

A-580-839  
6th Administrative Review  
POR: 05/01/05-04/30/2006  
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DATE: December 3, 2007

MEMORANDUM TO: David M. Spooner  
Assistant Secretary  
for Import Administration

FROM: Stephen J. Claeys  
Deputy Assistant Secretary  
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Sixth Antidumping Duty  
Administrative Review of Certain Polyester Staple Fiber from the  
Republic of Korea

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## SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the sixth administrative review of certain polyester staple fiber from the Republic of Korea. As a result of our analysis, we have made changes to the preliminary results. We recommend that you approve the positions described in the "Discussion of Issues" section of this memorandum. Below is a complete list of the issues in this review for which we received comments and rebuttals from interested parties:

### General Comments

Comment 1: Coding of Specialty Fibers  
Comment 2: Home Market Sales Database  
Comment 3: Classification of U.S. Sales as Constructed Export Price Sales  
Comment 4: MTA and QTA as Identical Products  
Comment 5: Valuing PTA and QTA at the Transfer Price Paid by Huvis  
Comment 6: Major Input Test for Samnam's Purchases of Paraxylene  
Comment 7: SK Chemicals' SG&A and Financial Expenses Ratios  
Comment 8: Huvis' G&A Expenses

Comment 9: Zeroing Dumping Margins

Comment 10: The Rate Applicable to Dongwoo's Sales

## **BACKGROUND**

On June 6, 2007, the Department of Commerce ("Department") published in the Federal Register the preliminary results of the sixth administrative review of the antidumping duty order on certain polyester staple fiber ("PSF") from the Republic of Korea.<sup>1</sup> The period of review ("POR") is May 1, 2005, through April 30, 2006. We invited interested parties to comment on the Preliminary Results.

On July 27, 2007, we received case briefs from Wellman, Inc.; Invista, S.a.r.L.; and DAK Americas, LLC (collectively, "the petitioners"), Huvis Corporation ("Huvis"), and Consolidated Fibers Inc. ("Consolidated Fibers") (an importer of subject merchandise sales by Dongwoo)/Dongwoo Industry Co., Ltd. ("Dongwoo").

On August 3, 2007, consistent with 19 CFR 351.301(b)(2) and 19 CFR 351.104(a)(2)(ii)(A), we rejected Consolidated Fibers/Dongwoo's case brief because it contained untimely filed new factual information. On August 7, 2007, we received a revised case brief from Consolidated Fibers/Dongwoo.

On August 24, 2007, we received rebuttal briefs from the petitioners, Huvis, and Consolidated Fibers/Dongwoo. A public hearing was not requested.

## **DISCUSSION OF ISSUES**

### **GENERAL**

#### **Comment 1: Coding of Specialty Fibers**

*Petitioners' Argument:* The petitioners argue that Huvis admitted that it "simply added codes in numerical order for its other specialty fibers" and that this "coding does not rank Huvis' specialty fiber products, but rather assigns the codes among specialty products without priority."<sup>2</sup> The petitioners contend that Huvis' additional coding must be rejected because it does not specify notable physical differences in the product or the hierarchy of those differences between and among the products. The petitioners assert that this coding prevents the Department from identifying the most similar match in the margin calculations.

According to the petitioners, Huvis has not demonstrated that sea island fiber ("SIP"), cation

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<sup>1</sup> See Certain Polyester Staple Fiber from Korea: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Intent to Rescind, 72 Fed. Reg. 31,279 (Jun. 6, 2007) ("Preliminary Results").

<sup>2</sup> See Huvis' January 11, 2007 supplemental questionnaire response ("Huvis' Jan. 11 SQR") at 17.

dyeable fiber (“CDF”), and polyester wool fiber (“PWF”) are obtained by “introducing chemical additives during the polymerization state of PSF production,” the Department’s requirement for a specialty fiber. The petitioners assert that SIP, CDF and PWF should be coded as regular fibers, and therefore, matched to U.S. sales of regular fibers.

*Huvis’ Argument:* Huvis counters by asserting that the record establishes clearly that regular and specialty products (including SIP, CDF, and PWF) are distinguished by commercially significant physical characteristics, as well as by production processes, end uses, and costs of production. For example, Huvis notes that CDF fiber is endowed with enhanced dyeability and anti-piling through the combined “cation group” (a group of atoms carrying a positive charge).<sup>3</sup> According to Huvis, comparing its regular products chart to its specialty products chart demonstrates that its regular products differ from its specialty products in that the regular products do not contain the additional chemicals added to the chip which, combined with more complex production processes, provide specialty products with their unique characteristics.<sup>4</sup>

Moreover, Huvis argues that the Department has verified the accuracy of the information provided by Huvis with regard to its specialty products in prior reviews. In the second review, Huvis contends that the Department concluded that unique chemicals and minerals were added to specialty products during the polymerization that were not added to regular or conjugate PSF, making them physically different products.<sup>5</sup>

In the fourth review, likewise, the Department concluded that Huvis’ specialty products have physical characteristics that are different from its regular products. For example, Huvis’ product brochure detailed many physical characteristics that differentiate the specialty fibers from the regular fibers.<sup>6</sup> Also, in the fourth review, Huvis maintains that the Department disagreed “with the petitioners’ assertion that evidence exists that specialty and regular products have the same chip and additive inputs.”<sup>7</sup> Huvis notes that the Department found that “these cost and price differences support Huvis’ assertion that its specialty products have distinct commercial attributes.”<sup>8</sup>

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<sup>3</sup> See Huvis’ September 8, 2006 Section B response (“BQR”) at 3-5 and App. B-3.

<sup>4</sup> See Huvis’ Jan. 11 SQR at 15 & App. S-15.

<sup>5</sup> See Certain Polyester Staple Fiber from Korea: Final Results of Antidumping Duty Administrative Review, 68 Fed. Reg. 59,366 (Oct. 15, 2003), and accompanying Issues and Decision Memorandum at Comment 2.

<sup>6</sup> See Notice of Final Results of Antidumping Duty Administrative Review: Certain Polyester Staple Fiber from the Republic of Korea, 70 Fed. Reg. 73,435 (Dec. 12, 2005), and accompanying Issues and Decision Memorandum at Comment 1.

<sup>7</sup> Id.

<sup>8</sup> Id.

Finally, Huvis contends that the Department in the fifth review again verified “the product-matching criteria of subject merchandise produced or sold by Huvis,” in particular “how Huvis identified or determined the ... product matching criteria,” including specialty fibers.<sup>9</sup> Huvis maintains that the Department concluded: “Our discussions and the documents we reviewed were consistent with the information provided in Huvis’ questionnaire responses.”<sup>10</sup> Huvis concludes that the Department should continue to accept Huvis’ coding of specialty products as it has done consistently in every previous review.

*Department’s Position:* We disagree with the petitioners’ allegation that the case record does not support Huvis’ claim that CDF, SIP, and PWF are specialty products. Huvis’ descriptions of the production process of these three fibers demonstrates that each is either made with specialty chips or additional additives which are introduced during the polymerization process.<sup>11</sup> Huvis’ narrative descriptions of CDF, SIP, and PWF are supported through its recipe tables and we note that CDF, SIP, and PWF either use specialty chips or contain additional additives not present in Huvis’ regular products.<sup>12</sup>

We acknowledge that the Department is unable to establish the ranking of CDF, SIP, and PWF in the model matching hierarchy. However, contrary to the petitioners’ suggestions, it is not necessary to rank these three specialty fibers here because Huvis’ home market sales of these specialty fibers do not match to any U.S. sales, regardless of their ordering, and are accordingly not used in the Department’s final margin calculation.

## **Comment 2: Home Market Sales Database**

*Petitioners’ Argument:* The petitioners assert that, although reported as home market sales, the fact that certain of Huvis’ home market sales were delivered to a Korean port in a shipping container indicates that Huvis had knowledge that these sales were export sales.<sup>13</sup> Moreover, according to the petitioners, Huvis claims that domestic sales are paid by open account while domestic-local sales (sales where the merchandise is further manufactured by the purchaser before export) are paid by a letter of credit (“L/C”). Despite this, the record shows that some domestic-local sales are paid by open account. Therefore, petitioners claim that Huvis’ sales accounts are faulty and do not provide a basis for accurately reporting the company’s home market and export sales. Consequently, the petitioners contend that Huvis’ entire home market

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<sup>9</sup> See Petitioners’ March 21, 2007 letter at Enclosure 1 for a copy of Memorandum to the File, “*Verification of the Sales and Cost Response of Huvis Corporation in the Antidumping Review of Certain Polyester Staple Fiber from the Republic of Korea*,” dated May 23, 2006 (“*Fifth Review Verification Report*”) at 9.

<sup>10</sup> Id.

<sup>11</sup> See Huvis’ BQR at 3-5.

<sup>12</sup> See Huvis’ BQR at App. B-3; see also Huvis’ Jan. 11 SQR at 15-17 and App. S-15.

<sup>13</sup> Huvis’ April 9, 2007 SQR (“Huvis’ Apr. 9 SQR”) at 7 and Appendix S-66.

sales database should be rejected.

The petitioners note that Huvis stated that sales recorded in account number 4610 (“domestic” sales) are paid by open account and Huvis knows that these are home market sales.<sup>14</sup> Sales that are recorded in account number 4620 (“domestic-local” sales) are sales of goods that the customer consumes and then exports, and pays Huvis with a letter of credit (“L/C”).<sup>15</sup>

The petitioners contend that the containerized sales shipped to a Korean port, but reported in the home market database, show that reliance on Huvis’ accounting system and the type of payment is not a reasonable basis to classify sales under the Department’s knowledge test.

