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7th Administrative Review
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DATE: November 26, 2008

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

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the 2006/07 Antidumping
Duty Administrative Review of Certain Polyester Staple Fiber
from the Republic of Korea

SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the 2006/07 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:

- Comment 1: Huvis's Reporting of Affiliated Parties**
- Comment 2: Huvis's Submitted Costs by CONNUM**
- Comment 3: Costs of the Suwon Factory**
- Comment 4: Huvis's Financial Expenses Ratio**
- Comment 5: Huvis's Classification of Certain Home Market Sales**
- Comment 6: Loading Fees For Huvis's Sales**
- Comment 7: Korean Brokerage Expenses for Huvis's U.S. Sales**
- Comment 8: Huvis's Absorption of Antidumping Duties**

Comment 9: Ministerial Error in Calculation of Huvis's Credit Expenses

Comment 10: Valuing PTA and QTA

Comment 11: Adjustment for the Cost of Paraxylene

BACKGROUND

On May 30, 2008, the Department of Commerce ("Department") published in the Federal Register the preliminary results of the seventh administrative review of the antidumping duty order on certain polyester staple fiber ("PSF") from the Republic of Korea.¹ The period of review ("POR") is May 1, 2006, through April 30, 2007. We invited interested parties to comment on the Preliminary Results.

On June 30, 2008, we received case briefs from Wellman, Inc., Invista, S.a.r.L., and DAK Americas, LLC (collectively, "the petitioners"), and Huvis Corporation ("Huvis"). On July 14, 2008, we received rebuttal briefs from the petitioners and Huvis. A public hearing was not requested.

DISCUSSION OF ISSUES

Comment 1: Huvis's Reporting of Affiliated Parties

Petitioners' Argument: The petitioners note that the Court of International Trade ("CIT") stated that entities:

are "affiliated" where they share either certain relationships, such as by family, shared company officers, directors, partners, employer/employee status, or cross-ownership of voting stock, see 19 U.S.C. § 1677(33)(A)-(E), or share any other relationship by which one entity is "legally or operationally in a position to exercise restraint or direction over the other."²

According to the petitioners, further direction is provided by the Statement of Administrative Action which states that:

any person who controls any other person and that other person will be considered affiliated persons ... {and} the traditional focus on control through stock ownership fails to address modern business arrangements, which often find one firm "operationally in a position to exercise restraint or direction" over another even in the absence of an equity relationship. A company may be in a position to exercise restraint or direction, for example, through corporate or family groupings.³

¹ Certain Polyester Staple Fiber from Korea: Preliminary Results of the 2006/2007 Antidumping Duty Administrative Review, 73 FR 31058 (May 30, 2008) ("Preliminary Results").

² *Hontex Enterprises, Inc. v. United States*, 248 F. Supp. 2d 1323, 1339 (Ct. Int'l Trade 2003) (citations omitted).

³ Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316(I) at 838 (1994) ("SAA").

The petitioners contend that, despite three opportunities to disclose all of its affiliated parties, Huvis has denied the existence of affiliated parties beyond SK Chemicals Co., Ltd. (“SKC”) and Samyang Corporation (“Samyang”).⁴ The petitioners argue that Huvis’s position is contradicted by the audited 2006 annual report for SK Corporation, where SK Corporation and its independent auditors confirm that SK Corporation is affiliated with Huvis, SKC, and SK Petrochemical, as these companies are SK Corporation’s “combined subsidiaries.” Moreover, the petitioners note that SK Corporation’s 2006 audited financial statements confirm Huvis’s affiliation with two other SK entities, although Huvis has denied such affiliation.⁵

According to the petitioners, Huvis’s entire argument is that a company can never be considered a subsidiary or affiliate with a second company unless there is direct stock ownership and the company’s results are consolidated. The petitioners maintain that Huvis’s argument is counter to (1) section 771(33) of the Act and Korean GAAP, which broadly define affiliation by reference to control, not consolidation, and (2) the Department’s reliance on audited financial statements, especially with regard to the disclosure of related parties and related-party transactions.

The petitioners argue that SK Corporation controls, directly or indirectly, those entities that SK Corporation views as “related parties.”⁶ Under the U.S. antidumping law and Korean GAAP, the petitioners contend that SK Corporation and Huvis are related parties if there is control, joint control, or an equity interest. The petitioners assert that, according to SK Corporation’s unconsolidated audited financial statements, SK Corporation had significant related-party transactions with Huvis.⁷ Since Huvis has stated that SK Corporation has no equity interest in Huvis, then SK Corporation must have control, or joint control, over Huvis under Korean law, otherwise SK Corporation would not have included Huvis among the related parties with which it has significant transactions.

The petitioners claim that the Department will deem a respondent’s audited financial statements as reliable – especially with respect to the disclosure of related parties – when those financial statements are accompanied by an unqualified auditor’s opinion. In Stainless Steel Butt-Weld Pipe Fittings from Taiwan,⁸ the Department found that where an independent accounting and auditing firm issued an unqualified opinion on a company’s financial statements, that “[i]mplicit in this [the auditor’s] opinion is the auditors’ attestation that proper disclosure of related parties

⁴ Huvis’s Apr. 15, 2008, supplemental questionnaire response (“SQR”), at 3.

⁵ Huvis’s Apr. 15, 2008, SQR, at 1-2; see also Huvis’s Feb. 20, 2008, SQR, at 16-17.

