FINAL RESULTS
OF REDETERMINATION
PURSUANT TO COURT REMAND
DUPONT TEIJIN FILMS USA, LP, MITSUBISHI POLYESTER FILM OF AMERICA, LLC, AND TORAY PLASTICS (AMERICA), INC., V. UNITED STATES AND POLYPLEX CORPORATION LIMITED
COURT NO. 02-00463

SUMMARY

The Department of Commerce (Commerce) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (USCIT) in Dupont Teijin Films USA, LP, Mitsubishi Polyester Film of America, LLC, and Toray Plastics (America), Inc., v. United States and Polyplex Corporation Limited, USCIT Slip Op. 03-79 (July 9, 2003), Court No. 02-00463 (Dupont Teijin). The plaintiffs in Dupont Teijin filed a motion for judgement upon the agency record contesting the final determination of sales at less than fair value in polyethylene terephthalate film, sheet and strip (PET film) from India. See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from India, 67 Fed. Reg. 34899, 34901 (May 16, 2002), and accompanying Issues and Decision Memorandum (Final Determination), as amended, 67 Fed. Reg. 44175 (July 1, 2002) (Amended Final Determination). The issue in Dupont Teijin was whether Commerce improperly excluded Polyplex Corporation Limited (Polyplex) from the antidumping duty (AD) order on PET film from India, because the company's AD margin, after adjusting for countervailing duty (CVD) export subsidies in the cash deposit instructions, was determined to be zero.

In these final results, Commerce, pursuant to the USCIT's remand order, has determined that it will issue cash deposit instructions identifying a cash deposit rate for Polyplex of zero and amend the Final Determination to include Polyplex within the AD order.

BACKGROUND

On December 21, 2001, Commerce published its Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Polyethylene Terephthalate Film, Sheet and Strip From India, 66 Fed. Reg. 65893 (December 21, 2001) (Preliminary Determination). In its Preliminary Determination, Commerce calculated the U.S. price for the two respondents (Polyplex and Ester Industries Limited (Ester)) by increasing the reported price by the amount of export subsidies calculated in the companion CVD investigation. This resulted in a weighted-average dumping margin of 1.38 percent for Polyplex. See id. at 65989.

Both the petitioners (plaintiffs in Dupont Teijin) and Ester argued that Commerce's preliminary adjustment to U.S. price for export subsidies is contrary to Commerce's previous practice and 19 U.S.C. §1677a(c)(1)(C) of the statute (which states that Commerce will increase U.S. price by any countervailing duty "imposed" to offset an export subsidy). In its Final Determination, Commerce

agreed with the petitioners and Ester on this point. See Final Determination at Comment 1. Rather than increasing U.S. price by the amount of any export subsidies, Commerce explained that, in AD investigations, its practice is to reduce the percentage AD margin by the export subsidy rate calculated in a concurrent CVD investigation. See id. Commerce noted that this adjustment occurs "in the cash deposit instructions sent to Customs[,]" not in the calculation of U.S. price. Commerce completed its CVD investigation and found that Polyplex's weight-averaged, net subsidy rate, after accounting for program-wide changes, is 18.66 percent, *ad valorem*. In its Final Determination, Commerce calculated a weighted-average AD margin of 10.34 percent for Polyplex. See Final Determination, 67 FR at 34901. In the cash deposit instructions for Ester and Polyplex, Commerce reduced each respondent's AD margin by its net export subsidy rate, as advocated by both the petitioners and Ester. This adjustment resulted in a zero rate for Polyplex.

In its Final Determination, Commerce stated that "because the rate for Polyplex is zero, after adjusting the dumping margin for the export subsidies in the companion affirmative countervailing duty investigation, Polyplex will be excluded from the antidumping duty order." See Id. In the Amended Final Determination, in which the AD order was published, Polyplex was excluded from the AD order on PET film from India. See Amended Final Determination, 67 FR at 44176. It was Commerce's exclusion of Polyplex from the AD order on PET film from India that was the focus of Dupont Teijin.