The petitioners argue that, in Tung Mung Development Co., Ltd. v. United States, 25 CIT 752 (2001), the Court of International Trade upheld the application of adverse facts available (“AFA”) for a respondent’s flawed methodology of categorizing sales.<sup>16</sup> The petitioners assert that, although Huvis stated that it relied on the “same methodology that has been repeatedly endorsed by the Department in this and numerous other cases,” Huvis’ argument provides no support for continuing the error in this current review.<sup>17</sup> The petitioners contend that Huvis claimed that occasionally a customer that purchases PSF for further processing prior to export will be unable to open a local L/C and that this change in the payment method does not transform a home market sale into an export sale. The petitioners argue that Huvis’ excuse fails to refute that the sales in question were delivered to a Korean port in a shipping container. The petitioners further contend that Huvis’ statement that it “knows” that open account sales are home market sales is simply wrong. The petitioners contend that, for home market sales merchandise delivered to a Korean port in a shipping container, no other conclusion can be drawn other than Huvis had knowledge that these sales were export sales.

The petitioners observe that Huvis stated that “even if there was any merit to petitioners’ misguided allegations” these errors “could hardly justify discarding Huvis’ entire home market database ...”<sup>18</sup> The petitioners argue that the issue is whether Huvis’ system of classifying and reporting its sales was accurate and in conformity with the Department’s instructions and the U.S. antidumping laws.<sup>19</sup> The petitioners assert that, for the final results, the Department should, at a minimum, rely on the highest normal value in Huvis’ home market sales database for comparison to all of Huvis’ U.S. sales, or assign total AFA.

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<sup>14</sup> Huvis’ Apr. 9 SQR at 8.

<sup>15</sup> Id.

<sup>16</sup> See Tung Mung, 25 CIT at 785.

<sup>17</sup> Huvis’ May 22, 2007 letter at 1.

<sup>18</sup> Id.

<sup>19</sup> See Tung Mung, 25 CIT at 785.

*Huvis' Argument:* Huvis maintains that, occasionally, a customer that purchases PSF for further processing prior to export will be unable to open a local L/C, because, e.g., it has exceeded its credit limit. Huvis argues the customer's payment for such sales on an open account basis does not transform these sales into export sales.

Huvis contends that its system properly classified, and Huvis properly reported, all sales as home market, U.S., or third country under the Department's knowledge test and its home market sales database does not include any export sales.

Huvis argues that the Department verified its overall sales accounting systems in both the second and fifth reviews, and found that Huvis correctly reports its local L/C sales. Huvis contends that it explained that raw material local L/C sales (also known as domestic-local sales) indicate that the merchandise will be further processed prior to export.<sup>20</sup> Huvis argues that the manufacturer does not typically know the final destination of the merchandise.<sup>21</sup> Huvis asserts that it noted that finished goods local L/C sales (also known as export-local sales) occur when the merchandise is not further processed by the manufacturer's customers prior to export and Huvis did not report such sales as home market sales.<sup>22</sup> Huvis reiterates that the manufacturer knows the ultimate destination for finished goods local L/C sales because it prepares and submits the export permit to Korean customs.<sup>23</sup> Huvis points to the Department's sales verification report in the second review for a discussion of these two types of local L/C sales which remains accurate in the current review.<sup>24</sup>

Huvis contends that, for merchandise sent to Korean ports, it has stated that it knows the ultimate destination for export-local sales because it prepares and submits the export permit to Korean customs.<sup>25</sup> Huvis argues that it has articulated that it knows that the merchandise of domestic-local sales is destined for exportation after further processing pursuant to the terms of the local L/C.<sup>26</sup> Accordingly, Huvis maintains that, for reporting purposes, domestic-local sales are home market sales, while export-local sales are export sales.<sup>27</sup>

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<sup>20</sup> Huvis' Apr. 9 SQR at 7-9.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> See Huvis' Apr. 9 SQR, Appendix S-67 for a copy of Memorandum to the File, "Verification of the Sales Response of Huvis Corporation in the 2001/2002 Antidumping Duty Administrative Review of Certain Polyester Staple Fiber from Korea," dated May 12, 2003 ("Second Review Sales Verification Report") at 5.

<sup>25</sup> See Huvis' Apr. SQR at 8-9.

<sup>26</sup> Id.

<sup>27</sup> Id.

Huvis argues that there is no evidence on the record to support petitioners' contention that goods shipped in a container are always exported without further processing. Huvis points out that a manufacturer may further process the goods at the port and then reload the finished goods into the shipping container before exportation. The extensive discussion of the freight calculation for such containerized sales in the Department's sales verification report in the second review supports the verification of these containerized sales.<sup>28</sup> Huvis concludes that the record supports its reporting of every transaction in accordance with what it knew based on its books and records.

*Department's Position:* We agree with Huvis that it properly reported its home market sales. In the second and fifth reviews, we verified that Huvis' reported home market sales include "domestic" sales and "domestic-local" sales. The record of this review indicates the same classifications for its home market sales. Huvis states that domestic-local sales are usually L/C sales, but can be open account sales if the domestic customer is unable to obtain a L/C. Domestic-local sales occur when Huvis makes a sale of merchandise that will be further processed prior to export and it doesn't know the ultimate destination of the merchandise. Documentation on the record confirms that the L/C of such domestic-local sales does not specify the ultimate destination and it notes that the merchandise will be further processed prior to export.

Additionally, Huvis reports, and we verified in the second and fifth reviews, that its export sales include "export-local" and "export-direct."<sup>29</sup> As stated by Huvis, export-local sales occur when Huvis makes a domestic sale of finished goods in which it knows the ultimate destination. Therefore, Huvis' reporting methodology demonstrates that it distinguishes between domestic-local and export-local sales on the basis of knowledge of the ultimate destination. This distinction provides further support that Huvis' domestic-local sales are home market sales.

The sales in question fall into the category of domestic-local sales, regardless of whether the sales were made pursuant to a L/C or open account payment terms. Although these sales were shipped by container to Korean port cities, we agree with Huvis that this fact without any other corroborating evidence is not dispositive that the merchandise was not subject to further processing or that Huvis had knowledge of the ultimate destination. The petitioners' reliance on Tung Mung is not applicable to Huvis' reporting of home market sales because Huvis has demonstrated that its method of classifying sales is not flawed. The Department notes that the inclusion or exclusion of the sales in question has no effect on Huvis' margin calculations.

### **Comment 3: Classification of U.S. Sales as Constructed Export Price Sales**

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<sup>28</sup> See *Second Review Sales Verification Report* at 20-21.

<sup>29</sup> See *Fifth Review Verification Report* at 5-6, 11; see also *Second Review Sales Verification Report* at 5.

*Petitioners' Argument:* The petitioners contend that all of Huvis' U.S. sales are constructed export price ("CEP") sales. According to the petitioners, Huvis America Branch's ("Huvis AB") activities included the manufacture, processing, selling and importing/exporting of (1) polyester staple fiber and related product, (2) regenerated fiber and related products, (3) raw material of and the chemical products related to polyester and regenerated fibers, (4) synthetic resins and related products, and (5) precision chemicals. The petitioners argue that Huvis AB was permitted to sell and import/export (1) by-products and utilities generated in the above-listed manufacturing operations, (2) facilities and equipment also related to the above-listed manufacturing operations. Additionally, the petitioners assert that Huvis AB's business scope also included (1) investing in venture funds, (2) engaging in electronic commerce, (3) technology service, (4) investing in synthetic and chemical engineering, (5) real estate transactions, and (6) other incidental activities for the business.<sup>30</sup> The petitioners argue that Huvis AB's activities far exceed Huvis' descriptions of Huvis AB's activities of reviewing published magazines, attending trade shows, and visiting distributors and end-user customers.<sup>31</sup> The petitioners claim that it is not logical or likely that Huvis AB's sole employee simply read magazines, attended trade shows and visited customers.<sup>32</sup> Thus, according to the petitioners, the Department should reclassify Huvis' U.S. sales as CEP sales and deduct estimated U.S. indirect selling expenses ("ISEs") and the U.S. CEP profit from Huvis' gross unit price.

The petitioners further assert that, as partial AFA, the Department should rely on Huvis' selling, general, and administrative ("SG&A") expenses expressed as a percentage of sales to estimate Huvis AB's ISEs, because Huvis stated that "the expenses of Huvis' {America Branch} office were recorded in Huvis' accounting system."<sup>33</sup> Also, the petitioners contend that the Department should reduce the U.S. gross unit price for CEP profit, using the Department's standard programming language.

*Huvis' Argument:* Huvis counters by citing PSF Fifth Review Final Results<sup>34</sup> where the Department analyzed Huvis AB's activities, accounting records, and email communications in concluding that Huvis AB's expenses were properly accounted for as Huvis' ISEs. Huvis argues that there is no evidence on the record that would show that these facts do not apply in this review period. More specifically, according to Huvis, there is no evidence whatsoever that Huvis AB had any direct involvement in activities related to Huvis' U.S. sales of subject

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<sup>30</sup> See Petitioners' February 28, 2007 letter at Enclosure 1.

<sup>31</sup> Huvis' Jan. 11 SQR at 5.

<sup>32</sup> See Petitioners' October 19, 2006 letter at Enclosure 1; Huvis' Jan 11 SQR at Exhibits S-2 and S-4.

<sup>33</sup> Huvis' Jan. 11 SQR at 4.

<sup>34</sup> See Certain Polyester Staple Fiber from Korea: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 71 Fed. Reg. 58,581 (Oct. 4, 2006), and accompanying Issues and Decision Memorandum ("PSF Fifth Review Final Results") at Comment 2.



merchandise, such as sales negotiation, shipment, invoicing, or collecting payment.<sup>35</sup>

Huvis contends that it has already explained that the scope of business cited by the petitioners is directly related to the activities of Huvis Corporation in Korea, not the one-man Huvis AB office located in the United States.

