

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

FROM: Susan H. Kuhbach
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the
2008 - 2009 Administrative Review of Polyethylene Terephthalate
Film, Sheet, and Strip from the Republic of Korea.

SUMMARY:

We have analyzed the comments of interested parties in the June 1, 2008 through May 31, 2009, administrative review of the antidumping duty order covering polyethylene terephthalate film, sheet, and strip (PET film) from the Republic of Korea. We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum.

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

Comment 1: Clerical Error
Comment 2: Kolon's Profit Ratios
Comment 3: G&A Expense Ratio (Gain on Sale of Land)
Comment 4: G&A Expense Ratio (Calculation of the Denominator)
Comment 5: U.S. Indirect Selling Expenses
Comment 6: Domestic Inland Freight
Comment 7: Offsetting of Negative Margins

BACKGROUND:

This review covers one manufacturer/exporter of the subject merchandise, Kolon Industries, Inc. (Kolon). On July 14, 2010, the Department published in the Federal Register the preliminary results of the June 1, 2008, through May 31, 2009, administrative review of the antidumping order on PET film from Korea. See Polyethylene Terephthalate, Film, Sheet, and Strip from the

Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review, 75 FR 40784 (July 14, 2010).

On August 13, 2010, we received case briefs from DuPont Teijin Films, Mitsubishi Polyester Film, Inc. and Toray Plastics America Inc. (collectively, petitioners) and Kolon. On August 18, 2010, we received rebuttal comments from Kolon. The Department has conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

DISCUSSION OF THE ISSUES

Comment 1: Clerical Error

Kolon states the Department's preliminary margin calculation changed the coding in its programming language related to certain product characteristics (i.e., specification (SPECH/U), surface treatment (SURFACEH/U), grade (GRADEH/U) and thickness (MICRONH/U)) from letters to numbers. In particular, these product characteristics were assigned a numeric value in the Comparison Market Program while a character (letter) value was assigned in the U.S. Margin Program. As a result of the different treatment between the two calculation programs, no identical matches resulted in the Department's preliminary calculations. However, Kolon argues its sales files reveal that a majority of CEP sales have identical matches in the comparison market. See Kolon's Case Brief at 2 and 3. As a result, Kolon requests the Department revise its U.S. Margin Program to ensure the product characteristics are consistent across the Comparison Market Program and U.S. Margin Program. Id. at 3.

Department Position: We agree that these are clerical errors and have corrected them for the final results. Specifically, we adjusted the U.S. Margin Program to reflect numeric values for product characteristics SPECU, SURFACEU, GRADEU and MICRONU in order to be consistent with values used in our Comparison Market Program for product matching purposes. See Memorandum to the File, "Analysis of Data Submitted by Kolon Industries, Inc. (Kolon) for the Final Results of Polyethylene Terephthalate Film, Sheet, and Strip from Korea (A-580-807)" (Final Analysis Memorandum), dated November 12, 2010.

Comment 2: Kolon's Profit Ratios

Petitioners argue Kolon reported aberrational profit ratios for subject merchandise sold in the home and U.S. markets when compared to Kolon's overall profit margin and the profit margins of film products as a whole. See Petitioners' Case Brief at 2. Petitioners note there is also a disparity between the profitability of subject merchandise and that of other film products and urge the Department not to rely on these reported data for the final results. For instance, petitioners state that because Kolon produces a variety of products, its financial statements are divided into different business segments, such as "Industrial Materials," "Film" (e.g., PET film, nylon film, etc.), "Chemistry" (e.g., synthetic resins) and "Other" (e.g., real estate leasing). Petitioners maintain they were able to calculate an operating profit ratio as a percentage of sales for each of these business segments and compared them with the profit ratio reflective from sales of subject merchandise. Id. From its comparison, petitioners claim the film business segment

resembles the profit rate of the overall company, while the profit rate of subject merchandise reflects an alternate trend.¹ *Id.* at 3. Petitioners maintain the disparities between Kolon's profit ratios cannot be explained by any economic rationale, but rather indicates an effort to manipulate data in order to obtain a de minimis margin. *Id.* at 2.

Kolon refutes petitioners' allegations, and argues they are unsubstantiated and without merit. First, Kolon states petitioners' analysis contains numerous flaws, such as dividing the company's U.S. market profit ratio by expenses, while at the same time dividing the home market profit ratio by sales which results in an inflated profitability of its reported U.S. market sales. *See* Kolon's Rebuttal Brief at 4. Next, Kolon challenges the petitioners' analysis of home market sales using control numbers (CONNUMs) categorized as either "identical" (i.e., CONNUMs reported in both the comparison market and U.S. market sales files) or "similar" (i.e., all other CONNUMs reported as home market sales). According to Kolon, this methodology is distortive because not all sales of a given CONNUM will be used to calculate normal value (NV). For example, Kolon points out the Department's below-cost test eliminates below-cost transactions exceeding 20 percent of the volume of home market sales of the CONNUM and thus, suggests petitioners' analysis is skewed. Further, Kolon argues that petitioners' analysis fails to consider the Department's practice of ensuring whether or not home market transactions are, in fact, contemporaneous with U.S. sales. *Id.* With respect to similar CONNUMs, Kolon explains petitioners' analysis also neglects to account for the Department's 20 percent cap imposed on the difference-in-merchandise adjustment to NV. For example, Kolon explains, subject merchandise may comprise various product lines from which a range of products sold in the home market may not even be comparable to products sold in the United States. Additionally, Kolon contends the Department's margin calculation also allows a single product to serve as NV for more than one U.S. CONNUM, and could, therefore qualify as both an identical and similar match to multiple U.S. CONNUMs. On the other hand, a U.S. CONNUM could also match to an identical home market CONNUM for some transactions, while matching to similar home market CONNUMs for others. *Id.* at 5.