⁶ The Statement of Korea Accounting Standards (SKA No. 20) defines a related party as:

A party is related to an entity if:

a) directly, or indirectly through one or more intermediaries, the party:

- (1) controls, is controlled by, or is under common control with, the entity (this includes parents, subsidiaries and fellow subsidiaries);
- (2) has an interest in the entity that gives it significant influence over the entity; or
- (3) has joint control over the entity.

See Petitioners’ Jun. 2, 2008, submission at Attachment 1.

⁷ See SK Corporation’s 2006 audited unconsolidated financial statements (submitted as Enclosure 1 of Petitioners’ May 27, 2008, submission) at note 23.

⁸ Notice of Final Results and Final Rescission in Part of Antidumping Duty Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan, 71 FR 67098 (Nov. 20, 2006), and accompanying Issues and Decision Memorandum (Pipe Fittings from Taiwan).

and related party transactions has been made.”⁹ Further, the petitioners state that, in the same case, the Department stated that “for the Department to reject the independent auditors’ opinion and discredit the financial statements it would have to have compelling evidence to the contrary.”¹⁰

The petitioners note that the failure to list Huvis as a related party in SK Corporation’s consolidated financial statements does not undermine the theory that SK Corporation and Huvis are related parties. The petitioners argue that a party related by control remains affiliated notwithstanding the presentation of consolidated financial results that may not include that affiliate (i.e., Huvis).

Thus, the petitioners assert that, based on the Department’s past practice and record evidence in this review, the Department must rely on SK Corporation’s audited financial statements and find that (1) Huvis is affiliated with SK Corporation, (2) Huvis is affiliated with numerous other undisclosed affiliated parties (whose involvement with the merchandise remains unknown), and (3) Huvis withheld information regarding transactions between Huvis and SK Corporation and other affiliates that hindered the Department’s ability to calculate an accurate dumping margin. According to the petitioners, respondents must provide the information requested and then make legal arguments as to their position on that information. Here, the petitioners maintain that Huvis withheld the existence of SK Corporation’s unconsolidated financial statements which identified Huvis as an affiliate in order to obtain an outcome favorable to Huvis.¹¹

Further, the petitioners argue that Huvis has impeded this investigation by (1) refusing to provide SK Corporation’s financial statements, which were requested in the antidumping questionnaire, (2) failing to allow the Department to consider and analyze each of these affiliated parties and to determine their involvement with the merchandise under review, and (3) failing to disclose all affiliated-party transactions, including related-party transactions of SK Corporation with Huvis, SKC, and SK Petrochemical, which would impact Huvis’s submitted costs and major input analysis. Accordingly, the petitioners argue that the Department should assign to Huvis a rate based on total adverse facts available.

Huvis’s Argument: Huvis contends that it has fully disclosed all facts related to its corporate structure and affiliations. In particular, Huvis notes that it provided detailed information on its corporate structure, including its parent companies, SKC and Samyang, the top ten shareholders of its parent companies, all holdings of Huvis and its two parent companies, and all other companies affiliated with Huvis, whether by equity ownership or otherwise.¹² In addition, Huvis responded fully, completely, and accurately to all requests for supplemental information received from the Department with respect to its affiliations.¹³

Given that Huvis is not affiliated with SK Corporation, Huvis argues that it had no basis to

⁹ Id. at Comment 1.

¹⁰ Id.

¹¹ See Stainless Steel Bar from Spain: Final Results of Antidumping Duty Administrative Review, 72 FR 42395 (Aug. 2, 2007) and accompanying Issues and Decision Memorandum.

¹² See Huvis’s Aug. 29, 2007, section A response (“AQR”) at 5-7 and Exhibits A-4, A-5, A-9-A-14.

¹³ See Huvis’s Feb. 20, 2008, SQR at 1-13; Huvis’s Apr. 16, 2008, SQR at 1-4.

believe or expect that SK Corporation's financial statements would be required by the Department. Huvis notes that, despite its public availability, the petitioners waited until after Huvis had submitted the last of its three supplemental responses to submit the SK Corporation unconsolidated financial statement.

Further, according to Huvis, the petitioners' sole basis for their claim is Huvis being listed as a "combined subsidiary" in SK Corporation's unconsolidated 2006 financial statement. Huvis argues that the term "combined subsidiaries," however, is not a standard accounting term in either English or Korean, and nothing in SK Corporation's financial statement explains the meaning of that term or the basis upon which SK Corporation believes that Huvis may be affiliated. Therefore, Huvis maintains that this reference alone cannot provide a basis for determining that Huvis is affiliated with SK Corporation under section 771(33) of the Act, especially since the implication of affiliation is directly contradicted by other factual information in the record.

First, Huvis points out that SK Corporation's unconsolidated financial statement does not include SKC or Huvis among the actual subsidiaries of SK Corporation that are either subject to consolidation, or accounted for using the equity method, or accounted for under the equity method by any of SK Corporation's consolidated subsidiaries.¹⁴ According to Huvis, were SK Corporation the "ultimate holding company" of Huvis and SKC, SK Corporation would be required to include them in its consolidated results. In addition, neither Huvis nor SKC is listed among the other equity holdings of SK Corporation nor does the SK Corporation unconsolidated financial statement identify any common shareholders among SK Corporation and SKC.¹⁵

Second, Huvis notes that SK Corporation's consolidated financial statement does not repeat the characterization of Huvis as a "combined subsidiary." Huvis maintains that, if the term "combined subsidiaries" was intended to denote ultimate corporate control by SK Corporation over Huvis, it is curious that there is no mention of this relationship in SK Corporation's consolidated financial statement.

