Lee to Neal M. Halper, "Verification Report on the Cost of Production and Constructed Value Data Submitted by Bangkok Polyester Public Company, Ltd." dated January 15, 2005, ("Cost Verification Report").

Respondent's Argument:

Bangkok Polyester claims that the Department should use the alternate cost database which revises the company's depreciation as if it had expensed the equipment-related acquisition costs in the year of purchase instead of capitalizing them and depreciating them. Bangkok Polyester explains that, while it was in the process of purchasing its capital equipment and preparing to commence its production operations for the subject merchandise, the Asian financial crisis hit and caused a significant change in its financial position (*i.e.*, devaluing the Thai Baht). At the time, Bangkok Polyester claims that, it had two options for treating the additional capital costs, according to International Accounting Standard No. 23 ("IAS 23"): recognize them all in that year (1997), or capitalize the additional costs as part of fixed assets and depreciate them accordingly. Bangkok Polyester chose to capitalize the additional costs.

Bangkok Polyester argues that its depreciation expenses are not reasonably reflected in its normal books and records due to the devaluation of the Thai Baht. Bangkok Polyester claims that this, in turn, distorts its costs of production. Bangkok Polyester cites several cases where it claims the Department departed from a respondent's normal books and records when it was determined that they did not reasonably reflect the costs of production. See Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile, 63 FR 31411 (June 9, 1998) (“Salmon Final Determination”); Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Italy, 63 FR 40422 (July 29, 1998) (“Steel Wire Rod Final Determination”); and Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Administrative Review and Notice of Determination Not to Revoke Order, 63 FR 50867 (September 23, 1998) (“DRAMS Final Results”).

Department's Position:

Under section 773(f)(1)(A) of the Tariff Act of 1930, as amended (“the Act”), the Department must rely on the costs as recorded in the normal books and records of the producer so long as those records are kept in accordance with the generally accepted accounting principles (“GAAP”) of the exporting country, unless those costs do not reasonably reflect the cost of producing the merchandise. In 1997, Bangkok Polyester capitalized all costs related to acquiring and installing its production equipment in its normal books and records in accordance with the GAAP of Thailand. The production equipment was put into service in the following year, and all of the capitalized expenses were used as the basis for Bangkok Polyester's depreciation expense calculations. Under IAS 23, Bangkok Polyester had a choice of whether to capitalize or expense certain costs incurred to purchase and install the equipment. Bangkok Polyester chose to capitalize those costs, and that is how the costs are still incorporated in its normal books and records.

Capitalizing all costs incurred in acquiring and installing fixed assets is a practice followed in most countries around the world. The theory behind this treatment is that all costs incurred in acquiring and preparing the asset for use are a part of the total cost of that asset which must be spread over the productive useful life of the asset. Through depreciation, the total cost of acquiring and preparing the asset for use can be spread throughout the period in which the asset produces saleable product. As this treatment allows for a proper matching of revenues with expenses, we consider Bangkok Polyester's normal books and records reasonable.

Regarding the past cases cited by Bangkok Polyester in which it claims that the Department allowed respondents to depart from their normal books and records, we note that those facts do not exist in this case. For instance, in DRAMS Final Results, 63 FR at 50871, the issue related to whether or not the respondent continued to claim a depreciation adjustment that it had claimed in past reviews. And, in Steel Wire Rod Final Determination, 63 FR at 40429, the issue was how to include leasehold improvement costs in the costs of production. In that case, even though Italian GAAP required the expenses to be fully recognized in the year incurred, for proper

matching of expenses to revenues, we treated the leasehold improvement costs as a capitalized asset and depreciated them over the life of the underlying asset. It was a departure from the normal books and records of the respondent, because those costs benefitted current and future periods.