With respect to petitioners' allegation of margin manipulation, Kolon states the Department requires evidence, and not merely conjecture in order to investigate such claims. While Kolon acknowledges petitioners stop short of using the terms "fictitious market" or "particular market situation" in their allegation, Kolon maintains their arguments are similar to those raised by petitioners in Porcelain-on-Steel Cooking Ware From Mexico; Final Results of Antidumping Duty Administrative Review, 58 FR 32095 (June 8, 1993) (POS Cooking Ware) and the comparison of "gross returns" on two product groups. Kolon states in POS Cooking Ware the Department determined the petitioners failed to provide support that "differences in gross returns between the various types of cookware sold in the home market were due to anything other than variations in prices based on normal market demand and differences in the COP for each type of merchandise." *See* Kolon's Rebuttal Brief at 5 (citing POS Cooking Ware and accompanying Issues and Decision Memorandum at Comment 2). Moreover, for the instant review, Kolon asserts the difference in profit levels between subject merchandise and the overall film business segment is minor and states, in fact, that the profit ratios of Kolon's other business units varied more significantly. *Id.* at 7.

¹ The details of petitioners' analysis and profit figures are business proprietary.

Further, Kolon asserts the difference in profit rates earned among its U.S. and home market sales is completely logical and grounded in sound economic rationale. For example, Kolon argues exchange rates used in the Department's margin calculation increased over 30 percent in the current review period when compared to the prior year. In particular, Kolon states that a comparison of the highest exchange rate versus the lowest exchange rate during the POR reveal a fluctuation of over 42 percent. *Id.* While Kolon states there is no evidence production costs increased close to that figure, Kolon argues that if they had, the exchange rate would translate to an increased profit margin on U.S. sales. *Id.* In performing its own analysis of the relative composition of sales in both the home and U.S. markets using the product characteristic thickness (MICRONH/U), Kolon argues that a sizeable portion of Kolon's home market sales are not even comparable to a significant number of Kolon's U.S. sales.² *Id.* at 8.

Finally, Kolon denies any distortions in its reported sales prices and claims any differences in its profitability among product lines are a reflection of actual market conditions. Kolon states it has fully complied in the instant review by providing the Department with timely, complete responses to requests for information. According to Kolon, petitioners' comparison of so-called "similar" home market sales are too physically dissimilar to U.S. sales under the Department's matching criteria to actually serve as "similar" CONNUMs for calculating the dumping margin. Thus, for the above reasons Kolon concludes there is no need for the Department to further investigate such claims as the data necessary to address petitioners' allegations are already on the record and prove nothing more than that U.S. prices exceed home market prices. *Id.* at 9 and 10.

Department Position: We disagree with petitioners and find there is insufficient evidence to exclude Kolon's reported profit from our margin calculation. We determine petitioners have not demonstrated Kolon's profit margin on sales of subject merchandise to the United States and home markets result from any unusual or unique circumstances that would render them aberrational. The Department recently noted in Carbazole Violet Pigment 23 from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 75 FR 36630 (June 28, 2010) (CVP from the PRC) "the existence of higher prices alone does not necessarily indicate that price data are distorted or misrepresented. Thus, the existence of a higher price is not sufficient to exclude a particular surrogate value, absent specific evidence that the value is otherwise abnormal or unreliable." See CVP from the PRC and accompanying Issues and Decision Memorandum at Comment 3. While the instant case does not involve surrogate values, the Department recently deemed this rationale analogous to financial ratios and used a respondent's reported profit, regardless of information showing the data were higher in comparison to profit rates of other companies subject to the review. See Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part, 75 FR 50992 (August 18, 2010) (Bedroom Furniture from the PRC) and accompanying Issues and Decision Memorandum at Comment 30(B)(ii)(a).

We agree with Kolon that it is often normal business practice for companies to reflect different profit ratios among various industry product lines given changing market demands. Therefore,

² The details of Kolon's analysis are business proprietary.

despite petitioners' speculations, we have no reason to believe the facts are other than what Kolon has submitted as timely responses to the Department's requests for information.

Comment 3: G&A Expense Ratio (Gain on Sale of Land)

Petitioners argue that Kolon improperly included in its general expense ratio a gain earned on the sale of land in the 2008 fiscal year. According to petitioners, the Department determines whether or not to classify a non-operating item as a general expense by examining the nature, significance and relationship of the asset to the general operations of the company. See Petitioners' Case Brief at 5 and 6. Under such criteria, petitioners maintain that Kolon's gain on the sale of land does not qualify as an offset to the general expenses.