Huvis argues that “supporting documents have already been provided by petitioners in Enclosure 1 of their submission dated October 19, 2006, each of which states clearly that the name of the corporation is Huvis Corporation, that the corporation is incorporated in Korea and has its principal offices in Korea, and that Huvis’s presence in North Carolina is a ‘registered agent’ or ‘registered office.’”<sup>36</sup> Huvis contends that it ceased operations at Huvis AB and transferred its one staff member back to Korea in January 2006 as articulated by Huvis AB’s only staff member.<sup>37</sup> In sum, Huvis argues that there is no basis for the Department to treat Huvis’ U.S. sales as CEP.

*Department’s Position:* We agree with Huvis that its U.S. sales should not be reclassified as CEP sales. As stated in AK Steel Corp. v. United States, 226 F.3d 1361 (Fed. Cir. 2000) (“AK Steel”), and quoted in Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part, 70 Fed. Reg. 67,665 (November 8, 2005) accompanying Issues and Decision Memorandum at Comment 22 (“Rebar from Turkey”):

{If} the contract for sale was between a U.S. affiliate of a foreign producer or exporter and an unaffiliated U.S. purchaser, then the sale must be classified as a CEP sale. Stated in terms of the EP definition: if the sales contract is between two entities in the United States and executed in the United States and title will pass in the United States, it cannot be said to have been a sale “outside the United States;” therefore, the sale cannot be an EP sale. Similarly, a sale made by a U.S. affiliate or another party other than the producer or exporter cannot be an EP sale.

See Rebar from Turkey (quoting AK Steel at 1371). Consistent with the definition of EP at section 772(b) of the Tariff Act of 1930, as amended (“the Act”), Huvis made its U.S. sales outside of the United States prior to the date of importation to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States.

Following our analysis in the fifth review, we carefully reviewed Huvis’ accounting records and email communications authored by the Huvis AB office staff during the POR in order to

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<sup>35</sup> See Huvis’ Jan. 11 SQR at 4-6 and Appendices S-3 to S-4.

<sup>36</sup> Id. at 3-4.

<sup>37</sup> See Fifth Review Verification Report at 4-5.

determine what activities the Huvis AB office performed. The record demonstrates that Huvis AB's activities were limited to reviewing published magazines, attending trade shows, and making limited visits to distributors and end-user customers. The purpose of Huvis AB's only customer visit during the POR was to discuss non-subject merchandise with an end-user.

Huvis AB had no involvement in sales negotiation, shipment, invoicing, or collecting payment. The petitioners' support documentation for the scope of Huvis AB's business pertains to Huvis, not Huvis AB. Therefore, we conclude that Huvis' U.S. sales are properly reported as export price sales.

#### **Comment 4: MTA and QTA as Identical Products**

*Petitioners' Argument:* The petitioners contend that the Chemsystems report<sup>38</sup> confirms that modified terephthalic acid ("MTA") and qualified terephthalic acid ("QTA") are interchangeable by stating that "a relatively recent development in terephthalic acid process technology is the availability of medium quality terephthalic acid, variously known as MTA, QTA or EPTA."<sup>39</sup> According to the petitioners, the report notes that "Eastman has long produced bottle-resin from its own proprietary medium quality terephthalic process without limitations in the marketplace, and is now offering their technology, EPTA, for license," and that "... producers such as Sam Nam in Korea, are marketing their QTA ... as compatible with virtually all polyester applications, including bottle, fiber and film." The petitioners contend that the different production methods to produce medium quality terephthalic acid do not affect the interchangeability of MTA, QTA, or EPTA.

The petitioners also argue that Huvis' purchases of MTA and QTA are in the range of acceptable 4-CBA impurities for medium quality terephthalic acid. The petitioners contend that, according to Chemsystems, "most medium-purity and high-purity technologies reduce 4-CBA to sub-300 or 50 ppm levels, respectively, and there is no evidence that further reduction has any great influence on the downstream process."<sup>40</sup>

The petitioners further assert that the Department's fifth review verification report states that, regardless of whether the product is purified terephthalic acid ("PTA"), MTA, or QTA, the offer sheets and raw material purchase approvals indicate a common purity level.<sup>41</sup> The petitioners maintain that the purchase documentation between Huvis and its affiliated suppliers of MTA and QTA confirms that there is no issue with regard to impurities. Based on third-party information and Huvis' verification report, the petitioners argue that the Department should find that MTA and QTA are interchangeable for purposes of application of the major input rule.

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<sup>38</sup> Petitioners' Oct. 19, 2006 letter at Enclosure 2 (citing to Chemsystems report).

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> See Fifth Review Verification Report at 43.

*Huvis' Argument:* Huvis points to the Department's conclusion in the fifth administrative review and argues that similar evidence is on the record of this review.<sup>42</sup> According to Huvis, the petitioners do not provide any basis for the Department to revisit this conclusion in this review.<sup>43</sup>

*Department's Position:* We agree with the petitioners (although for different reasons), and determine that the record establishes that MTA and QTA are interchangeable and can be successfully used in place of one another using similar quantities. Our decision differs from the final results of the fifth administrative review because facts present on the record of the instant review were not present on the record of the fifth administrative review.

To briefly summarize some past practice on this issue, in the fourth administrative review, we found that MTA and QTA were interchangeable and reasoned, in part, that Huvis' decision to use MTA or QTA was driven by plant proximity to the chemical supplier. See Certain Polyester Staple Fiber from Korea: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Review, 63 Fed. Reg. 32,756, 32,758 (June 6, 2005) ("PSF 4<sup>th</sup> AR - Preliminary Results") (unchanged in Notice of Final Results of Antidumping Duty Administrative Review: Certain Polyester Staple Fiber from the Republic of Korea, 70 Fed. Reg. 73,435 (December 12, 2005)). Distinguishing our findings from the fourth administrative review and the preliminary results of the fifth review, we concluded in the final results of the fifth administrative review that, "even if we were to determine that MTA could successfully be used in place of QTA ... there is no information on the record of this review that would allow us to determine whether the amounts of MTA needed to produce a specific PSF product would be the same." See Certain Polyester Staple Fiber from Korea: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 64 Fed. Reg. 58,581 (October 4, 2006), and accompanying Issues and Decision Memorandum at Comment 1 ("PSF 5<sup>th</sup> AR - Final Results").

In the instant review, as in the fifth administrative review, the Department has satisfied itself that MTA can be successfully used in place of QTA because Huvis' cost database shows that MTA can be used in place of QTA and vice versa to produce the same control number. Furthermore, and distinct from the fifth administrative review, the record confirms that similar input quantities of MTA or QTA are used to produce the same control number. In particular, the Department examined the required input quantity of MTA or QTA for a control number. See Huvis' February 13, 2007, Supplemental Questionnaire Response at Exhibit S-39. For this control number, the comparison between the amount of MTA or QTA needed to produce the same quantity of finished PSF shows that these inputs were used in similar quantities. Also, nothing

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<sup>42</sup> See Certain Polyester Staple Fiber from Korea: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 64 Fed. Reg. 58,581 (October 4, 2006), and accompanying Issues and Decision Memorandum at Comment 1

<sup>43</sup> See Huvis DQR, App. D-4 at 5-6, 13-14; Huvis' Feb. 13 SQR, App. S-40.

on the record of the instant review has brought into question the Department's finding in PSF 4<sup>th</sup> AR - Preliminary Results that Huvis' use of MTA or QTA continues to be driven by the proximity of the supplier to the production factory. Accordingly, we conclude that the record evidence of the instant review supports our finding that MTA and QTA can be substituted for one another using similar quantities.

#### **Comment 5: Valuing PTA and QTA at the Transfer Price Paid by Huvis**

*Huvis' Argument:* Huvis argues that, pursuant to section 773(f)(2) and (3) of the Act, the Department is required to test the arm's length nature of an input's transfer price based on market price or cost of production ("COP") alone when only one of these values is available on the record of the proceeding. Huvis argues that the Department departed from this practice when it disregarded Huvis' transfer prices for PTA and QTA even though those prices exceeded the affiliated supplier's COP for those inputs.

Huvis argues that the Department's consistent practice is to apply the major input rule by using the highest value among the transfer price, the market value, and the COP.<sup>44</sup> According to Huvis, when either market price or COP is unavailable, the Department's consistent prior practice has been to use only transfer price and the value that is available (either market price or COP) in applying the major input rule.<sup>45</sup> Huvis argues that the Department, in a similar recent case, relied on market prices alone when the respondent's affiliated supplier refused to provide COP information.<sup>46</sup>

Huvis argues that it is not appropriate for the Department to invent market prices for PTA and QTA. Huvis contends that, in Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Taiwan, 63 Fed. Reg. 40,461 (July 29, 1998) ("SSWR from Taiwan"), the Department did not use facts available to invent a market price where none existed.<sup>47</sup> Huvis asserts that at the very least, the Department should consider the MTA market price information to be a cap in valuing QTA, which is a less valuable grade of TPA.

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<sup>44</sup> See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Mexico, 67 Fed. Reg. 55,800 (Aug. 30, 2002), and accompanying Issues and Decision Memorandum ("Wire Rod from Mexico") at Comment 13.

<sup>45</sup> Id.; accord Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Reviews, 62 Fed. Reg. 18,448, 18,456 (Apr. 15, 1997) ("Carbon Steel Products from Canada") ("There is no market price on the record for this input. Therefore, the Department's analysis was focused on transfer prices and cost of production.").