We issued draft remand results to the parties on August 4, 2003. Polyplex filed comments on the draft remand on August 6, 2003, and the petitioners filed rebuttal comments on August 7, 2003. These comments are addressed below. In addition, we have made certain changes to our analysis in the draft remand.

ANALYSIS

In Dupont Teijin, the Court found that Commerce improperly excluded Polyplex from the AD order on PET film from India because Polyplex's dumping margin was greater than *de minimis*. The Court noted that there is no statutory authority to exclude an exporter because its cash deposit rate, but not its dumping margin, is greater than zero. Thus, the Court remanded Commerce's Final Determination for further consideration consistent with the Court's opinion. Specifically, the Court stated that :

> {u}pon remand, Commerce must calculate Polyplex's dumping margin after making the adjustments to export price required by 19 U.S.C. § 1677a and Commerce's reasonable interpretations thereof. If Commerce continues to calculate a dumping margin of 10.34 percent for Polyplex, Polyplex must be subject to the antidumping duty order, whether or not it is given a cash deposit rate of zero because of expected offsetting countervailing duties.

See Dupont Teijin at pages 9 -10 (emphasis in original).

As Commerce explained in its brief to the USCIT, Commerce interprets the term "imposed" in 1677a(c)(1)(C) to require an adjustment to export price for countervailing duty export subsidies following "assessment"of those duties. Plaintiffs do not contest this interpretation. However, Commerce implements this adjustment, in parallel AD and CVD investigations, by adjusting its calculated margin in its cash deposit instructions in order to take into consideration export subsidies and prevent assessment of both antidumping and countervailing duties to compensate for the same cause of unfairly priced imports

Therefore, pursuant to the USCIT's remand order, because Polyplex's dumping margin, before taking into account export subsidies, is 10.34 percent, Polyplex will be subject to the antidumping duty order on PET film from India. Accordingly, Commerce will issue cash deposit instructions to the U.S. Bureau of Customs and Border Protection (BCBP) identifying a cash deposit rate for Polyplex of zero and amend the Final Determination to include Polyplex within the AD order.

INTERESTED PARTY COMMENTS

Comment 1: Whether Commerce's Draft Remand is Consistent with the Court's Opinion

In its opinion, the Court stated, in part, that:

> {u}pon remand, Commerce must calculate Polyplex's dumping margin after making the adjustments to export price required by 19 U.S.C. § 1677a and Commerce's reasonable interpretations thereof.

In addition, with respect to the applicability of §1677a(c)(1)(C) (which states that Commerce will increase U.S. price by the amount of any countervailing duty imposed to offset an export subsidy), the Court stated that Commerce may set forth its new interpretation of this provision but it "must follow the statute and provide a reasoned analysis for the ultimate methodology it adopts."

Polyplex contends that Commerce followed neither of the Courts' instructions. Specifically, Polyplex contends that Commerce refused to make the adjustment required under §1677a(c)(1)(C) and failed to provide a reasoned analysis explaining why, in its draft remand, it considers this statutory provision only applicable to administrative reviews.

However, the plaintiffs dismiss Polyplex's interpretation of the Court's opinion. The Court stated that the applicability of §1677a(c)(1)(C) was not ripe for review, and thus, according to the plaintiffs, it could not have ordered Commerce to increase U.S. price in accordance with this statutory provision. Rather, the plaintiffs state that the Court ordered Commerce to calculate Polyplex's

dumping margin after making any adjustments "required by 19 U.S.C. §1677a(c)(1)(C)." According to the plaintiffs, §1677a(c)(1)(C) does not permit, much less require, any adjustment in this case, and thus, Commerce fully complied with the Court's order.

Commerce's Position:

As noted above, the Court directed Commerce to "calculate Polyplex's dumping margin after making the adjustments to export price required by 19 U.S.C. § 1677a and Commerce's reasonable interpretations thereof." The particular section of 19 U.S.C. § 1677a at issue here, §1677a(c)(1)(C), requires Commerce to increase U.S. price by the amount of any countervailing duty imposed to offset an export subsidy. As explained in detail below, and consistent with Commerce's additional brief to the Court, Commerce considers countervailing duties to be imposed upon the issuance of a countervailing duty order. At the time that Commerce issued its Final Determination, Polyplex's sales were not subject to a countervailing duty order. Consequently, Commerce's decision in the draft remand not to increase U.S. price in accordance with §1677a(c)(1)(C) is consistent with the Court's opinion.