Further, petitioners explain such a transaction is not routine in Kolon's normal course of business. Petitioners add that land is a non-depreciable asset, and thus there are no costs associated with the asset in the company's cost of production. As such, according to petitioners, there is no basis for including the offset as there are simply no costs to offset. Petitioners cite to Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Korea, 67 FR 62124 (October 3, 2002) and accompanying Issues and Decision at Comment 15 and Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars From the Republic of Korea, 66 FR 33526 (June 22, 2001) and accompanying Issues and Decision Memorandum at Comment 7 as examples where the Department has denied including gains and losses related to the sale of land. See Petitioners' Case Brief at 6 and 7.

Kolon contends the inclusion of its gain on the sale of land in the G&A expenses calculation is consistent with Department practice. In particular, Kolon explains the reported gain at issue relates to the relocation of its corporate headquarters. Kolon contends the Department has considered restructuring and relocation costs in the calculation of general expenses or even selling expenses. See Kolon's Rebuttal Brief at 11. For example, Kolon cites Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review, 74 FR 50774 (October 1, 2009) and accompanying Issues and Decision Memorandum at Comment 1; Certain Frozen Warmwater Shrimp from Ecuador: Final Results of Antidumping Duty Administrative Review, 74 FR 47201 (September 15, 2009) and accompanying Issues and Decision Memorandum at Comment 11; and Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from France, 67 FR 3143 (January 23, 2002) and accompanying Issues and Decision Memorandum at Comment 10, where the Department included restructuring costs as either general expenses or selling expenses depending on the type of expense. See Kolon's Rebuttal Brief at 11 and 12. For the instant review, Kolon explains the gain at issue was realized in connection with the company's relocation of its corporate headquarters from Seoul to Gwacheon. Thus, it is required to include the associated costs in its G&A calculation which the Department has previously recognized as elements of COP and CV. Id. at 12.

Department's Position: We agree with petitioners and have revised Kolon's G&A ratio calculation to exclude its reported gain on the sale of land for these final results. The Department considers the nature, significance and relationship of an activity when determining whether or not it is related to the general operations of the company. 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 India, 69 FR 76916 (December 23, 2004). In this case, we note that Kolon is in the business of manufacturing and selling merchandise and is not in the real estate business. Therefore, Kolon's sale of land is not part of the company's normal business operations. The Department has previously determined that significant gains and losses from non-routine sales of fixed assets unrelated to general operations of the company are not included in the calculation of G&A expenses. For example, in the changed circumstance review of this order the Department did not include the gains from the sales of Kolon's headquarter building, employee apartments and employee health and entertainment complex in the calculation of G&A expenses. See Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement of the Antidumping Duty Order, 73 FR 18259 (April 3, 2008) and accompanying Issues and Decision Memorandum at Comment 8. The resulting gain from the sales of those assets generated non-recurring income that was not part of its normal operations. Similarly, for the instant review, Kolon's sale of property constitutes a significant transaction in both form and value and is a non-routine disposition of fixed assets unrelated to the general operations of the company.

However, we also acknowledge it is the Department's practice to include gains or losses incurred on the routine disposition of fixed assets in the G&A expense ratio calculation. See e.g., Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber from Canada, 70 FR 73437 (December 12, 2005) (Softwood Lumber from Canada) and accompanying Issues and Decision Memorandum at Comment 8; see also Stainless Steel Sheet and Strip in Coils From Mexico: Final Results of Antidumping Duty Administrative Review, 75 FR 6627 (February 10, 2010) and accompanying Issues and Decision Memorandum at Comment 8. For example, routine sales of machinery and equipment would constitute a normal part of Kolon's business operations as it relates to the manufacturing of merchandise, and accordingly any such resulting gains or losses on the sale of machinery and equipment could be included as part of the Department's G&A calculation.

We also disagree with Kolon that the nature of this transaction resembles restructuring and relocation expenses which the Department has determined are incurred in the normal course of business and relate to the company's general operations. However, the Department has previously found that restructuring and relocation costs usually include labor expenses and the re-orientation of equipment at production facilities as well as involving costs associated with improving or making continuing operations more efficient. See Softwood Lumber from Canada and accompanying Issues and Decision Memorandum at Comment 8 (citing Notice of Final Results of Antidumping Administrative Review of Stainless Steel Bar from France, 70 FR 46482 (August 10, 2005) and accompanying Issues and Decision Memorandum at Comment 3; and Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from the United Kingdom, 67 FR 3146 (January 23, 2002) and accompanying Issues and Decision Memorandum at Comment 3.) We find the gain on the sale of land in the instant review does not correspond to Kolon's manufacturing or selling capabilities, but is merely related to the disposition of assets. Further, there are no labor expenses identified by Kolon with respect to this gain. As such, the circumstances of this transaction are that of the disposal of an asset unrelated to Kolon's general and continuing operations, and therefore, we have adjusted Kolon's

G&A expense calculation to exclude Kolon's gains on this transaction. See Final Analysis Memorandum.