Third, Huvis's consolidated and unconsolidated financial statements do not characterize SK Corporation as the "ultimate parent company" or as an affiliated party of any kind, whether by equity ownership or otherwise.¹⁶ Huvis maintains that it would be improper to disregard its audited financial statements in favor of a single, and internally contradictory, reference contained in the financial statement of an unrelated company.

Huvis contends that, despite the petitioners' argument, Huvis does not dispute that parties can be affiliated within the meaning of the antidumping statute by means other than equity ownership. But, according to Huvis, the petitioners have based their entire argument on the characterization of Huvis as a "combined subsidiary" of SK Corporation, and have argued that SK Corporation is

¹⁴ See SK Corporation's 2006 unconsolidated financial statement (submitted as Exhibit 1 of Huvis's Jun. 6, 2008, submission) at note 23.

¹⁵ *Id.* at note 6.b; Compare *id.* at note 1 with Huvis's AQR at Exhibit A-11.

¹⁶ Huvis's AQR at Exhibit A-9 (Huvis unconsolidated financial statement) and Exhibit A-10 (Huvis consolidated financial statement).

the “ultimate holding company” of Huvis. Huvis maintains that the words “subsidiary” and “holding company” both are normally understood to imply equity relationships.¹⁷ Therefore, Huvis contends that, it has focused on evidence demonstrating that there is no direct or indirect equity relationship between SK Corporation and Huvis or SK Corporation and SK Chemicals.

Huvis asserts that the petitioners’ argument that SK Corporation has control, or joint control over Huvis must be established based on record evidence. According to section 771(33)(G) of the Act, Huvis notes that “control” exists when one entity is “legally or operationally in a position to exercise restraint or direction over” the other entity. Huvis argues that such control cannot be based on familial relationships, as Huvis has disclosed the shareholders of its two parent companies, and there is no affiliation there with any shareholders of SK Corporation.¹⁸ Further, Huvis notes that affiliation cannot be based on membership in the same corporate group because Huvis has already established that it is not a member of the SK Group of companies.¹⁹

In conclusion, Huvis states that the petitioners’ argument that Huvis is affiliated with SK Corporation, whether by means of direct equity ownership or by means of “control” or “joint control” is wholly unsupported by the record.

Department’s Position: For the reasons explained below, we agree with Huvis that it has fully reported its “affiliated persons.” Therefore, neither facts available nor adverse facts available is warranted in this review.

Under section 771(33)(A) of the Act, “{m}embers of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants” are affiliated.²⁰ Huvis reported that “there are no companies owned by family members of its owners that are not listed” as affiliates.²¹

Under section 771(33)(B) of the Act, an affiliated person is “{a}ny officer or director of an organization and such organization.”²² Huvis stated that “there are no companies in which there is a shared officer or director, etc.”²³

Section 771(33)(C) of the Act states that affiliated persons are “partners,” while section 771(33)(D) of the Act notes that an affiliated person is “employer and employee.”²⁴ There is no evidence of any partnership between Huvis and SK Corporation and the “employer/employee” relationship is not relevant in this case.

Under section 771(33)(E) of the Act, an affiliation person is “{a}ny person directly or indirectly

¹⁷ See Black’s Law Dictionary 368 and 298 (8th ed. 2004) (“Holding Company. A company formed to control other companies, usu. confining its role to owning stock and supervising management”).

¹⁸ Huvis’s AQR at 7 and Exhibit A-5.

¹⁹ See Huvis’s Jun. 6, 2008, submission at Exhibit 3.

²⁰ 19 U.S.C. § 1677(33)(A).

²¹ Huvis’s Feb. 20, 2008, SQR, at 1; see also Huvis’s Aug. 29, 2007, QR, at 6-7.

²² 19 U.S.C. § 1677(33)(B).

²³ Huvis’s Feb. 20, 2008, SQR, at 1; see also Huvis’s Aug. 29, 2007, QR, at 6-7.

²⁴ 19 U.S.C. § 1677(33)(C)-(D).

owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.”²⁵ Huvis’s 2006 consolidated and unconsolidated financial statements confirm that it is 50 percent owned by SKC and 50 percent owned by Samyang.²⁶ Also, SK Corporation does not have an equity interest in SKC²⁷ nor is it among the ten largest shareholders of Samyang.²⁸ Because no shareholder owns 5 percent or more of Samyang, SK Corporation cannot be affiliated with Samyang under section 771(33)(E) of the Act.²⁹

The petitioners do not point to any evidence that contradicts or undermines Huvis’s claims regarding affiliations under sections 771(33)(A)-(E) of the Act and we see no basis to find affiliation under these provisions. Although the petitioners do not point to any particular provision, they appear to allege that Huvis is affiliated with SK Corporation under section 771(33)(G) and, because of this affiliation with SK Corporation, with other SK companies under section 771(33)(F) of the Act.³⁰ As the nexus of the alleged affiliations is Huvis’s relationship with SK Corporation, we turn to section 771(33)(G).

Section 771(33)(G) of the Act states that “{a}ny person who controls any other person and such other person” are affiliated.³¹ Such control exists “if the person is legally or operationally in a position to exercise restraint or direction over the other person.”³² Under 19 CFR 351.102(b), in considering whether control over another person exists, the Department considers “the following factors among others: corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships.”