Similarly, in Salmon Final Determination, 63 FR at 31432, the Department found that “Given the fact that the companies’ price-level adjustment methodology is consistent with Chilean GAAP and the Association has not shown this practice to distort salmon production costs during the period, we have recalculated each company’s fish stock costs to include the price-level adjustment reported in accordance with its normal accounting practices.” As in the Salmon Final Determination, we find that Bangkok Polyester’s depreciation expenses are in accordance with its normal accounting practices. Further, we find that Bangkok Polyester’s capitalized asset costs and depreciation expenses reasonably reflect the cost of producing the merchandise. Therefore, for this final determination, we agree with petitioner and are disregarding the alternative cost database. We have used the verified cost file submitted on which is based on the costs reported in Bangkok Polyester’s normal books and records. See Cost Verification Report at Exhibit A1.

Comment 3: Cost Reconciliation Items.

Petitioner’s Argument:

Petitioner claims that the Department should adjust Bangkok Polyester’s reported costs for the reconciling items noted in its cost verification report. See Cost Verification Report at 3 and 16.

Respondent’s Argument:

Bangkok Polyester did not comment on this issue.

Department’s Position:

We agree with petitioner and have included these reconciling items in TOTCOM for our calculations for the final determination. See Final Cost Calculation Memorandum at 1.

Comment 4: G&A Expense Ratio.

Petitioner’s Argument:

Petitioner contends that the Department should use the revised G&A ratio as specified in the Bangkok Polyester cost verification report. See Cost Verification Report at 2 and 17-18. Petitioner notes that the Department found that Bangkok Polyester had improperly excluded expenses related to G&A activities for its overall operations. Petitioner explains that the

Department also found that Bangkok Polyester erroneously included packing expenses in the COGS denominator of the G&A expense ratio calculation. In addition, petitioner claims that the Department must apply this revised G&A expense ratio to Bangkok Polyester's TOTCOM, inclusive of the revised scrap offset, the additional G&A expense items, and the packing adjustment.

Respondent's Argument:

Bangkok Polyester claims that the expenses in question were related to 2002, but were paid in 2003. Therefore, Bangkok Polyester claims it properly excluded them from the G&A expense ratio.

Department's Position:

We agree with petitioner that we should include the additional G&A expense items in the numerator of the G&A ratio and that we should exclude the packing expense from the ratio denominator. With regard to Bangkok Polyester's argument that the additional category of expenses should be excluded from the POI G&A expense ratio, we note that those expenses are recorded in a separate account. As mentioned in its supplemental A submission, that category of expenses relates to "expenses that were owed, but not paid until later in time, such as import duties that should have been paid at the time of importation, but were not, expenses in 2002 that were not paid until 2003, etc." See Supplemental Section A dated September 8, 2004 at page 13.

It is clear from our cost verification exhibits that this category of expenses relates to items that are G&A in nature. See Cost Verification Exhibit at D1. Although the expenses in question relate to 2002, they were booked by Bangkok Polyester when they became quantifiable and identifiable in 2003. Likewise, those same types of expenses relating to 2003 would be booked subsequently in 2004. As the information for 2003 was not quantified or available for the POI, we find it reasonable to include these 2002 period costs in the G&A expense ratio as an approximation for the 2003 expenses. See Notice of Final Determination of Sales at Less than Fair Value; Silicomanganese from Venezuela, 67 FR 15533 (April 2, 2002), and the accompanying Issues and Decision Memorandum at Comment 2. We have applied the revised G&A expense ratio to the TOTCOM, revised for the scrap offset correction. However, because the additional G&A expenses and the packing cost exclusion are reflected in the revised G&A expense ratio, we have not added them to the TOTCOM. See Final Cost Calculation Memorandum at 1.

Comment 5: Financial Expense Ratio.

Petitioner's Argument:

Petitioner argues that the Department should use the revised financial expense ratio as specified in the Bangkok Polyester cost verification report. See Cost Verification Report at 2 and 18-19. Petitioner explains that the Department found that Bangkok Polyester erroneously included

packing expenses in the COGS denominator of the financial expense ratio calculation. In addition, petitioner claims that the Department must apply this revised financial expense ratio to Bangkok Polyester's TOTCOM, inclusive of the revised scrap offset, the additional G&A expense items, and the packing adjustment.