Comment 4: G&A Expense Ratio (Calculation of the Denominator)

Petitioners explain that the cost of goods sold (COGS) denominators used in the calculation of Kolon's G&A and interest expense ratios should be on the same basis to ensure both calculations reflect the base to which it is applied. However, according to petitioners, Kolon's reported COGS denominator includes both the cost of finished goods and the cost assigned to scrap, while its reported cost of manufacture (COM) includes only the cost of finished goods and has been reduced by Kolon's earned scrap revenue. See Petitioners' Case Brief at 7 and 8. Petitioners maintain that the cost of sales denominator should be adjusted to exclude an amount for scrap revenue to ensure it is on an equal basis with Kolon's COM. Id. at 8.

Kolon rebuts petitioners' argument and maintains such a proposed adjustment has a de minimis impact on the G&A ratio. As such, Kolon urges the Department to disregard petitioners' argument in accordance with 19 CFR 351.413 which permits the Department to decline individual adjustments that have "an ad valorem effect of less than 0.33 percent" of U.S. price or NV. See Kolon's Rebuttal Brief at 12.

Department's Position: Consistent with our practice, we have determined it appropriate to include this adjustment in Kolon's reported G&A expense ratio. We agree with petitioners that in order to produce an accurate result, the bases upon which the G&A and financial interest expense ratios are calculated must be the same as the COM upon which they are applied. See Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement in the Antidumping Duty Order, 74 FR 22885 (May 15, 2009) and accompanying Issues and Decision Memorandum at Comment 7 (Thai Hot Rolled) (citing e.g., Notice of Final Determination of Sales at Less Than Fair Value: Live Cattle from Canada, 64 FR 56736, 56738 (October 21, 1999) and accompanying Issues and Decision Memorandum at Comment 2). In particular, the Department has previously employed this adjustment of reducing the COGS denominator used in the G&A expense ratio by scrap revenue. See, e.g., Certain Steel Concrete Reinforcing Bars from Turkey: Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 FR 65082 (November 7, 2006) (Rebar from Turkey) and accompanying Issues and Decision Memorandum at Comment 10.

Pursuant to section 773(b)(3)(B) of the Act, in calculating the COP of the merchandise under consideration, the Department adds to COM an amount for G&A and financial expenses. These amounts are determined by calculating G&A and financial expense ratios and multiplying these ratios by the COM of the merchandise under consideration. The ratios are calculated by dividing total G&A and financial expenses by the company's COGS. For these final results, we subtracted the COGS of scrap from the G&A and financial expense calculations, and thus were able to keep the denominators of both calculations on the same basis as the COM to which they were applied (i.e., the COGS of scrap was also subtracted from the COM). As discussed in Thai Hot Rolled, G&A and financial expenses are borne by the sales of all products of the company and apply to the costs of sales of all products sold. If the cost assigned to scrap is removed from

the total costs of the company in the calculation of COM then the remainder is the costs of subject and non-subject merchandise. In order for the entire amount of G&A and financial expenses to be allocated to the costs of such remaining merchandise, the G&A and financial expense ratios must be adjusted to remove the cost assigned to scrap from the denominators of both ratio calculations. In this case, because the product-specific cost to which the G&A expense ratio is applied has been reduced by scrap revenue, the denominator of the ratio must likewise be reduced by the scrap revenue.

While we acknowledge that 19 CFR 351.413 defines an “insignificant adjustment” as any individual adjustment having an ad valorem effect of less than 0.33 percent, or any group of adjustments having an ad valorem effect of less than one percent, of the EP, CEP, or NV, we note section 777A(a)(2) of the Act also allows the Department flexibility to determine, on a case-by-case basis, whether it should disregard a particular insignificant adjustment. See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27372-73 (May 19, 1997). In the instant case, it is appropriate to adjust Kolon’s G&A expense data in order to demonstrate a consistent approach of the Department’s calculation of G&A expenses and ensure an accurate result.

Accordingly, we have adjusted Kolon’s G&A expense ratio to subtract the scrap revenue from the COGS denominator of the G&A expense ratio in order to keep the denominator on the same basis as the COM to which the ratio is applied. This is consistent with Kolon’s reported interest expense calculation. As noted in Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Antidumping Duty Order in Part, 75 FR 50999 (August 18, 2010) (2008-2009 OJ from Brazil), excluding scrap revenue as an offset in the denominator of a ratio and then applying that ratio to a COM reduced by scrap revenue is arithmetically incorrect as the denominator does not reflect scrap revenue while the COM does. See 2008-2009 OJ from Brazil and accompanying Issues and Decision Memorandum at Comment 9. As such, in order to correctly allocate the total G&A expenses incurred by Kolon, the G&A ratio must be calculated using a COGS figure reduced by scrap revenue. This is consistent with the Department’s methodology employed in other cases with similar fact patterns. See e.g., 2008-2009 OJ from Brazil and accompanying Issues and Decision Memorandum at Comment 9; see also Rebar from Turkey and accompanying Issues and Decision Memorandum at Comment 10.