<sup>46</sup> Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Preliminary Results of Antidumping Duty Administrative Review, 71 Fed. Reg. 53,370, 53,375 (Sept. 11, 2006) ("Carbon Products from Korea") (unchanged in final results, Notice of Final Results of the Twelfth Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 72 Fed. Reg. 13,086 (March 20, 2007)).

<sup>47</sup> See SSWR from Taiwan, 63 Fed. Reg. at 40,471.

Huvis contends that the Department's consistent practice in virtually every case where either market price or COP information is missing has been to use only transfer price and the value that is available in applying the major input rule. According to Huvis, in this regard, SKF USA Inc. v. United States, 116 F. Supp. 2d 1257 (2000) ("SKF"), was an exception. Huvis argues that the Department has improperly treated Huvis like respondent SKF, which declined to provide information on market pricing that was within its own control.<sup>48</sup> Huvis claims that it was unable to provide the requested information, because its affiliate, which is 60 percent owned and controlled by unaffiliated companies refused to provide it, and thus Huvis should have been treated like the respondent in Carbon Products from Korea. According to Huvis, the Department's decision is arbitrary and unlawful because it has failed to explain why it treated Huvis differently from the similarly situated respondent in Carbon Products from Korea.<sup>49</sup>

Huvis claims that another critical factor distinguishing the present case from SKF is that, in the present case, the Department failed to satisfy the requirements set forth in section 782(e) of the Act which must be met before facts available may be used in favor of usable information provided by a respondent. According to Huvis, the partial facts available used by the Department in SKF was SKF's own market price information from its questionnaire responses.<sup>50</sup> Huvis contends that the Department in that case did not need to satisfy the five requirements of section 782(e)(1)-(5) of the Act.

Likewise, Huvis argues that in SSWR from Taiwan, the Department did not violate section 782(e) of the Act because it relied upon the market price information that the respondent was able to submit to fill in the gaps resulting from the missing information. In contrast to SSWR from Taiwan, Huvis contends that the Department rejected usable, verifiable cost and pricing information submitted by Huvis in violation of section 782(e) of the Act, and instead invented "market price" information that had no relationship to any actual pricing information on the record. Huvis asserts that section 782(d)-(e) of the Act addresses situations in which a party, such as Huvis, has provided usable information to the Department but has been unable to provide all requested information despite its best efforts.<sup>51</sup>

In this review, Huvis contends that the record establishes unequivocally that Huvis did not meet any of the five requirements for applying adverse facts available. Huvis satisfied the requirements of section 782(e)(1) of the Act by submitting timely information on Samnam

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<sup>48</sup> See SKF, 116 F. Supp. 2d at 1264 (SKF provided market price information for only one input because documentation was voluminous and providing it would require significant resource expenditure); SKF, 116 F. Supp. 2d at 1268 ("the Court finds that Commerce's methodology for valuing the major inputs was reasonable in light of SKF's shortcomings in its responses to Commerce's requests for information.").

<sup>49</sup> See Consolidated Bearings Co. v. United States, 348 F.3d 997, 1007 (Fed. Cir. 2003).

<sup>50</sup> 116 F. Supp. 2d at 1264.

<sup>51</sup> See section 782(d)-(e) of the Act.

Petrochemicals Co., Ltd.’s (“Samnam”) COP.<sup>52</sup> Huvis notes that the Department has never found or even suggested that Samnam’s COP information could not be verified, and thus, the requirements of section 782(e)(2) were satisfied.

Huvis further asserts that the information submitted was not so incomplete that it could not serve as a reliable basis for reaching the applicable determination and it was the same information relied upon in prior administrative reviews. Huvis contends that the requirements of section 782(e)(3) of the Act were satisfied.

Huvis argues that the record shows that it complied with the Department’s information requests to the best of its ability, and that Huvis’ submission of information on its TPA purchases from Samnam satisfied the requirements of section 782(e)(4) of the Act. Huvis contends that it promptly notified and fully explained to the Department why it could not supply the requested market price information to prove that the transfer prices were at arm’s length, and Huvis offered COP data as an alternative means of making the required showing.

Huvis argues that the information submitted could be used without undue difficulties, since the Department did in fact use the Samnam COP data in the second and third reviews for PTA and QTA, and in the fourth review and fifth review preliminary results for PTA, and has relied on similar data in numerous prior cases. Therefore, according to Huvis, the requirements of section 782(e)(5) of the Act were satisfied in this review.

Huvis contends that, since the record establishes that Huvis satisfied each of the five requirements of section 782(e) of the Act, the Department should use Huvis’ COP information for its assessment of whether Huvis’ transactions with Samnam should be disregarded under the major input rule. Alternatively, Huvis argues that the Department could approximate the missing market price information based on the market price information that is on the record--selecting a market price for QTA no greater than that of MTA, a more valuable grade of TPA--as the agency did in SKF and SSWR from Taiwan.

*Petitioners’ Argument:* The petitioners claim that Huvis’ excuses that Samnam will not submit its unaffiliated prices for QTA and PTA do not hold up under scrutiny. First, the petitioners argue that the Department’s questionnaire sought average POR market prices for QTA and MTA<sup>53</sup> from Samnam which does not indicate to Huvis what “Samnam charges every other customer.”<sup>54</sup> Second, the petitioners maintain that the Department is seeking historical information that has no bearing on any future price negotiations between Huvis and Samnam. Specifically, the petitioners note that the requested market information is one to two years old

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<sup>52</sup> See Huvis’ Sept. 8, 2006 section D response, App. D-4 at 1-3; see also Huvis’ Feb. 13 SQR, Apps. S-39, S-40, S-43, S-45.

<sup>53</sup> Because Huvis did not source MTA from Samnam, it is presumed that the petitioners inadvertently stated MTA instead of PTA.

<sup>54</sup> Huvis’ Feb. 13, 2007 SQR (“Huvis’ Feb. 13 SQR”) at 5-6.

and, therefore, not revealing of current market pricing.

According to the petitioners, in the original investigation, Samyang stated that one of its owners, Samnam, supplied Samyang with PTA and QTA.<sup>55</sup> The petitioners note that Samyang submitted the transfer price and market prices between Samnam and its unaffiliated customers in the original investigation.<sup>56</sup> The petitioners claim that Samyang (now Huvis) did not receive and submit Samnam's COP in the original investigation, but did receive and submit Samnam's market prices.

The petitioners also contend that the market price information can be submitted directly from Samnam to Huvis' counsel or directly by Samnam to the Department, eliminating the concerns that Samnam may have regarding Huvis' examination of these data.

For the final results, the petitioners assert that the Department should find that Huvis has impeded the Department's attempts to obtain the necessary major input data for QTA and PTA. The petitioners argue that, as partial AFA for Huvis' withholding of the major input information for QTA and PTA, the Department should determine the highest calculated cost of any control number and then assign this cost to each control number.

The petitioners continue that, pursuant to section 773(f)(3) of the Act, the Department was imposing the major input rule on Huvis' purchases of QTA and PTA from Samnam.<sup>57</sup> The petitioners maintain that the Department found that "{b}ecause Huvis failed to provide a market price" for QTA and PTA, the Department filled the gap in the record created by Huvis by setting a proxy market price for QTA and PTA based on Samnam's submitted COP plus Samnam's profit; a calculation mischaracterized by Huvis as an invented market price.

The petitioners then state that while the Department only relied on two of the three elements of the major input rule for valuing QTA and PTA in the second and third reviews, the Department changed its practice regarding the major input rule in the fourth and fifth reviews by relying on all three elements of the major input rule for MTA, PTA and QTA. The petitioners argue that the most recent practice of the Department is to examine all three elements of the major input rule for Huvis' TPA inputs.

The petitioners contend that the Court has found that, even if the Department did not rely on transfer price, COP, and market price for the major input rule in previous reviews, the Department's reliance on all three components in subsequent reviews is well within the

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<sup>55</sup> Notice of Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber from the Republic of Korea, 65 Fed. Reg. 16,880, 16,882 (Mar. 30, 2000).

<sup>56</sup> Id.

<sup>57</sup> See Memorandum to File, "2005/2006 Antidumping Duty Administrative Review of Certain Polyester Staple Fiber from Korea," dated May 30, 2007, at 3.

Department's discretion under the statute.

In SKF, the petitioners argue that the Department relied on partial facts available to develop proxy market prices, where the respondent had only provided usable COP and transfer price data.<sup>58</sup> According to the petitioners, SKF pointed out that “{i}ndeed, in AK Steel, the appellate court opined that the antidumping ‘statute leaves possible application of the fair-value and major-input provisions to the discretion {of} the agency.’”<sup>59</sup> The petitioners assert that SKF stated that, just because the Department did not rely on all three elements of the major input rule in previous reviews “does not make Commerce’s exercise of discretion to apply them in this review unreasonable.”<sup>60</sup> Thus, the Department’s reliance on the submitted COP and profit for the market prices in this review was well within the Department’s discretion and reasonable.

The petitioners contend that Huvis’ summary of the facts in Carbon Products from Korea is misleading, which once corrected, support the Department’s preliminary calculations of Huvis’ QTA and PTA calculations in this review. The petitioners maintain that, in that case, because the respondent only submitted the COP and transfer price for a major input, the Department first looked to see if “an inference adverse to the interests of an interested party that has failed to cooperate by not acting to the best of its ability to comply with a request for information” should be applied to the respondent.<sup>61</sup> In that case, the petitioners argue that the Department declined to apply AFA to the respondent (in the same manner that AFA was not applied to Huvis) and stated that “in prior cases, we have turned to other COP information on the record, if available, as non-adverse ‘gap-filling’ facts available.”<sup>62</sup> In Carbon Products from Korea, the Department stated that “the record contains no other information about the affiliated supplier’s COP” and, thus, the Department relied on the two submitted elements for the major input test.<sup>63</sup>

The Department followed the same procedures here. The difference was that the Department found available COP information on the record to use as a “gap-filling” facts available for the missing average market prices for QTA and PTA. Thus, contrary to the statements made in Huvis’ case brief, the Department has followed case precedent and should affirm its preliminary calculation of Huvis’ major inputs, QTA and PTA.