Respondent's Argument:

Bangkok Polyester agrees that the Department should use the revised financial expense ratio as specified in the Bangkok Polyester Cost Verification Report.

Department's Position:

We excluded the packing expense from the ratio denominator. We have applied the revised financial expense ratio to the TOTCOM, revised for the scrap offset correction. However, because the additional G&A expenses and the packing cost exclusion are reflected in the revised G&A and financial expense ratios, we have not added them to the TOTCOM. See Final Cost Calculation Memorandum at 2.

Comment 6: Direct Selling Expenses for Sample United States Sale.

Petitioner's Argument:

Petitioner claims that one sample sale has been incorrectly reported in the January 4, 2005 revised United States sales database. Petitioner points out that, during the Department's sales verification, it found that Bangkok Polyester under-reported the direct selling expenses for one of the sample sales. Petitioner notes that the Department verified that the direct selling expenses for this sample sale should include the lab testing fee as well as courier fees. As such, petitioner argues that the Department should use the verified direct selling expenses for this sample sale instead of the amount that Bangkok Polyester reported in its January 4, 2005 submission.

Respondent's Argument:

Bangkok Polyester argues that the direct selling expenses for this sample sale should be amended to reflect the minor correction reported by Bangkok Polyester during the Department's sales verification. Bangkok Polyester also notes that, during the sales verification, the Department confirmed that this sale was indeed a sample sale. See Sales Verification Report at Exhibit 1 and 19.

Department's Position:

We verified that the sale in question was in fact a sample sale. The Department does not include

samples sales in its margin calculations. See NSK Ltd. and NSK Corporation v. United States, 115 F.3d 965, 974-975 (Fed Cir. 1997).² Thus, because we are excluding this sale from our calculation, the parties' arguments on this issue are moot. See also Sales Verification Report at Section VII and Exhibit 1 and 19.

Comment 7: Bank Charges for Export Sales.

Petitioner's Argument:

Petitioner asserts that charges in an account consisting mainly of bank charges incurred for receiving payments from customers, letters of credit, document processing fees, etc., should not be included in Bangkok Polyester's indirect selling expenses calculation. Petitioner believes that the charges should be counted as part of Bangkok Polyester's direct selling expenses. Petitioner argues that the document processing fees for letters of credit are generally considered to be direct selling expenses because they relate to specific export sales.

Respondent's Argument:

Bangkok Polyester alleges that petitioner's claim that the account consists of bank charges incurred for receiving payments from customers, letters of credit, document processing fees, etc., is misleading. Bangkok Polyester counters that, while the account "could" be used for that purpose, it also has charges in it that are not related to the production or export of subject merchandise. Bangkok Polyester argues that the Department verified and noted in the Sales Verification Report that this account showed "charges for letters of credit, transferring money, a savings account, and purchasing cashiers checks." Bangkok Polyester claims that the account does not show charges relating to specific sales. Therefore, Bangkok Polyester argues that there is no reason to remove these charges from Bangkok Polyester's indirect selling expenses and to treat them as part of direct selling expenses. Bangkok Polyester does state that, if the Department were to include the charges as direct selling expenses, the Department would have to reduce Bangkok Polyester's indirect selling expenses by the amount of the reclassified bank charges.

Department's Position:

We disagree with petitioner that the bank service charges should be included in Bangkok Polyester's direct selling expenses. At the sales verification we noted that fees incurred in the bank service charges account were not solely related to the export or manufacture of subject merchandise, and, as such, cannot be directly attributed to a specific sale. See Sales Verification Report at 6. Therefore, we have included the bank service charges as part of Bangkok Polyester's

² In NSK Ltd. vs. United States, the court determined that samples do not constitute sales, and thus are not to be used for margin calculations.

indirect selling expenses for the final determination.

Comment 8: Duty Drawback.

Petitioner's Argument:

Petitioner argues that 1) the duty drawback claimed by Bangkok Polyester does not directly relate to the importation of raw materials used to produce the subject merchandise; and 2) even if Bangkok Polyester's claim is legitimate, Bangkok Polyester has not produced evidence on the record to substantiate the reported amount for duty drawback.