Comment 5: U.S. Indirect Selling Expenses

Petitioners contend that Kolon’s reported U.S. indirect selling expense ratio should be rejected because its calculation excluded the expenses attributable to sales of non-subject merchandise. Petitioners describe Kolon’s U.S. indirect selling expense ratio as including expenses charged directly to respective business divisions, while also including certain expenses charged on behalf of the entire operation. See Petitioners’ Case Brief at 8. According to petitioners the particular business division that comprises non-subject merchandise was assigned an unusually high percentage of expenses, and thus were excluded from the indirect selling expense calculation without adequate explanation. Petitioners claim Kolon neither explains nor provides support for the classification of its accounts, and thus, does not warrant acceptance of the reported ratio. Id. at 9 and 10. Petitioners urge that instead of allocating certain expenses to particular business

divisions, the Department should use an indirect selling expense ratio reflective of total expenses allocated over total sales. Id. at 10.

Kolon defends its reported U.S. indirect selling expenses stating its ratio calculation is reasonable, accurate and non-distortive. In fact, Kolon argues its indirect selling expenses reflect the most specific allocation possible by including expenses incurred in connection with the film business division, while excluding expenses incurred by the non-film business division. Kolon maintains its calculation is consistent with 19 CFR 351.401(g)(2) which requires an allocation be calculated on “as specific a basis as is feasible.” See Kolon’s Rebuttal Brief at 14. In the first step of its calculation, Kolon states it identified all expenses according to the various business divisions. As for these identifiable expenses, because the non-film business division had nothing to do with the sale of subject merchandise these expenses were properly excluded from the numerator of the indirect selling expense ratio calculation. Id. at 15. In the next step of its calculation Kolon describes that it allocated an amount for common expenses to both the film business division and the non-film business division based on the nature of each account. For example, Kolon explains if an expense was incurred in connection with variable employee activities or fixed expenses, it allocated the common expenses based on the number of employees in each business division. Otherwise, Kolon stated it allocated the common expenses based on relative sales value. As a result of this methodology, which Kolon describes as a hybrid calculation, the majority of total common expenses were allocated to the film business division while the remainder was allocated to the non-film business division and eventually excluded from the numerator of the calculation. Id. After removing the expenses identified in these two steps, the resulting amount was then divided by sales revenue of the film business division, which Kolon maintains reflects an apples-to-apples approach. Meanwhile, Kolon suggests petitioners’ proposed methodology would overstate the indirect selling expense ratio by including selling expenses and revenue attributable to sales of non-subject merchandise. Id. at 16.

Kolon asserts its calculation methodology is consistent with both Department practice, and precedent established in the U.S. Court of International Trade. For example, Kolon cites e.g., Certain Corrosion-Resistant Carbon Steel Flat Products from Korea, 74 FR 11082 (March 19, 2009), where the Department accepted the indirect selling expense ratio which excluded expenses related to the U.S. affiliate’s sales of non-subject merchandise and to the affiliate’s non-selling activities. See Kolon’s Rebuttal Brief at 17. Kolon states the CIT also upheld this methodology in U.S. Steel Corp. v. United States, Court No. 07-00133, Slip Op. 10-28 (Ct. Int’l Trade 2010) and notes the Department “properly sought to exclude from the calculation of indirect selling expenses those payroll and common expenses that were attributable to {the U.S. affiliate’s} sales of non-subject merchandise, as well as its management of investments (its non-selling activities).” See Kolon’s Rebuttal Brief at 17. Similarly, Kolon notes, the Department explained “if the denominator used to calculate a factor for indirect selling expenses is comprised of the sales value for subject and non-subject merchandise, we allow the exclusion of expenses pertaining exclusively to non-subject merchandise from the numerator if the remaining selling expenses are common expenses pertaining to both subject and non-subject merchandise.” Id. at 18 (citing Ball Bearings and Parts Thereof from France, Germany, Italy, Japan and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 71 FR 40064 (July 14, 2006) and accompanying Issues and Decision Memorandum at Comment 29; NSK Ltd. v.

United States, 358 F. Supp. 2d 1276 (Ct. Int'l Trade 2005); and Timken Co. v. United States, 209 F. Supp. 2d 1373, 1381 (Ct. Int'l Trade 2002)). In particular, Kolon notes in NSK Ltd. v. United States, 358 F. Supp. 2d 1291 (Ct. Int'l Trade 2005), the CIT agreed the Department reasonably accepted an allocation methodology in which the respondent first removed expenses that were related to sales of non-subject merchandise and then calculated the indirect selling expense ratio based on the remaining expenses. See Kolon's Rebuttal Brief at 18. Additionally, Kolon refers to several other cases (e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Prestressed Concrete Steel Wire Strand from Mexico, 68 FR 68350 (December 8, 2003); Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From France, 67 FR 78773 (December 26, 2002); and Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From South Korea, 65 FR 41437 (July 5, 2000)) where the Department accepted calculation methodologies on a divisional- or subject merchandise-specific basis as done in the instant review. See Kolon's Rebuttal Brief at 18 and 19. Kolon argues petitioners' proposed calculation is inconsistent with Department practice because it employs a general allocation. Accordingly, Kolon claims it is reasonable and appropriate to exclude expenses associated with sales of non-subject merchandise from the calculation of the U.S. indirect selling expense ratio and urges the Department to accept its reported methodology for these final results. Id. at 23.