*Department’s Position:* We have continued to apply facts available for the missing market prices of PTA and QTA. Under section 773(f)(2) of the Act (transactions disregarded), the

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<sup>58</sup> SKF, 116 F. Supp. 2d. at 1267.

<sup>59</sup> Id. (citing AK Steel Corp. v. United States, 203 F.3d 1330, 1343 (Fed. Cir. 2000)).

<sup>60</sup> Id. (citing AK Steel Corp., 203 F.3d at 1343)

<sup>61</sup> Carbon Products from Korea, 71 Fed. Reg. at 53,375.

<sup>62</sup> Id.

<sup>63</sup> Id.



Department is to value the input at the higher of the market price or the transfer price. Under section 773(f)(3) of the Act (the major input rule), the Department compares the market price and transfer price to the affiliated party's cost of producing the major input and uses the highest value of the three.

The Federal Circuit has affirmed the Department's interpretation of transactions disregarded and the major input rule, stating:

{I}t is reasonable to conclude that where the transfer price is less than market value, per subsection (2), or the cost of production, per subsection (3), the transfer price is abandoned in favor of the higher of those two values. Commerce's interpretation of the statute, under which it simply uses the highest among the transfer price, market value, and cost of production, is neither arbitrary, capricious, nor manifestly contrary to the statute ..."

NTN Bearing Corp. v. United States, 368 F.3d 1369, 1375-76 (Fed. Cir. 2004).

In developing a market price that the respondent failed to provide, SKF held that the Department has the discretion to rely on partial facts available. SKF focused on the statute's use of the word "may" in sections 773(f)(2)-(3) of the Act and found that "the word 'may,' when used in a statute, usually implies some degree of discretion." Also, SKF noted that the Department's failure to rely on all three elements of the major input rule in previous reviews "does not make Commerce's exercise of discretion to apply them in this review unreasonable."

Based on the reasoning in SKE, although the Department did not use the affiliated supplier's COP in Carbon Products from Korea for application of section 773(f)(3) of the Act, Carbon Products from Korea does not preclude the Department from using its discretion here to require all elements of section 773(f)(2)-(3) in determining the value of PTA and QTA. Also, the facts of Carbon Products from Korea can be distinguished from the instant review, because, in Carbon Products from Korea, the record contained no other information about the affiliated supplier's COP, while here, the record allows us to calculate a proxy for the market price for PTA and QTA. Similarly, the facts of Wire Rod from Mexico and Carbon Steel from Canada can be distinguished from the instant review, because, in those cases, the Department relied on transfer price and COP because the record contained no other information that could be used to determine a market price.

Because Huvis did not report a market price for either PTA or QTA, we looked to facts available on the record to calculate a market price for each input. In SSWR from Taiwan, the Department relied upon market information that the respondent was able to submit to fill in the gaps resulting from the missing market price information. The Department reasoned that "it was able to rely on sales transactions for a comparable input between the affiliated supplier and an unaffiliated customer in the home market, or purchase transactions for a comparable input between an unaffiliated supplier and the respondent company." See SSWR from Taiwan, 63 Fed. Reg. at

40,471. The record of the instant review contains no information about Samnam's market prices of a comparable input. Also, record information is absent for determining the extent of any upward adjustment to SK Chemicals Co., Ltd. ("SK Chemicals")'s market price of MTA to fill the gap of the missing market price for PTA. Accordingly, we relied on other record information, *i.e.*, Samnam's reported COP and its financial statements, as a basis for calculating a reasonable proxy for the market price of PTA. The Department has calculated and applied profit margins from financial statements in other contexts as well. See section 773(e)(2)(A) (requiring the Department to obtain profit margin when calculating constructed value); Geum Poong Corp. v. United States, 26 C.I.T. 991, 993, 1001 (2002) (noting the Department's practice of "calculating CV profit rate based on financial statements from a producer").

Therefore, to determine this market price, we added Samnam's profit rate, which we calculated from Samnam's financial statements for the fiscal year ending 2005, to Samnam's COP. Under section 773(f)(2) of the Act, for PTA, we used the higher of transfer price and the proxy market price, and made the appropriate adjustment to Huvis' COP.

On the other hand, under the reasoning of SSWR from Taiwan, this record does contain a market price for SK Chemicals' sales of MTA, a comparable input. Based on our finding that QTA and MTA can be substituted in place of one another using similar quantities (see Comment 4, above), we have used the market price of MTA as a proxy for the market price of QTA. Our decision is consistent with SSWR from Taiwan because we have relied upon market pricing information supplied by Huvis to fill in the missing market price of QTA. Under section 773(f)(3), we used the highest of transfer price, COP, and proxy market price, and made the appropriate adjustment to Huvis' COP. See Memorandum from Team to File, "2005/2006 Antidumping Duty Administrative Review of Certain Polyester Staple Fiber from Korea - Final Results Calculation Memorandum for Huvis Corporation," dated December 3, 2007 ("*Huvis Final Calculation Memorandum*").

#### **Comment 6: Major Input Test for Samnam's Purchases of Paraxylene**

*Petitioners' Argument:* The petitioners claim that Samnam's 2005 financial statements note that (1) Samnam is based on joint-venture contracts between Samyang, LG Caltex Oil Co., and Japanese Mitsubishi Chemicals Co., Ltd. and (2) Samnam only produces TPA.<sup>64</sup> The petitioners point out that Samnam's financial statements note that "{t}he Company {Samnam} made a contract with GS-Caltex Oil Co., Ltd. with regard to the purchase of major raw material, Paraxylene ("PX") and the Company was entitled to purchase 75% of minimum required quantity for a year of PX which would be consumed in the production of finished products by the negotiated price based on this contract."<sup>65</sup>

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<sup>64</sup> Huvis' August 17, 2006 section A questionnaire response ("Huvis' AQR") at Exhibit A-13 (note 1).

<sup>65</sup> Id. at Exhibit A-13 (note 10).

The petitioners argue that, because Samnam has acquired a major input (PX) from an affiliated party that is used in the production of a major input (PTA and QTA) for the merchandise under consideration, the Department should require Huvis to demonstrate that the value of PX consumed by Samnam to produce PTA and QTA is based on the highest of the three factors of the major input rule.

*Huvis' Argument:* Huvis contends that the petitioners do not cite to a single precedent for their suggestion that the Department apply a once-removed major input test to Huvis' purchases of TPA. Moreover, Huvis argues that the record does not contain any information which would enable the Department to determine (i) whether PX is in fact a major input in TPA production, and (ii) if so, whether Samnam purchases it at arm's length prices. Huvis concludes that there is neither a legal nor factual basis for the Department to make any adjustment with regard to this input of an input.

*Department's Position:* We acknowledge the petitioners' argument that, in certain circumstances, the Department has required a respondent to demonstrate satisfaction of the major input rule for an input received by an affiliated supplier which provides an input for subject merchandise. In this case, the petitioners' request is for Huvis to demonstrate satisfaction of the major input rule for Huvis' PTA and QTA supplied by Samnam who obtained PX, an input in PTA and QTA, from an owner of Samnam. Based on the record, we do not have sufficient information to consider making any such adjustment.

First, the record does not contain information to determine whether PX purchased from GS-Caltex Oil Co., Ltd. is a major input of finished PSF. Second, even if the record did show that this purchased PX is a major input of finished PSF, there is no basis to determine whether the market price or COP exceed the transfer price to Samnam. Therefore, we have made no adjustments for these final results. However, we intend to pursue this issue in the subsequent administrative review.

#### **Comment 7: SK Chemicals' SG&A and Financial Expenses Ratios**

*Petitioners' Argument:* The petitioners contend that, for consistency purposes with its treatment of Samnam at the Preliminary Results, the Department should also separately calculate the SG&A ratio and the financial expenses ratio for SK Chemicals.

Also, the petitioners assert that the Department should find that Huvis has incorrectly eliminated the costs associated with impairment of fixed assets from SK Chemicals' SG&A expenses ratio. The petitioners note that, according to SFAS No. 121, the accounting treatment for impairment losses related to assets is the same regardless of whether the asset is a long-lived asset, intangible or goodwill. The petitioners contend that impairment losses on assets are to be reported as a component of income from continuing operations, before income taxes, either as a separate line item of the income statement or in aggregate in an appropriate line item of the income statement

(such as “other expenses”).<sup>66</sup> The petitioners maintain that the Department’s practice is to include impairment losses in the respondent’s SG&A ratio, when the impairment loss was written off by the respondent manufacturer in its normal books and records.<sup>67</sup>

The petitioners maintain that SK Chemicals recorded in its normal books and records a write-off for impairment loss on property, plant and equipment.<sup>68</sup> Under the Department’s practice and section 773(f)(1)(A) of the Act, the petitioners argue that Huvis improperly omitted this impairment loss as part of SK Chemicals’ SG&A ratio, and therefore, the Department should make this adjustment.<sup>69</sup>

*Huvis’ Argument:* Huvis asserts that the Department properly excluded the impairment loss from SK Chemicals’ SG&A expense. In a prior case, Huvis contends that the Department determined that gains associated with a fixed asset revaluation should not be included in the cost of production because the revaluation “does not result in an economic gain.”<sup>70</sup> Huvis argues that an impairment loss is analogous to a revaluation gain or loss in that the ability of the revalued assets to produce merchandise has not been affected. Furthermore, Huvis asserts that the revaluation of a productive asset does not change the cost to maintain and operate the asset, nor the useful life of the asset.