Nevertheless, we agree with Polyplex that Commerce's statement in the draft remand that §1677a(c)(1)(C) is applicable only in an administrative review, does not clearly convey or fully explain Commerce's position regarding the applicability of this section of the statute. Commerce has provided additional analysis of the applicability of this provision in Comment 3 below.

Comment 2: Whether Commerce's Draft Remand is Consistent with its Additional Brief to the Court

Polyplex claims that Commerce's position in the Draft Remand, that §1677a(c)(1)(C) only applies during an administrative review, is at odds with Commerce's additional brief to the Court (Additional Brief).[1] Citing from Commerce's Additional Brief, Polyplex notes that Commerce found "the statutory provision at issue (§1677a(c)(1)(C)) is "directly applicable under the circumstances of this case (i.e., at the investigative stage of the proceeding)." See Additional Brief at page 3. With respect to the instructions in §1677a(c)(1)(C) to increase U.S. price by the amount of any countervailing duty imposed, Polyplex notes that Commerce "has historically taken the position that countervailing duties are imposed only when they are assessed in the context of an administrative review

[1] At the oral hearing before the Court, the Court ordered parties to this suit to provide additional briefing with respect to the proper interpretation and application of §1677a(c)(1)(C). During the hearing, the Court stated that it disagreed with Commerce's interpretation in its initial brief that §1677a(c)(1)(C) did not apply until the assessment of duties following an administrative review. Thus, pursuant to the Court's direction, all parties submitted additional briefs to the Court.

or automatic assessment," but that Commerce explained in its Additional Brief that a better interpretation of the statute is that a countervailing duty is imposed where a countervailing duty order is issued. Polyplex Comments at 7.

Given that Commerce explained in its Additional Brief that a reasonable interpretation of §1677a(c)(1)(C) required it to increase U.S. price in an antidumping duty investigation, and the Court ordered Commerce to make "the adjustments to export price required by 19 U.S.C. §1677a and Commerce's reasonable interpretation thereof," Polyplex claims that the Court remanded the Final Determination based on the reasonable interpretations contained in Commerce's Additional Brief. According to Polyplex, for Commerce to reach a completely different and opposing position in its draft remand, without any explanation, displays a contempt for the judicial process.[2]

The plaintiffs argue that there is nothing in the Court's decision or in the law that would require Commerce to adhere to the "extraordinary" views it expressed in the Additional Brief. Moreover, unlike its Additional Brief, the plaintiffs contend that Commerce's Draft Remand is consistent with its Final Determination in this case, its practice over the past 16 years, and in the Court's decision in Serampore Industries v. United States, 675 F. Supp. 1354 (Ct. Int'l Trade 1987)(Serampore Industries). Consequently, the plaintiffs believe Commerce reached the correct decision in its Draft Remand.

Commerce's Position:

In its decision, the Court indicated that Commerce's Additional Brief did not speak for the agency as a final and conclusive determination because Commerce had not applied §1677a(c)(1)(C) in its Final Determination and thus, the issue regarding whether §1677a(c)(1)(C) applied to "unassessed" countervailable subsidies found in a companion CVD investigation "{was} not ripe for review." See Dupont Teijin at 10. Thus, as a matter of law, Polyplex is incorrect in arguing that Commerce is required or obligated to issue a remand that is consistent with its Additional Brief. Therefore, Commerce has not "displayed contempt" of the "judicial process," as Polyplex claimed, but has issued a draft redetermination consistent with the directions from the Court's opinion.

Nevertheless, as noted above, Commerce's statement in the draft remand, that §1677a(c)(1)(C) is applicable only in an administrative review, does not clearly convey or fully explain Commerce's position which was outlined in the Additional Brief. Commerce's position in this redetermination adopts the analysis contained in the Additional Brief. See Comment 3 below.