Petitioner points to the Departments' two-pronged approach for considering duty drawback claims. These criteria are that 1) the import duty and rebate payment are directly linked to, and dependent upon, one another; and 2) the company claiming the adjustment can demonstrate that there were sufficient imports of the imported raw material to account for the drawback received on the exports of the manufactured product.

With respect to these two prongs, petitioner challenges Bangkok Polyester's claim that the duty drawback directly relates to the importation of raw material used to produce the subject merchandise. Petitioner contends that it is the bag supplier who pays duties on the imported material used in the manufacture of bags, applies for the duty drawback, and receives the refund from Thai Customs. Therefore, petitioner asserts that the two-pronged test has not been satisfied, since the duty drawback applies to imported raw materials used by the bag supplier to manufacture bags, not the subject merchandise.

Respondent's Argument:

Bangkok Polyester alleges that petitioner's arguments regarding duty drawback are neither supported by law nor the facts on the record for this investigation. According to Bangkok Polyester, petitioner states that “{t}hus, the duty drawback does not directly relate to the importation of raw materials used to produce the subject merchandise, *i.e.* PET resin.” Bangkok Polyester argues that this statement is not relevant to whether Bangkok Polyester is entitled to the credit it is claiming. Bangkok Polyester further points out that petitioner seems to acknowledge in its case brief that the statement is not relevant. Bangkok Polyester believes that the crux of petitioner's argument against its duty drawback claim is that the Department does not appear to have all the facts it needs to determine if Bangkok Polyester is entitled to a duty drawback credit.

Bangkok Polyester argues that petitioner's contention that Bangkok Polyester did not provide enough duty drawback information is erroneous. Bangkok Polyester states that it put forth its best efforts in meeting the Department's requests for additional information, that it was able to provide substantial evidence to support that the items for which drawback is claimed were imported into Thailand, that the bags were used in the packaging of PET resin exported to the United States, and

that all Thai duty drawback requirements were met. Bangkok Polyester notes that petitioner itself seems to acknowledge this by citing in its case brief to Exhibit 20 of the Sales Verification Report. Bangkok Polyester argues that the cite provides a “detailed explanation” of the duty drawback program and proves that Bangkok Polyester submitted adequate evidence to support its claim. Bangkok Polyester also cites pages 19-20 of the Sales Verification Report to support its argument that it provided ample documentation to meet the Department’s duty drawback test and requests for additional information.

Department’s Position:

We disagree with Bangkok Polyester. During the sales verification, the Department was unable to verify the total amount of duty drawback received by the Bangkok Polyester’s bag supplier. The Department verified the payments (reported as duty drawback by Bangkok Polyester) made to Bangkok Polyester by its bag supplier, the documentation of the agreement between Bangkok Polyester and its supplier, and the documents from the Thai government regarding its duty drawback program. However, we note that, when specifically asked about the total amount of duty drawback its supplier received, Bangkok Polyester was unable to provide any evidence or information from the bag supplier to directly link the duty drawback the supplier received to the payment Bangkok Polyester received from its supplier. Because Bangkok Polyester could not link the import duty to the payment it received from its bag supplier or that they are dependent upon one another, we do not agree that these payments should be treated as duty drawback. However, we considered the payments as rebates for the bags Bangkok Polyester purchased for the bag supplier. Therefore, we reduced Bangkok Polyester’s total packing expenses for all markets by the total rebates it received from the bag supplier during the POI. See Sales Verification Report at 19 and Verification Exhibit 20. See Final Sales Calculation Memorandum at 4.

Comment 9: United States Packing.

Petitioner’s Argument:

Petitioner notes that, during the sales verification, the Department verified that packing materials included pallets which are only used for export sales, and that the cost of the pallets was erroneously allocated across all sales. Petitioner argues that the cost of these pallets should be allocated only to export sales. Petitioner computed the proportion of packing materials allocated to local production and requests the Department to increase the United States packing cost by this proportion.