*Department’s Position:* First, we disagree with the petitioners that we must separately calculate the SG&A ratio and the financial expenses ratio for SK Chemicals to be consistent with the calculations for Samnam. The reason for separating the calculations in the case of Samnam is because one of the ratios is a negative percentage, and therefore, the negative ratio is set to zero percent. Because both ratios are positive percentages with respect to SK Chemicals, there is no possibility that a negative ratio could offset the positive ratio in one combined SG&A and financial expenses ratio calculation. Accordingly, there is no need to perform each calculation independent of the other.

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<sup>66</sup> [www.fasb.org/st/](http://www.fasb.org/st/)

<sup>67</sup> See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Polyvinyl Alcohol From the Republic of Korea, 68 Fed. Reg. 13,681, 13,684 (Mar. 20, 2003) (“we revised the calculation of G&A expense ratio to: (1) Include losses from the impairment of goodwill, losses on the valuation of inventories, donations ...”); Notice of Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission: Certain Softwood Lumber Products From Canada, 70 Fed. Reg. 33,063, 33,070 (Jun. 7, 2005) (“We included in Abitibi’s G&A expense rate calculation the goodwill impairment that was written off {sic} in its normal books and records.”).

<sup>68</sup> Huvis’ AQR at Appendix A-11.

<sup>69</sup> Huvis’ Feb. 13 SQR at Appendix S-44.

<sup>70</sup> Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 66 Fed. Reg. 52,097 (Oct. 12, 2001), and accompanying Issues and Decision Memorandum (“DRAMS from Korea”) at Comment 1.

Second, we agree with the petitioners that Huvis' impairment loss related to property, plant, and equipment should be included in SK Chemicals' SG&A expenses. We have changed our position from the Preliminary Results based on further analysis of the relevant case law.

To begin, we disagree with Huvis' argument that the accounting transaction which was excluded from COP in DRAMs from Korea at Comment 1 and the impairment loss in the instant case are analogous. The revaluation in DRAMs from Korea resulting in an increase in the value of the assets was due to inflation. That economic gain resulting from inflation does not represent a real economic gain because the productive ability of the asset has not changed. SK Chemicals' impairment loss is an adjustment to the recorded historical value of an asset. This adjustment is made because the value of the asset is unrecoverable through the future use of the asset, *i.e.*, that the asset's productive value is impaired. This impairment loss represents the loss in value incurred by assets, and thus is a real cost which should be included in the SG&A expenses. See Stainless Steel Bar from France: Final Results of Antidumping Duty Administrative Review, 70 Fed. Reg. 46,482 (Aug. 10, 2005), and accompanying Issues and Decision Memorandum at Comment 1. Accordingly, the impairment loss in the instant case and the inflation-related gain in DRAMs from Korea are not comparable accounting transactions.

Therefore, we have included impairment losses in SK Chemicals' SG&A and financial expense ratio for the final results.

#### **Comment 8: Huvis' SG&A Expenses**

*Huvis' Argument:* Huvis contends that the Department should exclude certain facility closure expenses recorded as depreciation of idle assets from Huvis' SG&A expenses in the final results. Huvis notes that its auditors stated that "the company will shut down Suwon factory on March, 2006 together with retiring about 160 employees and takes it into consideration to sell tangible assets of Suwon factory in the future."<sup>71</sup> Huvis asserts that its 2006 financial statements confirm that Suwon has been permanently shuttered.

On January 2006, the Company ceased its complete operations of the production in Suwon factory due to the aggravation of profitability in FY products. As a result of this shutdown, the layoff or retirement for the employees was brought about in Suwon factory.<sup>72</sup>

Huvis contends that the loss resulted from Huvis having shut down its Suwon production facility in preparation for its potential sale, and that it is the Department's practice to exclude such G&A expenses associated with the shut down of a production facility. Huvis notes that the

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<sup>71</sup> Huvis' Aug. 17, 2006 section A response ("Huvis AQR"), App. A-9, Audit Report at 2; see also Huvis' Feb. 13 SQR, App. S-55.

<sup>72</sup> Huvis 2006 Independent Auditor's Report at 2 (copy in Attachment 1 of Huvis' July 27, 2007 case brief) ("Huvis 2006 Audit Report")

Department discussed this issue extensively in Lumber from Canada, stating that “in more recent cases, we have changed our practice and excluded the gains and losses associated with plant closures and sales.”<sup>73</sup>

Huvis argues that there has been a crucial change in the facts related to this facility between the previous review and the current review. According to Huvis, in the fifth administrative review, Huvis’ financial statements stated “that ‘the company plans to resume operations of {P}FY production if the profitability improves in consequent periods’.”<sup>74</sup> In this review, however, Huvis contends that its audited financial statements state that the company would “shut down Suwon factory” in March 2006 in preparation for potentially “sell{ing} tangible assets of Suwon factory in the future.”<sup>75</sup>

Huvis contends that the Department has made clear that it is not necessary for the sale of the facility to occur in the same accounting period as the closure.<sup>76</sup> Huvis argues that its financial statements indicate that it incurred costs during this review period to shut down the Suwon facility and ready it for sale. Huvis asserts that it is not relevant that Huvis did not originally intend to permanently shut down the Suwon facility. According to Huvis, Lumber from Canada describes a similar issue and confirms that it is not relevant that Huvis classified these expenses as “depreciation of idle assets” rather than as facility closure costs because section 773(f)(1)(A) of the Act directs the Department to also consider the nature of the item and whether the results reasonably reflect the costs associated with the production and sale of the merchandise.<sup>77</sup>

Therefore, Huvis concludes that, because it has shut down its Suwon facility in preparation for selling it, the Department should exclude these closure costs from SG&A.

*Petitioners’ Argument:* The petitioners counter by arguing that, based on statements made by Huvis and record information, the Suwon production facility has simply been idled and has not been sold or permanently shut down in its entirety. The petitioners argue that the Department’s

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<sup>73</sup> Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products From Canada, 70 Fed. Reg. 73,437 (Dec. 12, 2005), and accompanying Issues and Decision Memorandum (“Lumber from Canada”) at Comment 8.

<sup>74</sup> PSF Fifth Review Final Results at Comment 3 (quoting Huvis’ 2004 and first half 2005 financial statements).

<sup>75</sup> Huvis AQR, App. A-9, Audit Report at 2; see also Huvis 2006 Audit Report.

<sup>76</sup> Lumber from Canada at Comment 8.

<sup>77</sup> Id.

practice is to include in the G&A ratio expenses associated with idle assets.<sup>78</sup> The petitioners note that the Department would exclude such expenses only for “the sale of entire production facilities or the permanent shut-down of production facilities.”<sup>79</sup> The petitioners maintain that the record shows that the relevant depreciation costs are simply related to idled assets of the Suwon facility, which will likely be operational in the future, and thus were properly included as part of Huvis’ G&A ratio.

The petitioners contend that Huvis’ first-half 2006 financial statements note that “{Huvis} plans to resume its operations of FY production if the profitability improve in consequent periods.”<sup>80</sup> The petitioners argue that Huvis stated that it had “discontinued production at the Suwon factory in January 2006” and that it “did not sell or permanently shutdown any assets associated with Suwon.”<sup>81</sup>

The petitioners contend that the auditor’s opinion accompanying Huvis’ 2006 financial statements states that Huvis had ceased operations at the Suwon factory, because of the profitability issues. The petitioners argue that this opinion does not state that the Suwon factory had been sold in its entirety or was intended to be sold in its entirety. Based on the record evidence, the petitioners conclude that the Department should reject Huvis’ wrongful attempts to redefine its routine depreciation of idled assets as a sale of the entire Suwon factory.

*Department’s Position:* We agree with the petitioners and have continued to include in the G&A ratio expenses associated with idle assets because the record information does not demonstrate that Huvis sold or permanently shut down the Suwon factory. As the Department articulated with respect to Abitibi in Lumber from Canada, such expenses may only be excluded if the facility or mill in question “was permanently closed.” Lumber from Canada at Comment 8. In clarifying idle assets, the Department noted that “idle assets are still owned by the company, can be brought online quickly to fulfill a preplanned function, and represent extra capacity held by the company. As such idle assets are considered an overhead burden like any such excess capacity.” Id.

In the instant case, the Department has considered “the nature of the item in determining whether it should be included or excluded from the costs.” Id. Although the expense item is entitled “idle assets,” we have considered whether it is appropriate to exclude the amount because the nature of the expense relates to a sale or permanent shutdown of a facility, and we have

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<sup>78</sup> See Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan, 64 Fed. Reg. 24,329, 24,356 (May 6, 1999); Lumber from Canada at Comment 8.

<sup>79</sup> PSF Fifth Review Final Results at Comment 3.

<sup>80</sup> Huvis’ September 22, 2006 section A addendum at Appendix A-17.

<sup>81</sup> Huvis’ Jan. 11 SQR at 1.

concluded that it does not.

Huvis has failed to point to facts on the record to substantiate its claim that the idle asset expenses are related to a permanent shutdown. In fact, Huvis' January 2007 statement represents an unambiguous assertion that this facility was not permanently shutdown by stating it "did not sell or permanently shutdown any assets associated with Suwon." Its financial statements do not rebut this clear statement in its narrative. For example, Huvis' July 15, 2006 auditor's opinion (first-half 2006 financial statements) expresses Huvis' intent to resume operations of this facility "if profitability improve{s} in consequent periods." Additionally, Huvis' February 14, 2007 independent auditor's statement (fiscal year 2006 financial statements) explains the ceasing of operations, but again, this statement does not signify a permanent shutdown because the facility may be able to be brought on to fulfill production at a later time. Therefore, Huvis' statements and its financial statements do not provide clear evidence of a permanent shutdown and we conclude that these expenses are properly included in Huvis' G&A expenses.