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[2] Polyplex also notes that at the oral argument in this case, Judge Restani expressed the view that §1677a(c)(1)(C) applies in an investigation.

Comment 3: Whether Commerce's draft remand is contrary to the statutory requirement of an adjustment in the context of contemporaneous AD/CVD investigations

Polyplex argues that Commerce's Additional Brief was based on a reasonable reading of 19 U.S.C. §1677a(c)(1)(C), in that it recognized that the export price and constructed export price should be increased by the amount of any countervailing duty "imposed" on the subject merchandise under part I of that subtitle, to offset an export subsidy; and that this adjustment applies in the context of an investigation. According to Polyplex, there is no indication in 19 U.S.C. §1677a that certain adjustments apply in the context of investigations, while others apply only in the context of reviews. Thus, Polyplex finds that Commerce's draft redetermination, indicating that the provision applies only in administrative reviews, is not supported by the statute.

Polyplex refers to the word "imposed," and to Part I of Subtitle IV of Chapter 4 of the Tariff Act of 1930, entitled "Imposition of Countervailing Duties," both cited in section 19 U.S.C. §1677a(c)(1)(C), in support of its argument that this section covers the original countervailing duty investigation, including the final countervailing duty determination and order; and not administrative reviews of the countervailing duty order, which fall under a separate section entitled "Part III – Reviews; Other Actions Regarding Agreements." Thus, Polyplex argues that there is a statutory basis for concluding that Congress meant to signify countervailing duties imposed in the course of the investigation; not only those actually assessed after a review. Accordingly, Polyplex maintains that it would be reasonable for Commerce to interpret the statute as requiring an addition to export price for export subsidies found in companion countervailing duty investigations. Polyplex Comments at pages 7-8.

Polyplex further argues that the definition of the subject merchandise in the statute (i.e., 19 U.S.C. § 1677(25))[3] defines the scope or product coverage of merchandise under investigation, review, or order; as opposed to the temporal coverage of an investigation, review, or order. Polyplex states that nothing in the definition refers to the time period covered by the investigation, review, or order. Polyplex further argues that the inclusion of "order" within the list would seem to indicate a longer time frame than just a period of investigation or a review as argued by plaintiffs' counsel. Accordingly, Polyplex maintains that the definition of "subject merchandise" was never intended to do double-duty as both the scope of the product and the time period covered. Instead, Polyplex argues, the reference to "subject merchandise in the phrase "the amount of any countervailing duty imposed on the subject merchandise under Part I of this subtitle to offset an export subsidy" would appear to

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[3]19 U.S.C § 1677 (25):

> The term "subject merchandise" means the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title or a finding under the Antidumping Act 1921.

include countervailing duties imposed on the subject merchandise during every phase of an antidumping proceeding. See Polyplex Comments at pages 8-9.

Polyplex further provides that Part I includes sections 1671b and 1671d (preliminary and final determinations in the investigation phase), as well as 1671e, in which Commerce orders Customs officials to "assess" CVD duties when it issues an order. Accordingly, Polyplex argues that the statutory structure implies that the result of the investigation, assuming it is affirmative, is the imposition of a countervailing duty, and any countervailing duty imposed to offset an export subsidy in the context of an investigation must be added to U.S. price to comply with the mandate of section 1677a(c)(1)(C). Polyplex argues that, in this case, all of the countervailing duties imposed on the PET film it manufactured were to offset export subsidies, as there were no domestic subsidies found in the countervailing duty investigation of Polyplex. Thus, Polyplex argues that all of the countervailing duties imposed should be added to U.S. price. See Polyplex Comments at 9-10.

The plaintiffs argue that the statute does not permit Commerce to increase U.S. price under 19 U.S.C. § 1677a(c)(1)(C) if, as in this case, no countervailing duties will ever be imposed on the merchandise that was the subject of Commerce's dumping margin calculation. The plaintiffs dismiss Polyplex's interpretation of the statute as simply a rehash of old and weak arguments that the plaintiffs have already addressed in their response to the Additional Brief.