Based on our review of the record, there is no “corporate or family grouping” present because the only group identified on the record is the SK Group, and Huvis has demonstrated that it is not a member of that Group.³³ The record, including Huvis’s financial statements, does not provide any indication that Huvis and any unreported SK entities have a “franchise or joint venture agreement” or “close supplier relationship.”³⁴ Huvis reported that it did source short-term loans from a “SK” named company.³⁵ However, this financing accounted for approximately three percent of Huvis’s short-term borrowing in 2006.³⁶ This insubstantial amount of “debt financing” by an “SK” named entity does not give rise to concerns about control under section 771(33)(G) of the Act. Thus, after considering the relevant factors under 19 CFR 351.102(b),

²⁵ 19 U.S.C. § 1677(33)(E).

²⁶ See Huvis’s AQR, at Exhibit A-9, at note 1 and Exhibit A-10, at note 1.

²⁷ See Huvis’s AQR, at Exhibit A-11 (SKC’s 2006 financial statement), at note 1.

²⁸ See Huvis’s AQR, at Exhibit A-5.

²⁹ See Huvis’s AQR, at Exhibit A-5.

³⁰ Alternatively, the petitioners may be alleging that Huvis and all SK-named companies are affiliated under section 771(33)(G). For the reasons explained below, we find no affiliation between Huvis and these SK companies under section 771(33)(G) of the Act.

³¹ 19 U.S.C. § 1677(33)(G).

³² 19 U.S.C. § 1677(33)(G).

³³ See Huvis’s Jun. 6, 2008, submission at Exhibit 3.

³⁴ See Huvis’s AQR, Exhibits A-9 and A-10.

³⁵ See Huvis’s AQR at 17.

³⁶ See, Huvis’s AQR, at Exhibit A-9 (Huvis’s 2006 unconsolidated financial statement).

we find that, pursuant to section 771(33)(G) of the Act, neither SK Corporation nor any SK entity was in a position to exercise restraint or direction over Huvis.

We acknowledge that Huvis was listed as a “combined subsidiary” in SK Corporation’s 2006 unconsolidated financial statements and referred to as a “related party.” However, the petitioners and Huvis agree that the term “combined subsidiaries” does not have a standard meaning.³⁷ The Department has not encountered this term before and can only speculate that Huvis is possibly listed as a “combined subsidiary” based upon SKC’s small ownership interest in SK Corporation that was extinguished during the POR.³⁸ Regarding the reference to “related party,” we do not agree with the petitioners that Korean GAAP should control the Department’s determination of affiliation under section 771(33)(A)-(G) of the Act.

The petitioners cite Pipe Fittings from Taiwan claiming that the Department treats audited financial statements as reliable and arguing, therefore, that the Department should find affiliation between Huvis and SK Corporation on the basis of SK Corporation’s audited financial statements. While we don’t dispute the weight we give to audited financial statements, in this case, we have audited financial statements for both SK Corporation and Huvis, and Huvis’s statements do not provide any indication that SK Corporation (or the other SK companies at issue) is affiliated in any way with Huvis. Thus, the two financial statements conflict with one another, a different situation than that faced in Pipe Fittings from Taiwan.

Because of the conflict in SK Corporation’s financial statements and Huvis’s financial statements, we have reviewed the other evidence on the record to determine whether SK Corporation is “legally or operationally in a position to exercise restraint or direction over” Huvis.³⁹ As explained above, there is no information on the record showing that Huvis is controlled by SK Corporation or another SK entity. Any argument that SK Corporation could somehow have control over Huvis is further undermined by the undisputed fact that fully 50 percent of Huvis’s stock is owned by Samyang Corporation, an independent Korean company that is unrelated to SK Chemicals, SK Corporation or any other company that may arguably affiliated with those companies.⁴⁰ The petitioners’ comments on Huvis’s section A questionnaire response discuss the SK Group and the member companies of the SK Group.⁴¹ However, as explained above, Huvis is not part of that Group. The petitioners’ concern that “related-party” transactions between Huvis and SK Group entities, including SK Corporation, would impact Huvis’s reported costs is not present because Huvis reported that it obtains no inputs for subject PSF from SK Corporation.⁴² Also, we find nothing to undermine Huvis’s claim as the record does not indicate any transactions between Huvis and SK Group entities that would affect cost reporting for merchandise under review. Furthermore, we have reviewed Huvis’s home market and U.S. sales databases and conclude that any alleged affiliation with SK Corporation or other SK Group entities would have no effect on Huvis’s reported sales databases.

³⁷ See Huvis’s May 22, 2008, submission at 6; see also Petitioners’ June 2, 2008, letter at 4.

³⁸ See Huvis’s Apr. 16, 2008, SQR at 2. The level of ownership that did exist did not rise to the level of affiliation under section 771(33)(E).

³⁹ 19 U.S.C. § 1677(33)(G).

⁴⁰ See Huvis’s AQR at 6-7 and Exhibits A-4 and A-5.

⁴¹ See Petitioners’ Nov. 15, 2007, submission, at 2-5, and Enclosure 1.

⁴² See Huvis’s Jun. 6, 2008, submission at 6.

Therefore, we find no basis to conclude that Huvis is affiliated with SK Corporation or the other SK companies named by the petitioners. Accordingly, we determine that Huvis reported information about all of its affiliated parties within the meaning of sections 771(33)(A)-(G). Consequently, the Department has no basis to apply total AFA to Huvis in the final results. The Department will, however, continue to examine these issues in the 2007-2008 administrative review.