### **Comment 9: Zeroing Dumping Margins**

*Huvis' Argument:* Huvis argues that the Department should revise its calculation of Huvis' antidumping margin in the final results to include negative margins in which Huvis' U.S. price exceeded its normal value, and therefore, bring the Department's antidumping practices into alignment with its obligations under the World Trade Organization ("WTO") Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Antidumping Agreement").

Huvis asserts that eliminating the zeroing practice in reviews is necessary to comply with the recent decisions of the WTO Appellate Body ("AB") that zeroing in virtually any context contravenes the international obligations of the United States under the Antidumping Agreement.<sup>82</sup>

Huvis asserts that, in administrative reviews, the United States applies what is sometimes referred to as "simple zeroing," where the overall margin combines the results of each comparison of weighted-average normal value with an individual export transaction where a negative margin is considered to be zero.

Huvis argues that, in United States - Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/AB/R (May 9, 2006) ("U.S. - Zeroing (EC)"), the AB held that the zeroing methodology applied by the United States in administrative reviews in which the

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<sup>82</sup> See United States - Measures Relating To Zeroing And Sunset Reviews, WT/DS322/AB/R (Jan. 23, 2007) ("U.S. - Zeroing (Japan)") (ruling that zeroing is not permitted when the average-to-transaction comparison methodology is employed); see also United States - Final Dumping Determination on Softwood Lumber from Canada - Recourse to Article 21.5 of the DSU by Canada, WT/DS264/AB/RW (Sept. 1, 2006), ¶ 122 (ruling that zeroing is not permitted when the transaction-to-transaction comparison methodology is employed).



average-to-transaction comparison method is used is WTO non-compliant on an “as applied” basis.

Huvis maintains that the basis of the AB’s decision was its finding that in the context of the entire Antidumping Agreement, including Article 9.3, which applies to duty assessments, dumping margins must be calculated only on the basis of the “product as a whole.”

Huvis asserts that the AB first explored this line of reasoning in United States - Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 31, 2004) (“U.S. - Softwood Lumber”). Huvis notes that the AB concluded that, “If an investigating authority has chosen to undertake multiple comparisons, {it} necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2.”<sup>83</sup>

While the statute requires certain procedural steps in order for the Department to modify its practice “in the implementation of” a specific AB decision, Section 123(g)(1) of the URAA, 19 U.S.C. § 3533(g)(1), Huvis argues that this does not prevent the Department from modifying a general practice on its own initiative. Huvis contends that changing the Department’s margin calculation practice in reviews to make it compatible with the Antidumping Agreement would be the proper interpretation of existing U.S. laws, which have always allowed for the possibility that dumping margins can and should be calculated using a method that incorporates in their entirety the export prices for non-dumped sales.

*Petitioners’ Argument:* The petitioners argue that the Department recently considered, and rejected, exactly the same arguments and authority presented by Huvis in its case brief.<sup>84</sup> The petitioners assert that the Department may not modify its current practice for “zeroing” in administrative reviews until it completes the notification and comment process required by the Uruguay Round Agreements Act (“URAA”). The petitioners note that the Department has not yet invited public comment on its zeroing practice, and must therefore, continue its zeroing practice in these reviews.

The petitioners argue that the courts have long recognized that in light of the antidumping law’s inherent complexity, the agency’s attempts to interpret and apply the statute are entitled to special deference.<sup>85</sup> According to the petitioners, in interpreting the antidumping statute as a whole, the Department has long recognized that the statutory regime as a whole is best (and most fairly) effectuated when negative margins of dumping are treated as non-dumped sales, but not

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<sup>83</sup> U.S. - Softwood Lumber ¶ 98 (emphasis in original).

<sup>84</sup> See Brake Rotors From the People’s Republic of China: Final Results of Antidumping Duty Administrative and New Shipper Reviews and Partial Rescission of the 2005-2006 Administrative Review, 72 Fed. Reg. 42,386 (Aug. 2, 2007), and accompanying Issues and Decision Memorandum at Comment 7.

<sup>85</sup> See Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983).

allowed to cancel out positive margins.<sup>86</sup>

It is fundamentally not the responsibility of the agency to interpret and apply the WTO agreements or decisions of its dispute settlement bodies, as Huvis effectively is suggesting.<sup>87</sup> The petitioners note that 19 U.S.C. § 3533(g) provides that “[i]n any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until” there have been consultations between appropriate congressional committees, the agency involved, and the U.S. Trade Representative, and an opportunity for public comment.<sup>88</sup>

The petitioners maintain that this requirement recognizes that WTO rulings do not have the status of “supreme law” in the United States, and will be adopted only after careful and deliberate evaluation by Congress and the affected agency. For these reasons, Huvis’ request that the Department implement changes to its current practice of zeroing should be denied.

*Department’s Position:* We agree with the petitioners and have not changed our calculation of the respondent’s weighted-average dumping margins as suggested by the respondent for these final results.

Section 771(35)(A) of the Act defines “dumping margin” as the “amount by which the normal value *exceeds* the export price and 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 constructed export price (“CEP”). 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 U.S. Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. See also Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (“Corus Staal”), cert. denied, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006). See Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (“Timken”), cert. denied sub nom., Koyo Seiko Co. v. United States, 543 U.S. 976 (2004).

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<sup>86</sup> See Stainless Steel Sheet and Strip in Coils From Mexico; Final Results of Antidumping Duty Administrative Review, 70 Fed. Reg. 3,677 (Jan. 26, 2005) and accompanying Issues and Decision Memorandum at Comment 16.

<sup>87</sup> See 19 U.S.C. § 3533.

<sup>88</sup> See 19 U.S.C. § 3533(g)(4).

The Department notes it has taken action with respect to two WTO dispute settlement reports finding the denial of offsets to be inconsistent with the Antidumping Agreement. With respect to U.S. – Softwood Lumber (see United States -Final Dumping Determination on Softwood Lumber from Canada, Appellate Body Report, WT/DS264/AB/R (August 11, 2004) (adopted August 31, 2004)), consistent with section 129 of the Uruguay Round Agreements Act, the United States’ implementation of that WTO report affected only the specific administrative determination that was the subject of the WTO dispute: the antidumping duty investigation of softwood lumber from Canada. See 19 USC § 3538.

With respect to U.S. – Zeroing (EC), the Department recently modified its calculation of the weighted-average dumping margin when using average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted–Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77,722 (December 27, 2006). In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See 71 Fed. Reg. at 77,724. With respect to the specific administrative reviews at issue in that dispute, the United States has determined that each of those reviews has been superseded by a subsequent administrative review and the challenged reviews are no longer in effect.

As such, the AB’s reports in U.S. – Softwood Lumber and U.S. – Zeroing (EC) have no bearing on whether the Department’s denial of offsets in this administrative review determination is consistent with U.S. law. See Corus Staal, 395 F.3d at 1347-49; Timken, 354 F.3d at 1342. Accordingly, the Department has continued in this case to deny offsets to dumping based on export transactions that exceed NV.

According to respondent, the AB recently determined in U.S. – Zeroing (Japan) that zeroing in administrative reviews was inconsistent with U.S. WTO obligations, and therefore, the Department should eliminate its practice of “zeroing” in this administrative review. Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 USC § 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 USC § 3538(b)(4) (implementation of WTO reports is discretionary); see also Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316 (1994) at 354 (“SAA”) (“{ a}fter 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. . .”). Because no change has yet been made with respect to the issue of “zeroing” in administrative reviews, the Department has continued with its current approach to calculating and assessing antidumping duties in this administrative review. See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Administrative Review, 72 Fed. Reg. 28,676, 28,678 (May 22, 2007).

For the foregoing reasons, we have not changed the methodology employed in calculating the

respondent's weighted-average dumping margins for these final results.

#### **Comment 10: The Rate Applicable to Dongwoo's Sales**

*Consolidated Fibers/Dongwoo's Argument:* Consolidated Fibers/Dongwoo (hereinafter, "Consolidated Fibers") contend that Consolidated Fibers has determined that it made two unreviewed POR entries in December 2005 based on November invoices. Consolidated Fibers claims that, at the high end, virgin PSF is made principally from the chemicals MEG and PTA. Consolidated Fibers argues that there are two producers subject to this review: Huvis, a known virgin producer, and Dongwoo, a known regenerated PSF producer.

According to Consolidated Fibers, the Department indicated that it affirmatively searched import records and did not locate any entries of Dongwoo PSF during the POR.<sup>89</sup> Consolidated Fibers argues that, because the Department did not issue any supplemental/deficiency questionnaires to Dongwoo, the margins for the late-discovered sales must be derived from public sources or Huvis' questionnaire responses. Consolidated Fibers maintains that the history of reviews in this case demonstrates that rates for regenerated PSF producers are well below the rates for virgin respondents.

Consolidated Fibers contends that the Department has authority under the sampling provision to select Huvis for the purpose of determining a representative margin for all sales subject to review.<sup>90</sup> Consolidated Fibers claims this is all the more reasonable because Dongwoo did not sell a "commercial quantity" of PSF to the United States during the POR.<sup>91</sup> Based on Honey from Argentina, Consolidated Fibers contends that the sale of a single container or a small number of containers does not constitute a meaningful participation in the U.S. market, particular given that the shipments were requested and made in the aftermath of Hurricane Katrina. Additionally, Consolidated Fibers argues that the Department can address commentators' concerns of short supply and temporary relief indirectly by sampling and assigning Huvis' final rate to Dongwoo.<sup>92</sup>

Alternatively, Consolidated Fibers suggests a number of options in assigning a facts available rate to Dongwoo. First, Consolidated Fibers asserts that, as most representative, the Department

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<sup>89</sup> See Preliminary Results.