Respondent’s Argument:

Bangkok Polyester argues that petitioner does not provide any evidence to support its claim that United States packing should be increased by the proportion of packing materials allocated to local sales. Bangkok Polyester claims that pallet costs are only one part of packing material costs,

and that packing material costs are only part of the overall packing costs. Bangkok Polyester asserts that, in making its adjustment, the Department should increase United States packing by only those pallet costs included in local packing costs, not a ratio based on total production quantities as petitioner proposes.

Department's Position:

We agree with petitioner that the cost of pallets was incorrectly allocated to all local and export sales of PET resin. We verified that pallets are only used in export sales. See Sales Verification Report at 23 and Verification Exhibit 22. We disagree with petitioner's proposed allocation of all local packing materials to only export production because pallets are only a portion of total packing materials. However, we note that Bangkok Polyester did not submit any revised data as a minor error correction during the sales verification, nor did we ask for a correction to the method in which pallets were allocated across sales. Therefore, we do not have the information to enable us to calculate the cost of the pallets that was improperly allocated to local production. Pursuant to section 782(e) of the Act, the Department has used the verified packing information submitted by Bangkok Polyester to calculate its final dumping margin. Therefore, we have not made any adjustments to United States packing.

Comment 10: Unreported United States Sale.

Petitioner's Argument:

Petitioner notes that, during the sales verification, the Department found that one sale was improperly excluded from the United States database. Petitioner requests that the Department include this sale in its final determination.

Respondent's Argument:

Bangkok Polyester did not comment on this issue.

Department's Position:

We agree with petitioner that the sale in question was improperly excluded from the United States sales database. This sale has been included in Bangkok Polyester's January 4, 2005, revised database submission for the final determination.

Comment 11: Dumping Margin Program and Printout for the Preliminary Determination.

Petitioner's Argument:

In reviewing the computer print out of the Preliminary Determination margin calculation, petitioner noted that fields “CVESELLPR”, “COPCV”, “CVPROFIT”, “TOTCV” and “NETCV” contained missing values. Petitioner argues that, although constructed value was not used in the dumping margin calculations for the Preliminary Determination, the Department should correct the errors in the program for its final calculations.

Respondent’s Argument:

Bangkok Polyester did not comment on this issue.

Department’s Position:

We disagree with petitioner. Constructed value is only calculated in the Preliminary Determination margin program if there is no identical or similar match for the subject merchandise. In the Preliminary Determination, all sales had an identical or similar match, therefore, the program did not need to calculate constructed value and left those variables blank. The program performed the same test for the final determination and did not calculate constructed value because all sales have an identical or similar match.

Comment 12: Home Market Packing.

Respondent’s Argument:

Bangkok Polyester argues that the Department should utilize the packing costs for home market sales of products with U1 Additive that were revised and reviewed at verification.

Petitioner’s Argument:

Petitioner argues that the Department should not permit the sales verification to be used by Bangkok Polyester as a forum to recalculate previously submitted data. Petitioner argues that the revised packing costs constitute new information discovered during the course of the sales verification, and that Bangkok Polyester did not inform the Department of these revisions at the start of the sales verification, as it is required to do. Therefore, petitioner urges the Department not to use the revised data.

Department’s Position:

We do not agree with petitioner that the data constitutes new information. Bangkok Polyester submitted the revised data as a minor error correction during the sales verification. We verified the data and noted no discrepancies. We will use the per-unit amounts that were verified by the Department for the final determination. However, we note that two per-unit amounts were corrected and verified at the sales verification, even though Bangkok Polyester only mentioned

one in its case brief. Therefore, we have used the revised data for “Local U1” sales and “Local Non-U1” sales. See Sales Verification Report at 23 and Verification Exhibit 22.

Comment 13: Indirect Selling Expense.

Respondent’s Argument:

Bangkok Polyester argues that the home market indirect selling expenses calculated by the Department for the Preliminary Determination should be replaced by the home market indirect selling expenses verified by the Department at the sales verification.