Department's Position: We have made no changes to Kolon's calculation of its U.S. indirect selling expense ratio for these final results. Kolon's calculation in this review is in accordance with 19 CFR 351.401(g)(2) which requires a respondent to calculate its allocated expenses "on as specific a basis as is feasible." We find that Kolon appropriately identified its indirect selling expenses and segregated them according to business divisions as arising from either subject merchandise or non-subject merchandise. See Kolon's section C questionnaire response, dated October 13, 2009 at Exhibit C-20. Kolon also distinguished expenses incurred among both business divisions, namely "common expenses." In order to determine the appropriate expense per division of the common expenses, Kolon allocated such expenses on the basis of either the number of employees, or the sales value of the respective division. Expenses allocated to the business division of non-subject merchandise were excluded from the numerator of the indirect selling expense calculation, while sales revenue from the same division was also excluded from the denominator. Because Kolon is able to segregate its indirect selling expenses incurred on selling subject merchandise from expenses incurred selling non-subject merchandise, we determine it appropriate to exclude the expenses incurred and sales revenue recognized in conjunction with the non-subject merchandise. As such, Kolon's reported U.S. indirect selling expense calculation results in a reasonable allocation of selling expenses over the relative sales value to which the expenses correspond.

Kolon's reported U.S. indirect selling expense calculation is consistent with the prior administrative review of this order where Kolon also divided the total amount of indirect selling expenses incurred on film products, by the total amount of its sales of film products. See Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 74 FR 57993 (November 10, 2009) (2007-2008 Final Results), as explained e.g., in Kolon's questionnaire response, dated October 6, 2008 (public version) at C-38. We note the Act does not outline a particular methodology for calculating

indirect selling expenses. See Micron Tech. Inc. v. United States, 243 F.3d 1301, 1314 (Fed. Cir. 2001); see also Heveafil SDH. BHD. v. United States, 25 CIT 147, 159 (2001) (“The statute does not define indirect selling expenses”). Likewise, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103- 316, Vol. 1 (1994) (SAA) at 131 explains that the Department is not required to use a specific calculation methodology, merely stating that indirect selling expenses “would be incurred by the seller regardless of whether the particular sales in question are made, but reasonably may be attributed (at least in part) to such sales.” However, the Department has explained that its standard methodology is to calculate indirect selling expenses based on expenses incurred and sales revenue recognized (or COGS) during the same period of time. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador, 69 FR 76913 (December 23, 2004) and accompanying Issues and Decision Memorandum at Comment 26. Meanwhile, respondents must also properly identify indirect selling expenses because the classification of individual expenses substantially affects the outcome of the Department’s comparisons of EP and CEP to NV. See e.g., Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 74 FR 6365 (February 9, 2009) and accompanying Issues and Decision Memorandum at Comment 3. We find Kolon’s classification of U.S. indirect selling expenses and its calculation of its indirect selling expenses ratio is appropriate and fully complies with Department practice.

Comment 6: Domestic Inland Freight

Petitioners argue Kolon failed to report actual freight costs, and instead calculated the cost of freight based on fee schedules from unaffiliated trucking companies. As such, petitioners suggest Kolon’s reported freight may, or may not represent what the company paid to the freight companies for each shipment. Therefore, petitioners urge the Department to deny Kolon’s reported freight expense in its calculation of NV and apply facts available for the final results. See Petitioners’ Case Brief at 11.

Petitioners note the Department allowed Kolon various opportunities to demonstrate how its calculation methodology is reasonable, by raising questions in its supplemental questionnaires. However, petitioners contend Kolon merely repeated the explanation from its original questionnaire response which stated it could not report actual freight because the freight rates cover multiple shipments. *Id.* While petitioners acknowledge the Department has accepted the use of freight schedules when the fee schedule and actual amounts paid are the same, they maintain Kolon did not satisfy this threshold requirement and failed to show it paid the freight suppliers according to the fee schedule. *Id.* at 12. For example, petitioners maintain Kolon did not provide actual freight costs for five sample transactions requested in the Department’s supplemental questionnaire and only submitted its calculation of the average theoretical amount and the total freight rate charged for all deliveries covering the sample shipments. However, petitioners argue Kolon’s explanation failed to provide a link from the theoretical calculation to the amount actually paid. *Id.* Meanwhile, petitioners argue that a company subject to administrative review is obligated to provide a response to the best of its ability and to demonstrate its reported amounts are reasonable. According to petitioners, Kolon did not demonstrate it paid freight suppliers according to the fee schedule, which therefore constitutes a refusal by Kolon to provide information to the best of its ability. Therefore, petitioners urge the

Department to apply facts available for inland freight expense in these final results. Id. at 12 and 13.

Kolon denies it withheld information and asserts it responded in a timely manner to the Department's initial and supplemental questionnaires concerning its inland freight calculations, variables INLFTWH and INLFTCH. For example, Kolon explains its initial questionnaire response stated it did not have information in its accounting records to report the actual per-unit freight expenses on a transaction-by-transaction basis. Therefore, Kolon maintains it was only able to report the unit freight charges based on the schedules of freight charges and freight contracts for each facility agreed upon with unaffiliated freight providers. Kolon confirms this is the same methodology employed in the 2007-2008 Final Results. See Kolon's Rebuttal Brief at 24 and 25.