Comment 2: Huvis's Submitted Costs by CONNUM

Petitioners' Argument: The petitioners contend that Huvis has not complied with the Department's directions to provide a unique cost for each product (*i.e.*, the same reported cost for different CONNUMs). The petitioners identify particular CONNUMs where this has occurred and request that the Department reject the submitted costs for these CONNUMs.

Huvis's Argument: Huvis disputes the petitioners' claim. With respect to certain CONNUMs listed by the petitioners, Huvis claims that the distinguishing characteristic of these products is product grade/quality (not fiber type, as argued by the petitioners). Because product grade is determined at the end of the production process and all otherwise identical PSF products incur the same material and overhead costs regardless of product grade, costs do not differ by the grade of the product.⁴³ With respect to the second set of discrepancies alleged by the petitioners, Huvis notes that products with different deniers have the same cost in this instance because the products with the 150 denier were not produced during the POR.⁴⁴ Therefore, Huvis used the Department's model matching methodology to select the most similar surrogate product for the purpose of supplying cost information (*i.e.*, products only differing in denier, the least important characteristic).⁴⁵ Similarly, Huvis argues that, because a particular specialty fiber was not produced during the POR, it was necessary to report a surrogate cost. Huvis contends that it reported the cost of the product with the least number of differences from the non-produced CONNUM.⁴⁶ Lastly, Huvis points out that the products sold, but not produced, were sold only in the domestic market and were not used for comparison purposes because all Huvis U.S. sales were matched to identical home market products.

Department's Position: We agree with Huvis. The petitioners' argument that Huvis ignored cost differences based upon fiber type is misplaced because the petitioners have pointed to the fifth CONNUM digit which is product grade, not fiber type. The product grade for Huvis's merchandise is determined "after the PSF is cut and just before packing."⁴⁷ Thus, because

⁴³ See *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1060-61 (Fed. Cir. 1992) (affirming the Department's allocation of production costs equally between prime and non-prime grades of pipe).

⁴⁴ See Huvis's Mar. 6, 2008, SQR at Exhibit D-17 (providing the last cost database with zero production for these two CONNUMs).

⁴⁵ See Huvis's Apr. 16, 2008, SQR at 11.

⁴⁶ Huvis sold and produced products coded as "08" (flame resistant) but these products had other differences from the products coded as "09," making them less similar and thus unsuitable for use as cost surrogates.

⁴⁷ See Memorandum to the File, "Relevant Portions of Huvis Verification Reports," dated Nov. 26, 2008, at Exhibit 1 (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, at 9).

product grade is only determined at the end of the production process, it is appropriate to allocate the same costs to CONNUMs differing only in product grade. See IPSCO Inc. v. United States, 965 F.2d 1056, 1060-61 (Fed. Cir. 1992).

Regarding the allegation that Huvis has ignored other product characteristics, we do not agree with the petitioners. For two CONNUMs with a denier of “150” that Huvis sold, but did not produce during the POR, it chose the most similar CONNUM as a surrogate cost. These similar CONNUMs are identical in all other product characteristics.

For a CONNUM with a specialty fibers code of “09” (*i.e.*, cation dyeable fiber (“CDF”)) that Huvis sold, but did not produce during the POR, it is reasonable to choose a similar CONNUM, a product with a specialty fibers code of “10” (*i.e.*, polyester wool fiber (“PWF”)) as a surrogate cost when such CONNUM is identical with respect to all other product characteristics. Furthermore, it is not necessary to determine that Huvis’s selection of PWF is the most suitable surrogate CONNUM because Huvis’ home market sales of CDF do not match to any U.S. sales, and are thus not used in the Department’s final margin calculation.

Therefore, for the final results, we continue to rely upon Huvis’s reported costs.

Comment 3: Costs of the Suwon Factory

Petitioners’ Argument: The petitioners contend that Huvis’s claim of “discontinued production” at its Suwon factory is not equivalent to the disposal of a facility.⁴⁸ The petitioners assert that the Financial Accounting Standards Board Staff Position (FASB) 144 defines discontinued operations as assets that are disposed of during the period, so long as two conditions are met. First, the operations and cash flow of the component business have been or will be eliminated from the ongoing operations of the entity as a result of a disposal transaction. Second, the entity disposing of the business will not have any significant continuing involvement in the operations of the component after the disposal transaction.

According to the petitioners, Huvis continued to incur production costs at the Suwon factory for fiscal year 2006.⁴⁹ Therefore, Huvis has not disposed of its Suwon factory and all of the expenses associated with the Suwon factory including, but not limited to, depreciation expenses, should be captured in Huvis’s selling, general, and administrative (“SG&A”) expenses ratio.

Huvis’s Argument: Huvis argues that the Suwon factory cannot be brought back online. Huvis contends that it provided a complete list and description of all assets of the Suwon factory that have been sold as well as a sample contract for the sale of the assets formerly used at the Suwon factory.⁵⁰ In addition, Huvis maintains that it included before and after photographs of the factory demonstrating the complete disposal of the factory’s equipment and machinery. Huvis has also provided information demonstrating that the workforce at the Suwon factory was

⁴⁸ See also Petitioners’ Mar. 5, 2008, letter at 9-11.

⁴⁹ Huvis’s Mar. 6, 2008, SQR at Exhibit D-20.