Petitioner’s Argument:

Petitioner argues that the Department should not permit the sales verification to be used by Bangkok Polyester as a forum to recalculate previously submitted data. Petitioner argues that the revised home market indirect selling expenses constitute new information discovered during the course of the sales verification, and that Bangkok Polyester did not inform the Department of these revisions at the start of the sales verification, as it was required to do. Therefore, petitioner urges the Department not to use the revised data.

Department’s Position:

We do not agree with petitioner that the data constitutes new information. In the course of verifying Bangkok Polyester’s response, the Department noted that a charge for sample testing and shipping had been reported twice, once as a direct selling expense and again as an indirect selling expense. We verified the underlying data and are satisfied that the adjustment should be treated as a direct selling expense. We also noted that the allocation for calculating salaries and bonuses was preformed using an incorrect percentage breakdown, and that data in the bonus column for local and export had been reversed. We reviewed and verified the revised indirect selling expenses worksheets and calculation. Therefore, we have used the verified revised data for Bangkok Polyester’s indirect selling expenses. See Sales Verification Report at 21-22 and Verification Exhibit 21.

Comment 14: Brokerage and Handling.

Respondent’s Argument:

Bangkok Polyester argues that the Department should utilize the revised brokerage and handling charges it reported as a minor error correction during the sales verification for the final determination. Bangkok Polyester maintains that the brokerage and handling charges it previously reported incorrectly included a VAT charge. Bangkok Polyester further asserts that the VAT charge in brokerage and handling was incorrect because the VAT was refunded. Bangkok Polyester notes that the Department verified that the VAT is refunded to Bangkok Polyester and,

therefore, the Department should utilize the revised brokerage and handling charges exclusive of VAT for the final determination.

Petitioner's Argument:

Petitioner argues that the Department should not permit the sales verification to be used by Bangkok Polyester as a forum to recalculate previously submitted data. Although Bangkok Polyester did inform the Department of this revision at the start of the sales verification, as it was required to do, petitioner argues that the purpose of verification is to verify information already submitted on the record. Therefore, petitioner urges the Department not to use the revised data.

Department's Position:

We do not agree with petitioner that the data constitutes new information. Bangkok Polyester submitted the revised data as a minor error correction at the outset of the verification. This correction is similar to other minor error corrections typically accepted by the Department. We verified the data and noted no discrepancies. Therefore, we have used the VAT-exclusive brokerage and handling charges for our final margin calculations.

Comment 15: Offsets for Non-Dumped Sales.

Respondent's Argument:

In calculating the overall weighted-average dumping margins for purposes of the preliminary determination, the Department did not use non-dumped sales comparisons to offset or reduce the dumping found on other sales comparisons, consistent with our normal practice.

Bangkok Polyester argues that the Department's practice of assigning a zero dumping margin to CONNUMs sold in the United States above NV is not required by statute and is inconsistent with the World Trade Organization ("WTO") Anti-Dumping Agreement. Bangkok Polyester requests that the Department revise its methodology in this investigation to allow negative margins to be included in the aggregate margin calculation.

Bangkok Polyester argues that the Act does not require the practice of ignoring non-dumped sales comparison as an offset to or reduction in the dumping found on other sales comparisons. Bangkok Polyester contends that two recent court cases held that the Act does not require the Department to ignore non-dumped sales, even though the courts did uphold the Department's practice of not offsetting positive dumping margins with negative ones. See Timken Co. v. United States, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004) ("Timken") and SNR Roulements et. al. v. United States, No. 01-00686, Slip Op 04-100, at 20 (Court of International Trade ("CIT") Aug. 10, 2004). Therefore, Bangkok Polyester argues that the Department is free to comply with the letter and spirit of recent WTO dispute settlement rulings.

Bangkok Polyester cites to two decisions of the WTO Appellate Body: European Communities - Anti Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (March 1, 2001) (“EC-Bed Linen”) and United States - Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (August 11, 2004) (“US-Softwood Lumber”). In EC-Bed Linen, the WTO Appellate Body found that the European Community’s practice of not offsetting positive dumping margins was inconsistent with Article 2 of the WTO Anti-Dumping Agreement. In US-Softwood Lumber, the WTO Appellate Body found that the Department’s practice of not offsetting positive dumping margins sub-groups of products when doing a weight average-to-weighted-average comparison in the context of an investigation was inconsistent with the United States’ obligations under the WTO Anti-Dumping Agreement.