With respect to the five sample invoices selected by the Department in its first supplemental questionnaire, Kolon defends its first supplemental questionnaire response, explaining it was unable to calculate actual freight costs for these transactions because its accounting records did not separately identify the freight expenses. Kolon states its accounting system is unable to match monthly freight tax invoices to specific sales transactions. In lieu of such documentation, Kolon submitted sample screen shot printouts from its accounting system, as well as transportation contracts and fee schedules of each plant, in order to demonstrate how the freight amounts reflect the fee schedules. Id. at 25. Kolon asserts its reliance on freight schedules used by its unaffiliated freight providers has similarly been accepted by the Department in other proceedings (e.g., Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 69 FR 19153 (April 12, 2004) and accompanying Issues and Decision Memorandum at Comment 5). Kolon adds that while petitioners in the instant review suggest the Department has only accepted freight based on fee schedules shown to be the same as the actual amounts paid, they neglect to cite a single case where this has, in fact, occurred. See Kolon's Rebuttal Brief at 28, footnote 11.

Further, Kolon points out the Department's second supplemental questionnaire did not raise concerns about the completeness of the information supporting these five sample invoices. Rather, the Department's second supplemental questionnaire asked whether Kolon performed any studies about the theoretical standards underlying the weighted-average freight expenses, and to demonstrate how the reported freight charges relate to the actual freight charges. Kolon responded that it had not performed such studies in the normal course of business and clarified it was unable to link transportation charges incurred on individual shipments to individual home market sales. Id. at 25 and 26. Thus, Kolon fully detailed its calculation of domestic inland freight based on information available in its normal accounting records. Considering all the above reasons, Kolon asserts it has fully cooperated with the Department and did not impede, in any way, the instant review. Id. at 27.

Kolon argues the application of facts available is therefore not appropriate and claims the Department may only use "adverse inferences" under section 776 of the Act if it finds "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." Additionally, Kolon references the Federal Circuit's decision in Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003) which held that

compliance with the “best of its ability” standard can only be determined “by assessing whether the respondent has put forth its maximum effort to provide {the Department} with full and complete answers to all inquiries in an investigation.” See Kolon’s Rebuttal Brief at 27 and 28. Kolon asserts it has fully cooperated with the Department throughout the course of this review and has made every effort to comply with the Department’s requests. Kolon explains it does not keep accounting records in the normal course of business necessary to report actual, per-unit inland freight expenses on a transaction-specific basis and should not be penalized as a result. In reference to the Federal Circuit’s decision in Olympic Adhesives, Inc. v. United States, 899 F.2d 1565, 1572-1574 (Fed. Cir. 1990), Kolon states the Department’s authority to apply facts available does not extend to situations where information requested cannot be produced because the data do not exist. See Kolon’s Rebuttal Brief at 29. In the instant review, Kolon maintains the Department should not fault it for not producing calculations based on documentation that does not exist in its normal accounting records. Thus, Kolon concludes, facts available are simply not justified for these final results.

Department’s Position: We disagree with petitioners and determine it is not appropriate to assign facts available for these final results. We find Kolon provided sufficient documentation demonstrating how its calculation of inland freight is as specific as possible given the circumstances of its freight arrangements with unaffiliated trucking companies. First, to show how its reported inland freight expenses were consistent with the freight providers’ rates set forth in the freight contract, Kolon submitted a sample delivery contract and accompanying freight fee schedule from the unaffiliated freight provider. See Kolon’s section B questionnaire response, dated October 13, 2010 (BQR) at Exhibit B-7. Kolon explained its accounting system does not record individual transactions because its freight expenses are invoiced for multiple shipments which comprise both subject and non-subject merchandise. Therefore, Kolon calculated average inland freight expenses for merchandise sold from each of its production facilities (*i.e.*, Gumi, Kimcheon and Ulsan) to Kolon’s distribution warehouse in Ansan. See Kolon’s BQR at B-26. Kolon clarified it was able to report its freight expenses on a plant-specific basis because each facility is able to separately track its own freight costs while being charged for freight covering multiple shipments. *Id.* at footnote 6. Second, concerning the five sample invoices selected by the Department in its supplemental questionnaire, Kolon provided copies of applicable contracts and accompanying inland freight fee schedules (for each facility) corresponding to these particular invoices. See Kolon’s first supplemental questionnaire response, dated March 1, 2010 (SQR1) at Exhibit S-9. Kolon also provided sample screen shots from its accounting system associated with the representative freight charges. See Kolon’s SQR1 at Exhibit S-8. As demonstrated in these exhibits, the amounts shown in the fee schedules correspond directly to the amounts used in Kolon’s calculation of the reported average freight rate. Third, we determine Kolon provided a reasonable response to the Department’s second supplemental questionnaire which requested further evidence of the correlation between Kolon’s reported freight charges and actual freight charges. In particular, the Department’s second supplemental questionnaire asked Kolon if it had performed any studies demonstrating how the theoretical standards underlying its average freight charges related to actual freight charges. In its response, Kolon asserted it had not performed such studies, and reiterated its reported freight charges were based on freight schedules and contracts for each plant, agreed upon in the normal course of business. See Kolon’s second supplemental questionnaire response, dated June 29, 2010 at S2-1 and S2-2. We note Kolon cooperated with our requests for information, where possible, and where not

possible, it provided an adequate explanation as to why the requisite information was not available.