⁵⁰ See Huvis’s Apr. 16, 2008, SQR.

permanently eliminated through early retirements and reassignments to other facilities.⁵¹

Huvis contends that it explained that production at the Suwon factory ended in January 2006, and the monthly production total for January 2006 exactly matches the total production volume from the Suwon factory for fiscal year 2006.

Huvis argues that, in accordance with the Department's decision in Certain Softwood Lumber Products from Canada ("Lumber from Canada"),⁵² the Suwon factory has been permanently shut down without possibility of resuming production and, therefore, the extraordinary loss incurred in connection with this plant shutdown should not be included in the reported cost of production ("COP"). According to Huvis, in Lumber from Canada, the Department "disagree{d} with the petitioner that the permanent closure or sale of a production operation is routine and the type of transaction that should be picked up as part of G&A expense" and the Department "excluded net gains and losses incurred for the permanent closure or sale of production facilities."⁵³ Similarly, Huvis maintains that it has demonstrated that it has permanently and completely shut down the Suwon factory through the sale of its assets and the permanent termination of the factory work force, rendering the Suwon factory incapable of being brought back online to fill future production needs. Therefore, the Department should follow its practice and continue to exclude all of the expenses associated with the Suwon factory from the calculation of Huvis's SG&A expenses ratio.

Department's Position: We agree with Huvis and have continued to exclude expenses associated with the Suwon factory from the company's SG&A ratio because the record information demonstrates that Huvis sold or permanently shut down the Suwon factory. As the Department explained with respect to Abitibi in Lumber from Canada, such expenses would be excluded only if the facility or mill in question "was permanently closed." Lumber from Canada at Comment 8. This situation can be distinguished from that of "idle assets," as the Department has previously explained, "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 examined the record information and determined that the expense relates to a sale or permanent shutdown of a facility and, consequently, have excluded this cost from Huvis's COP.

Huvis has pointed to facts on the record to substantiate its claim that the idle asset expenses are related to a permanent shutdown. Specifically, Huvis supplied minutes from its Board of Directors meeting agreeing to the shutdown of the Suwon factory, a comprehensive list itemizing

⁵¹ See Huvis's Feb. 20, 2008, SQR at 2 and Exhibit A-20.

⁵² Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products From Canada, 70 FR 73437 (Dec. 12, 2005), and accompanying Issues and Decision Memorandum ("Lumber from Canada").

⁵³ Id. at Comment 8.

significant assets sold from the Suwon factory, a sample sales contract from the POR detailing assets to be sold, and before and after photographs of the Suwon factory showing the disposal of assets.⁵⁴ Further and contrary to the petitioners' assertion, Huvis did not incur any production costs in the Suwon factory after January 2006.⁵⁵

These facts taken together demonstrate that the Suwon factory was permanently shutdown and this factory is not able to be brought online to fulfill production at a later time. Therefore, the record establishes a permanent shutdown of the Suwon factory and we conclude that these expenses are properly excluded from Huvis's SG&A expenses.

Comment 4: Huvis's Financial Expenses Ratio

Petitioners' Argument: The petitioners contend that, because Huvis is a subsidiary of SK Corporation, Huvis should have submitted its financial expenses based on the highest level of consolidation, i.e., SK Corporation's consolidated financial statement.

Huvis's Argument: Huvis argues that, for the same reasons that the petitioners' claims that Huvis is affiliated with SK Corporation are without merit, the petitioners' claims regarding financial expenses should fail.

Department's Position: We have found that SK Corporation does not control Huvis (see Comment 1, above). Nor does its consolidated financial statement treat Huvis as a company subject to SK Corporation's consolidation.⁵⁶ Therefore, we have continued to use Huvis's financial statements to calculate the financial expenses ratio.

Comment 5: Huvis's Classification of Certain Home Market Sales

Petitioners' Argument: The petitioners contend that Huvis knowingly misclassified export sales as home market sales. The petitioners note that characteristics, including the containerization of the sales shipped to Korean port cities and the fact that the sales were tax-free, support that these local export sales are misclassified.⁵⁷

Huvis's Argument: Huvis maintains that it accurately reported all home market sales using the same methodology previously endorsed by the Department. Huvis notes that the Department agreed with Huvis in the 2005/06 administrative review stating that "although sales were shipped by container to Korean port cities, 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."⁵⁸ Huvis notes that its "domestic-local" sales being

⁵⁴ See Huvis's Apr. 16, 2008, SQR at Exhibit D-53.

⁵⁵ Id.; see also Mar. 6, 2008, SQR at Exhibit D-20.

⁵⁶ See SK Corporation's 2006 consolidated financial statement (submitted as Exhibit 2 of Huvis's Jun. 6, 2008, submission) at note 4.

⁵⁷ See Petitioners' Jul. 30, 2008, case brief at 14-16 for a complete discussion of the petitioners' proprietary arguments.

⁵⁸ Certain Polyester Staple Fiber from Korea: Final Results of the 2005–2006 Antidumping Duty Administrative Review, 71 FR 58581 (Dec. 10, 2007), and accompanying Issues and Decision Memorandum at Comment 2 ("Final

questioned by the petitioners are sales in which the customer indicates it will further manufacture the merchandise in Korea into non-subject products which will then be exported.⁵⁹ Thus, according to Huvis, these sales are sold on a tax-free basis. Huvis maintains that its containerization of the merchandise does not provide a sufficient basis for finding that these “domestic-local” sales are misclassified.