Commerce's Position:

19 U.S.C. § 1677a(c)(1)(C) provides that Commerce will make an adjustment to its calculations, by increasing export price and constructed export price by "the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy." Historically, Commerce has interpreted the term "imposed" to mean "assessment of countervailing duties," and the USCIT has upheld that interpretation as reasonable. See, e.g., Iron Construction Castings From India; Final Determination of Sales at Less Than Fair Value, 51 Fed. Reg. 9486 (Mar. 18, 1986), aff'd Serampore Industries. More specifically, Commerce has historically interpreted "imposed" to mean the assessment of duties on the entries subject to the investigation, following an administrative review (or automatic liquidation instructions, as the case may be).

However, the countervailing duty referred to in 19 U.S.C. § 1677a(c)(1)(C) is imposed under part I of this subtitle (subtitle IV), a part of the statute which does not encompass administrative reviews, but describes the procedures for conducting final determinations and the issuance of countervailing duty orders. Moreover, Part I of subtitle IV includes 19 U.S.C. § 1671e which notes that following affirmative determinations on the part of Commerce and the U.S. International Trade Commission (ITC), Commerce will publish a countervailing duty order which "directs customs officers to assess a countervailing duty ..." See 19 U.S.C. § 1671e(a). Because assessment of duties is expressly referenced in part I of subtitle IV and because it includes the imposition of countervailing duty orders, as explained in the Additional Brief, a better interpretation of 19 U.S.C. § 1677a(c)(1)(C) is

that a countervailing duty is imposed when a countervailing duty order is issued. Finally, as Commerce explained in great detail in the Additional Brief, the legislative history of 19 U.S.C. 1677(a) does not clarify what "imposed" means, except to the extent that the Senate Report specifically referred to countervailing duties "being assessed" in describing that provision - a reference that may be interpreted to mean duties following an order, but not yet assessed following an administrative review.[4]

Thus, Commerce now interprets 19 U.S.C. § 1677a(c)(1)(C) as requiring an increase in the respondent's export or constructed export price by the amount of countervailing duties imposed pursuant to a countervailing duty order. This position may be further explained by way of the following illustration: Commerce conducts a countervailing duty investigation and publishes its final determination. The ITC will then issue its final injury determination, which, if affirmative, will result in Commerce issuing the countervailing duty order. Once the order has been issued, countervailing duties will be "imposed." If, thereafter, Commerce issues a final determination in a companion antidumping duty investigation, Commerce will increase a respondent's export or constructed export price by the amount of countervailing duties imposed. If, however, a CVD order has not been issued prior to issuance of the final determination in the companion antidumping duty investigation, Commerce will adjust its calculations through its cash deposit instructions to prevent assessment of both antidumping and countervailing duties to compensate for the same cause of unfairly priced imports.

Although we agree with Polyplex's statement that Commerce's Additional Brief expresses a reasonable interpretation of 19 U.S.C. § 1677a(c)(1)(C), we disagree with the conclusion Polyplex has drawn from that brief. In the antidumping duty investigation under consideration, no countervailing duties were "imposed" at the time Commerce made its final determination. Thus, contrary to Polyplex's argument, Commerce was not required by 19 U.S.C. § 1677a(c)(1)(C) to increase export prices by any countervailing duties calculated in the companion countervailing duty investigation. In fact, Commerce has <u>never</u> argued that such an obligation exists, and such an adjustment would be contrary to both the plain reading of the statute and the legislative history of that provision.

Pursuant to the above analysis of U.S.C. § 1677a(c)(1)(C), and the Court's instructions, Commerce will include Polyplex with the AD order because Commerce has calculated a 10.34 percent dumping margin for Polyplex. In addition, in order to prevent assessment of both antidumping and countervailing duties to compensate for the same cause of unfairly priced imports, in its cash deposit instructions, Commerce will adjust Polyplex's antidumping margin to account for countervailable export subsidies calculated in the companion countervailing duty investigation.