Section 776(a) of the Act provides in pertinent part that the Department shall make a determination on the basis of the facts available (1) if necessary information is not available on the record, or (2) in any of four situations, including when an interested party fails to provide such information by the deadlines for its submission, in the form and manner requested. Section 776(b) of the Act states the Department may use an adverse inference when selecting from among the facts otherwise available if an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information. We do not find that any of these conditions apply in this case. As required by section 782(d) of the Act, we provided Kolon with an opportunity, in our first and second supplemental questionnaires, to remedy or explain any deficiencies identified in its original questionnaire response. We determine Kolon has provided the requested information within the established deadlines and in a form and manner consistent with our requests. We find the freight fees at issue are clearly based on rate schedules that are used in the marketplace and serve as a reasonable surrogate for Kolon's actual expenses given the nature of the company's record keeping. In addition, we note Kolon's reporting limitations and its inability to match freight invoices to specific sales transactions in this review, is consistent with the prior segment of this proceeding. See 2007-2008 Final Results, as explained e.g., in Kolon's section B questionnaire response, dated October 6, 2008 (public version) at B-23 through B-26. Therefore, we continue to use Kolon's reported home market inland freight expenses for these final results.

Comment 7: Offsetting of Negative Margins

Kolon asserts the Department should eliminate its "zeroing" methodology in this administrative review. Kolon asserts that while the Department has declined to offset margins of dumping to account for sales sold above NV, the World Trade Organization (WTO) Dispute Settlement Body has consistently held that zeroing is inconsistent with the WTO antidumping agreement. Kolon cites to United States-Final Anti-Dumping Measures on Stainless Steel from Mexico, Report of the Appellate Body, WT/DS344/AB/R (April 30, 2008), United States Measures Relating to Zeroing and Sunset Reviews, Report of the Appellate Body WT/DS322/AB/R (January 9, 2007) (US-Zeroing (Japan)), United States Measures Relating to Zeroing and Sunset Reviews, Report of the Appellate Body, WT/DS294/AB/R (April 18, 2006) (US-Zeroing (EC)), and United States-Continued Existence and Application of Zeroing Methodology, Report of the Panel, WT/DS350/R (October 1, 2008) to support its assertion that the WTO has held that zeroing in administrative reviews is inconsistent with the United States' WTO obligations. See Kolon's Case Brief at 4. Kolon notes that in response to a WTO ruling, the Department has eliminated zeroing in original investigations. Kolon asserts that in light of the WTO decisions cited in its brief, the Department should eliminate its zeroing practice in the instant administrative review consistent with Department practice in investigations and the United States' international obligations. Id. at 5.

Department Position: We have not changed our calculation of the weighted-average dumping margin, as suggested by Kolon, in these final results.

Section 771(35)(A) of the Act defines “dumping margin” as the “amount by which the NV exceeds the export or constructed export price of the subject merchandise” (emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than EP or CEP. The Department’s zeroing practice is an appropriate interpretation of the Act. As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The Federal Circuit has held that this is a reasonable interpretation of the statute. See e.g., Timken Co. v. United States, 354 F.3d 1334, 1342-45 (Fed. Cir. 2004) (Timken); see also Corus Staal BV v. the Department, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (Corus I).

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

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

Kolon has cited WTO dispute-settlement reports finding the Department’s “zeroing” methodology to be inconsistent with the Antidumping Agreement. As an initial matter, the Federal Circuit has held that WTO reports are without effect under U.S. law, “unless and until such a [report] has been adopted pursuant to the specified statutory scheme” established in the Uruguay Round Agreements Act (URAA). See Corus Staal BV v. United States, 593 F.Supp.2d 1373, 1384 (Ct. Int’l Trade 2008) (Corus III); accord Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (Corus II) at 1370, 1375; and NSK Ltd. v. United States, 510 F.3d 1375, 1380 (Fed. Cir. 2007) (NSK). While the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations, the Department has not adopted any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. With respect to US-Zeroing (Japan), Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See e.g., 19 U.S.C. 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department’s discretion in applying the statute. See 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process,

Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 U.S.C. 3533(g). With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure. With regard to US-Zeroing (Japan), it is the position of the United States that appropriate steps have been taken in response to that report and those steps do not involve a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review. Furthermore, in response to US-Zeroing (Japan), the Federal Circuit has repeatedly affirmed the permissibility of denying offsets in administrative reviews. See Corus II at 1374-75; and NSK at 1380. With respect to US-Zeroing (EC), such WTO reports are not self-executing under U.S. law and there has been no implementation action taken by the United States pursuant to U.S. law that would require the Department to adopt a different methodology in this instance.

For all these reasons, the various WTO Appellate Body reports regarding “zeroing” do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, the Department has continued to deny offsets to dumping based on EPs or CEPs that exceed NV in this review.

For the foregoing reasons, we have not changed the methodology employed in calculating the weighted-average dumping margins for the final results.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the positions set forth above and adjusting the margin calculations accordingly. If these recommendations are accepted, we will publish the final results and the final weighted average dumping margin for Kolon in the Federal Register.

Agree_____ Disagree_____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date