Department’s Position: We agree with Huvis that it properly reported its home market sales. In the 2001/02 and 2004/05 administrative reviews, we verified that Huvis’s reported home market sales include “domestic” sales and “domestic-local” sales.⁶⁰ In its questionnaire responses in the instant review, Huvis’s explanation of a local L/C sale where “merchandise was further processed before being exported” is consistent with a “domestic-local” sale described in prior reviews.⁶¹ Documentation on the record of the instant review confirms that the L/C of a “domestic-local” sale does not specify the ultimate destination and it notes that the merchandise will be further processed prior to export.⁶² Further, although these sales are delivered to the destination code of a Korean port city, the destination code includes the city’s metropolitan area.⁶³

As we stated in the 2005/06 administrative review, “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.”⁶⁴ The petitioners’ argument that the tax-free basis of the sales in question indicates that these sales are export sales is not determinative because the merchandise from these sales could be manufactured into another product in Korea before export and, thus, properly classified as domestic sales. Therefore, we have continued to include these sales in Huvis’s margin calculations, but note that the inclusion or exclusion of the sales in question has no effect on the results.

Comment 6: Loading Fee for Huvis’s Sales

Petitioners’ Argument: The petitioners argue that the cost of loading merchandise onto the container/truck for shipment is not a direct selling expense but a packing expense.⁶⁵ As a result, the petitioners maintain that the Department should refrain from making a downward adjustment to the home market price for the loading fee.

Results of PSF from Korea – 2005/2006”).

⁵⁹ See Huvis’s Feb. 20, 2008, SQR at 32.

⁶⁰ See Memorandum to the File, “Relevant Portions of Huvis Verification Reports,” dated Nov. 26, 2008, at Exhibit 1 (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, at 5) and Exhibit 2 (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, at 6).

⁶¹ See Final Results of PSF from Korea – 2005/2006 at Comment 2

⁶² See Huvis’s Apr. 16, 2008, SQR, at 8-9 and Exhibit B-30.

⁶³ Id. at 8.

⁶⁴ Final Results of PSF from Korea – 2005/2006 at Comment 2.

⁶⁵ See Notice of Final Determination of Sales at Not Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Taiwan, 70 FR 13454 (Mar. 21, 2005), and accompanying Issues and Decision Memorandum at Comment 6 (“PET Resin from Taiwan”) (where the Department stated that loading merchandise into a container was part of packing expenses).

Huvis' Argument: Huvis contends that it treated the loading costs as direct selling expenses pursuant to the Department's instructions.⁶⁶ Also, contrary to the petitioners' argument, Huvis maintains that the loading charges at issue relate to loading merchandise for shipment, not a packing cost.⁶⁷ Thus, Huvis asserts that it correctly classified these charges as direct selling expenses in both the home and U.S. sales databases.

Department's Position: We acknowledge that we instructed Huvis to report its costs associated with preparing merchandise for shipment as direct selling expenses.⁶⁸ However, upon examination of the reported loading expenses and consistent with the Preliminary Results, we find that these loading expenses are properly classified as movement expenses.⁶⁹ Movement expenses, for both export price and home market price, are defined as the amount attributable to any additional costs, charges, or expenses incident to bringing merchandise from the original place of shipment to the place of delivery. See sections 772(c)(2)(A) and 773(a)(6)(B)(ii) of the Act. Huvis has described the fees as covering "the cost of loading the merchandise onto container or truck (by forklift) for shipment from the factory."⁷⁰ Thus, these fees fall within sections 772(c)(2)(A) and 773(a)(6)(B)(ii) of the Act.

The Department's treatment of loading expenses as movement expenses is also consistent with the 2005/2006 administrative review.⁷¹ Other cases in which the Department has treated loading expenses as movement expenses include: Certain Frozen Warmwater Shrimp from India: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, 73 FR 12103, 12110 (Mar. 6, 2008); (unchanged in final results) Certain Frozen Warmwater Shrimp From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 40492 (Jul. 15, 2008); Certain Steel Concrete Reinforcing Bars from Turkey: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Revoke in Part, 73 FR 24535, 24538 (May 5, 2008); (unchanged in final results) Certain Steel Concrete Reinforcing Bars from Turkey: Final Results of Antidumping Duty Administrative Review and Determination to Revoke in Part, 73 FR 66218 (Nov. 7, 2008).

Comment 7: Korean Brokerage Expenses for Huvis's U.S. Sales

Petitioners' Argument: The petitioners maintain that Huvis failed to report its Korean brokerage expenses for U.S. sales in the currency in which the expenses were incurred. According to the petitioners, Huvis reported the expenses in U.S. dollars although the Korean brokerage contract specifies that the brokerage fee is 4.5 percent of the value of the product, with minimum

⁶⁶ See Jan. 8, 2008, letter from Department of Commerce to counsel for Huvis, at question 96.

⁶⁷ See PET Resin from Taiwan at Comment 6.

⁶⁸ See Jan. 8, 2008, letter from Department of Commerce to counsel for Huvis, at question 96.

⁶⁹ See Memorandum from Team to File, "2006/2007 Antidumping Duty Administrative Review of Certain Polyester Staple Fiber from Korea - Preliminary Results Calculation Memorandum for Huvis Corporation," dated May 23, 2008.

⁷⁰ See Huvis's Sept. 14, 2007, section B questionnaire response ("BQR") at B-19 and Huvis's Sept. 14, 2007, section C questionnaire response ("CQR") at C-14.