Petitioner’s Argument:

Petitioner counters that the Department’s methodology is appropriately applied in this case consistent with the statutory obligations under the Act. Petitioner cites to multiple Federal Register notices and decision memoranda where the Department has outlined, in detail, its position on this matter. See Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore and the United Kingdom: Final Results of Antidumping Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination to Revoke Order in Part, 69 FR 55574 (September 15, 2004) and the accompanying Issues and Decision Memorandum at Comment 1; Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and Singapore: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Review in Part, and Determination Not to Revoke Order in Part, 68 FR 35623 (June 16, 2003) and the accompanying Issues and Decision Memorandum at Comment 2; Notice of Final Determination of Sales at Less than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 66 FR 50408 (October 3, 2001) and the accompanying Issues and Decision Memorandum at Comment 1; and Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Final Results of 2000-2001 Administrative Review, Partial Rescission of Review, and Determination to Revoke Order, in Part, 67 FR 68990 (November 14, 2002) and the accompanying Issues and Decision Memorandum at Comment 9.

Petitioner also argues that the Department’s practice with regard to not offsetting positive dumping margins with non-dumped sales was also recently upheld by the Court of Appeals for the Federal Circuit (“Federal Circuit”) in Corus Staal B.V. and Corus Steel USA Inc. v. United States, 395 F.3rd 1343 (Fed. Cir. January 21, 2005) (“Corus Staal”). Petitioner notes that Bangkok Polyester did not cite or discuss this most recent binding precedent of the Federal Circuit.

Department’s Position:

We have not changed the Preliminary Determination methodology for calculating the aggregate dumping margin for this final determination. As we have discussed in prior cases, our methodology is consistent with our statutory obligations under the Act. See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical

Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand, 69 FR 76918 (December 23, 2004) and the accompanying Issues and Decision Memorandum at Comment 1, and Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 66 FR 50408 (October 3, 2001) and the accompanying Issues and Decision Memorandum at Comment 1. The CIT has consistently upheld the Department's treatment of non-dumped sales. *See, e.g., SNR Roulements v. United States*, 341 F. Supp. 2d 1334, 1346-47 (CIT 2004); *Corus Staal BV v. United States*, 283 F. Supp. 2d 1357 (CIT 2003); and *Bowe Passat Rienigungs Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1150 (CIT 1996). Furthermore, the Federal Circuit, in Timken, and most recently in Corus Staal, Ct. No. 04-1107 (December 21, 2004) at 5, 10, has affirmed the Department's methodology as a reasonable interpretation of the statute.

Bangkok Polyester's claim that the WTO Appellate Body rulings in EC-Bed Linen and US-Softwood Lumber render the Department's interpretation of the statute inconsistent with the United States' international obligations and, therefore, unreasonable is also unavailing. In implementing the Uruguay Round Agreements Act, Congress made clear that reports issued by WTO panels or the Appellate Body "will not have any power to change United States law or order such a change." *See* Statement of Administrative Action ("SAA") at 660. The SAA emphasizes that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures . . ." *Id.* To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. *See* 19 U.S.C. § 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. *See* 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary); *see also SAA* at 354 ("After considering the views of the Committees and the agencies, the Trade Representative *may* require the agencies to make a new determination that is "not inconsistent" with the panel or Appellate Body recommendations..." (emphasis added)).

Thus, the Federal Circuit recently stated:

We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.

See Corus Staal, Ct. No. 04-1107, at 10.

For the aforementioned reasons, we have not changed the methodology used in calculating Bangkok Polyester's margin.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting the related margin calculations accordingly. If these recommendations are accepted, we will publish the final determination of this antidumping duty investigation and the final dumping margins in the Federal Register.

AGREE _____

DISAGREE _____

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

Date