<sup>90</sup> See section 777A(c)(2) of the Act.

<sup>91</sup> See Honey from Argentina: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part, 72 Fed. Reg. 25,245 (May 4, 2007) and accompanying Issues and Decision Memorandum (indicating that comparatively low sales volumes were not "commercial quantities" and that a single container did not meet the minimum definition of a "commercial quantity" in the context of a revocation request).

<sup>92</sup> Preamble to Final Antidumping and Countervailing Duty Rule, 62 Fed. Reg. 27,296, 27,322 (May 19, 1997).

could compute the simple average of the rates earned by regenerated PSF exporters in the past annual reviews. Second, Consolidated Fibers contends that, although Huvis is a virgin producer, the Department could assign as facts available Huvis' final results rate, specifically November shipments, to Dongwoo on the basis that the pricing data is the most contemporaneous.

Consolidated Fibers maintains that should the Department draw an adverse inference against Dongwoo, the adverse inference margin assigned must be corroborated and representative of Dongwoo's experience.<sup>93</sup> In PAM, the Court admonished the Department that “[i]t is not within Commerce’s discretion ‘to select unreasonably high rates with no relationship to the respondent’s actual dumping margin’” and that, even if there were several individual record transactions at or above 45.49 percent, they would be aberrant in such circumstances.<sup>94</sup>

Consolidated Fibers contends that the all-others rate, itself a product of GATT-illegal zeroing, is excessive and the 4.07 rate of East Young, the highest review rate of any regenerated PSF producer, is the most adverse rate the Department may consider.

In following with the PAM Court, for the adverse inference to be representative, Consolidated Fibers argues that it should come from a November 2005 transaction of Huvis and individual transactions that deviate far from the average margin for that month must be disregarded.

*Petitioners’ Argument:* The petitioners did not comment on this issue.

*Department’s Position:* We determine that AFA is appropriate for sales made by Dongwoo during the POR. Section 776(a) of the Act provides that the Department will apply “facts otherwise available” if, inter alia, necessary information is not available on the record or an interested party: 1) withholds information that has been requested by the Department; 2) fails to provide such information within the deadlines established, or in the form or manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; 3) significantly impedes a proceeding; or 4) provides such information, but the information cannot be verified.

In its August 10, 2006 questionnaire response, Dongwoo reported that it made no sales or shipments of subject merchandise to the United States during the POR. However, on July 12, 2007, we placed a memorandum on the record confirming through U.S. Customs and Border Protection data that Dongwoo did make shipments to the United States during the POR.

Although the deadline to submit new factual information had passed, on August 3, 2007, we sought comments on the discrepancies between information provided in Dongwoo’s August 10,

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<sup>93</sup> See PAM, S.P.A. v. United States, 2007 Ct. Intl. Trade LEXIS 102, Slip Op. 2007-103 (July 2, 2007) (“PAM”).

<sup>94</sup> Id. at 27 (citing F.lli de Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000)).

2006 questionnaire response and the Department's July 12, 2007 memorandum. Dongwoo did not provide any comments.

By asserting in its original questionnaire response that it had no sales or shipments to the United States, Dongwoo failed to provide the requested information. In doing so, Dongwoo withheld requested information and significantly impeded the proceeding. Therefore, pursuant to sections 776(a)(2)(A) and (C) of the Act, the Department finds that the use of total facts available is appropriate.

According to section 776(b) of the Act, if the Department finds that an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information, the Department may use an inference that is adverse to the interests of that party in selecting from the facts otherwise available. See also Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India, 70 Fed. Reg. 54,023, 54,025-26 (September 13, 2005); and Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil, 67 Fed. Reg. 55,792, 55794-96 (August 30, 2002). It is the Department's practice to apply adverse inferences to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. See, e.g., SAA at 870. Furthermore, "affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference." See Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27,296, 27,340 (May 19, 1997); see also Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003) ("Nippon").

We find that Dongwoo did not act to the best of its abilities in this proceeding, within the meaning of section 776(b) of the Act, because it withheld information specifically requested by the Department. Therefore, an adverse inference is warranted in selecting from the facts otherwise available with respect to this company. See Nippon, 337 F.3d at 1382-83.

We considered Consolidated Fibers' arguments on the proper rate to apply to Dongwoo's sale and find these comments are not applicable because the Department has applied total AFA pursuant to section 776(b) of the Act (see below). Therefore, the Department is not considering claims by Consolidated Fibers that the type of merchandise produced or exported by Dongwoo during the POR should affect the selection of an appropriate rate. Also, we find Consolidated Fibers' argument regarding the use of the Department's sampling provision not applicable because that provision refers to circumstances where "it is not practicable to make individual weighted average dumping margin determination ... because of the large number of exporters involved in the investigation or review." See section 777A(c)(2) of the Act. Consolidated Fibers' argument fails because this provision requires a "large number of exporters," but here, only two respondents are subject to this administrative review. Additionally, Consolidated Fibers' suggestions to apply company-specific rates calculated in prior administrative reviews or the present review to Dongwoo's sales do not adequately induce respondents to provide the requested information to the Department.

Section 776(b) of the Act provides that the Department may use as AFA, information derived from: 1) the petition; 2) the final determination in the investigation; 3) any previous review; or 4) any other information placed on the record. The Department's practice, when selecting an AFA rate from among the possible sources of information, has been to ensure that the margin is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." See, e.g., Certain Steel Concrete Reinforcing Bars from Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 Fed. Reg. 65,082, 65,084 (November 7, 2006). In this case, the Department considered: 1) the rates alleged in the petition, which ranged from 48.14 to 84.03 percent; 2) the rates calculated in the final determination of the investigation, which ranged from 0.12 to 7.91 percent (see Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber from the Republic of Korea, and Antidumping Duty Orders: Certain Polyester Staple Fiber from the Republic of Korea and Taiwan, 65 Fed. Reg. 33,807, 33,808 (May 25, 2000); see also Certain Polyester Staple Fiber from the Republic of Korea: Notice of Amended Final Determination and Amended Order Pursuant to Final Court Decision, 70 Fed. Reg. 74,552, 74,553 (Dec. 24, 2003)); and 3) the rate calculated in the fourth administrative review, 5.87 percent (see Notice of Final Results of Antidumping Duty Administrative Review: Certain Polyester Staple Fiber from the Republic of Korea, 70 Fed. Reg. 73435, 73436 (Dec. 12, 2005)).

In order to ensure that the margin is sufficiently adverse so as to induce cooperation, we have assigned a rate of 48.14 percent, which is the lowest rate alleged in the petition, as modified in the Department's initiation notice. See Initiation of Antidumping Duty Investigations: Certain Polyester Staple Fiber From the Republic of Korea and Taiwan, 69 Fed. Reg. 23,053, 23,055 (Apr. 29, 1999) ("LTFV Initiation"). The Department finds that this rate is sufficiently high as to effectuate the purpose of the facts available rule (*i.e.*, we find that this rate is high enough to encourage participation in future segments of this proceeding in accordance with section 776(b) of the Act).

Information from the petition and prior segments of the proceeding constitutes secondary information and section 776(c) of the Act provides that the Department shall, to the extent practicable, corroborate that secondary information from independent sources reasonably at its disposal. The Department's regulations provide that "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. See 19 CFR 351.308(d); see also SAA at 870. To the extent practicable, the Department will examine the reliability and relevance of the information to be used.

To corroborate the petition margin, we compared it to the transaction-specific rates calculated for the participating respondent in this review. We find that it is reliable and relevant because the lowest transaction-specific petition rate is comparable to the range of individual transaction margins calculated for the participating respondent. See Certain Frozen Warmwater Shrimp from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative

Review, 72 Fed. Reg. 10,658, 10,663 (March 7, 2007) (unchanged in the final results) (finding that multiple transaction-specific margins of participating respondents similar to the lowest petition satisfied the Department’s corroboration requirement).

Further, the Department will consider information reasonably at its disposal as to whether there are circumstances that would render a margin inappropriate. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department may disregard the margin and determine an appropriate margin. See, e.g., Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 6,812, 6,814 (Feb. 22, 1996) (where the Department disregarded the highest calculated margin as AFA because the margin was based on a company’s uncharacteristic business expense resulting in an unusually high margin). Because Dongwoo has not been reviewed under this antidumping duty order, there is no basis to compare the calculated AFA rate to Dongwoo’s prior level of dumping. Therefore, in the instant case, we examined whether any information on the record would discredit the selected rate as reasonable facts available. Specifically, we reviewed the quantities involved in the transaction-specific rates used for corroboration purposes and we note that the quantities of these transactions are quantities typical of the participating respondent’s normal transactions. See Memorandum from Team to the File, “Corroboration of Data Contained in the Petition for Assigning Facts Available Rates in the 2005-2006 Antidumping Duty Administrative Review of Certain Polyester Staple Fiber from Korea,” dated December 3, 2007 (“Corroboration Memo”). Therefore, we have determined that the 48.14 percent margin is appropriate as AFA and are assigning it to Dongwoo.

## RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related margin calculations accordingly. If these recommendations are accepted, we will publish the final results of this administrative review and the final weighted-average dumping margins for all firms reviewed in the Federal Register.

AGREE \_\_\_\_\_

DISAGREE \_\_\_\_\_

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David M. Spooner  
Assistant Secretary  
for Import Administration



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Date