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[4] Additional Brief at 7-9. (discussing the Senate and House Reports referencing the implementation of this provision, S. Rep. No. 96-249, 94, *reprinted in* 1979 U.S.C.C.A.N. 480 and H.R. Doc. No. 96-153, 412, *reprinted in* 1979 U.S.C.C.A.N. 683).

Comment 4: Whether Commerce's Draft remand is contrary to precedent, the de minimis provisions of the Act, and the World Trade Organization (WTO)

Polyplex maintains that if Commerce continues with its draft redetermination, it would, for the first time, be imposing an antidumping duty order on a respondent, who has its own investigated cash deposit rate, based on its own dumping margin, and whose cash deposit rate was *de minimis*. According to Polyplex, neither the plaintiffs nor Commerce have been able to identify a single precedent for such an action. This, according to Polyplex, is "hardly surprising," given that Commerce is required to ignore any weighted average dumping margin that is *de minimis*, as stipulated in provisions 1673b(b)(3) and 1673d(a)(4), which are required by the WTO Antidumping Agreement. See Polyplex Comments at page 11.

Polyplex further argues that the plaintiffs have at no time in this appeal cited to statutory authority that permits the cash deposit rate to differ from the dumping margin. By contrast, Polyplex adds, the Uruguay Round Agreements Act (URAA) states in various places that the cash deposit rates are "based on" the antidumping and countervailing duty margin. See e.g., 19 U.S.C. § 1673d(c)(1)(B)(ii). Thus, Polyplex argues that the URAA (as required by the WTO Antidumping Agreement) does not authorize Commerce to impose an AD order on an investigated respondent with a zero AD cash deposit rate.

Finally, Polyplex argues that Commerce's draft remand decision to ignore 19 U.S.C. § 1677a(c)(1)©) "flies in the face of its ultimate purpose," because it was included in U.S. law to comply with U.S. obligations under Article VI of the GATT. Polyplex cites to the Statement of Administrative Action, explaining that "{a} new adjustment to 'purchase price' and 'exporter's sales price' is intended to reflect provisions of Article VI of the General Agreement on Tariffs and Trade, by mandating the addition to 'purchase price' or 'exporter's sales price' of any duty actually imposed to offset an export subsidy paid on the same merchandise." Accordingly, Polyplex argues that it would be "particularly egregious" to adopt an interpretation of a statutory provision that causes the United States to violate its WTO obligation when in fact Congress and the Administration have stated that the provision is intended to effectuate those very WTO obligations.

The plaintiffs state that in the above-referenced comment, Polyplex raised issues already fully briefed by the parties and fully addressed in the Court's opinion in this matter. The plaintiffs add that, in essence, Polyplex confuses cash deposits with dumping margins, maintaining that the Court made clear that a respondent with an above *de minimis* dumping margin must be included in an antidumping order. Accordingly, the plaintiffs argue as Polyplex has an above *de minimis* dumping margin in this case and, it must be included in the antidumping order.

Commerce's Position:

Contrary to Polyplex's claim, Commerce's draft redetermination is not inconsistent with its past practices because this is the first case where Commerce found that a respondent received a larger amount of countervailable export subsidies than the amount of dumping calculated in the antidumping investigation (leading to an AD cash deposit of zero). While Commerce has adjusted U.S. price by export subsidies in administrative reviews, our practice in investigations has been to adjust the AD cash deposit rate by the export subsidy rate to avoid the imposition of AD and CVD duties that compensate for the same cause of unfairly priced imports. The Court has not objected to Commerce adjusting Polyplex's cash deposit rate by the export subsidy rate, however, the Court has clearly stated that Commerce cannot exclude Polyplex from the AD order on PET film based on a zero cash deposit rate. As a result, Commerce has issued a final results of redetermination that includes Polyplex in the order and assigns it a cash deposit rate of zero pursuant to, and consistent, with the Court's remand order.

RESULTS OF REMAND REDETERMINATION

As a result of this redetermination, Commerce will issue cash deposit instructions to the BCBP identifying a cash deposit rate for Polyplex of zero and amend the Final Determination to include Polyplex within the AD order.

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James J. Jochum
Assistant Secretary
for Import Administration

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Date