⁷¹ See Certain Polyester Staple Fiber from Korea: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Intent to Rescind, 72 FR 31279, 31280, 31282 (Jun. 6, 2007); (unchanged in final results): Final Results of PSF from Korea – 2005/2006.

payments quoted in Korean Won.⁷² The petitioners claim that this provides a further indication of Huvis's lack of cooperation in this review.

Huvis' Argument: Huvis asserts the brokerage fee calculations, reported in U.S. dollars, are correct and consistent with the manner in which these fees were reported in previous reviews. Huvis asserts that it could not report this expense in Korean Won because it could not determine the exact exchange rate used by the broker without manually reviewing the records for each transaction which is impractical. Finally, the domestic brokerage is an extremely small direct expense, and thus, immaterial.

Department's Position: As Huvis noted, it has reported these brokerage expenses in U.S. dollars in prior administrative reviews. Moreover, these brokerage expenses are so small that the impact of reporting these expenses in Korean Won would be immaterial. For the one example provided in Huvis's response, the brokerage expenses reported in U.S. dollars rather than Korean Won has no effect as the amounts are equal when rounded to the ten thousandth digit (i.e., four decimal places).⁷³ Although this is only one example, we have no basis to find that the result would differ for other transactions. Therefore, we do not find that Huvis has failed to cooperate and we have continued to use Huvis's brokerage expenses reported in U.S. dollars in our margin calculations.

Comment 8: Huvis's Absorption of Antidumping Duties

Petitioners' Argument: The petitioners argue that the Department should find Huvis absorbed the antidumping duties it paid to the U.S. Customs and Border Protection for the U.S. sales where it was the importer of record.

Huvis' Argument: Huvis argues that a duty absorption finding is not warranted in the instant review for two reasons. First, Huvis contends that the petitioners failed to request a duty absorption inquiry within 30 days of the date of publication of the notice of initiation of review as required by 19 CFR 351.213(j). Therefore, Huvis maintains that any such request in the petitioners' case brief should be deemed untimely and disregarded.

Second, consistent with section 751(a)(4) of the Act, Huvis maintains that the U.S. Court of Appeals for the Federal Circuit ("CAFC") has held, and Department practice confirms, that the Department is not empowered to conduct a duty absorption inquiry with respect to sales for which the foreign producer acts as the importer of record. Specifically, in Agro Dutch Industries,⁷⁴ the CAFC held that, when the foreign producer acted as its own importer of record, its sales could not be considered sales of merchandise "through an affiliated importer" and, therefore, a duty absorption inquiry was not appropriate under the statute. Similarly, in Certain Frozen Warmwater Shrimp from India,⁷⁵ the Department found that it was not appropriate to

⁷² Huvis's Feb. 20, 2008, SQR, at Exhibit C-15.

⁷³ Huvis's Apr. 16, 2008, SQR, at Exhibit C-18.

⁷⁴ See Agro Dutch Industries Ltd. v. United States, 508 F.3d 1024, 1033 (Fed. Cir. 2007) ("Agro Dutch Industries").

⁷⁵ See Certain Frozen Warmwater Shrimp from India: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, 73 FR 12103, 12109 (Mar. 6, 2008).

make a duty absorption finding when one of the two respondents made only export price (“EP”) sales to unaffiliated parties and the other respondent acted as the importer of record for both its EP and constructed export price sales. Therefore, Huvis maintains that the petitioners’ duty absorption argument should be dismissed.

Department’s Position: We agree with Huvis that there is no basis to conduct a duty absorption inquiry in this review. Section 751(a)(4) of the Act states, in part, that “{Commerce} shall determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter.”⁷⁶

Since Huvis is both the importer and foreign producer for the sales in question, there is no basis for reducing the U.S. price under the duty absorption rule. As cited by Huvis, in Agro Dutch Industries Ltd. v. United States,⁷⁷ the CAFC held that section 751(a)(4) of the Act does not apply when the importer and foreign producer are the same entity. The Department’s practice, as stated in Certain Frozen Warmwater Shrimp from India,⁷⁸ is consistent with the CAFC’s decision. Therefore, the Department finds no evidence that a duty absorption finding is warranted in this instance.

Comment 9: Ministerial Error in Calculation of Huvis’s Credit Expenses

Huvis’s Argument: Huvis contends that the Department failed to subtract comparison market credit expenses from the comparison market net price whenever the credit amount was in U.S. dollars in the margin calculation program.

Petitioners’ Argument: The petitioners argue that the Department should make the same correction to the comparison market program. The petitioners also assert that the Department failed to include credit expenses in U.S. dollars in determining constructed value (“CV”).

Department’s Position: We agree with both Huvis and the petitioners, and have corrected the programming language accordingly. See Memorandum from Team to File, “2006/2007 Antidumping Duty Administrative Review of Certain Polyester Staple Fiber from Korea - Final Results Calculation Memorandum for Huvis Corporation,” dated November 26, 2008.

Comment 10: Valuing PTA and QTA

Huvis’s Argument: Huvis contends that the Department adjusted Huvis’s reported COP and CV by increasing the cost of PTA and QTA based on an erroneous determination of the market price for those chemicals. Huvis argues that the Department did not follow its established practice, but

⁷⁶ 19 U.S.C. § 1675(a)(4).

⁷⁷ See Agro Dutch, 508 F.3d at 1033.

⁷⁸ See Certain Frozen Warmwater Shrimp from India: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, 73 FR 12103, 12109 (Mar. 6, 2008) (unchanged in final results: Certain Frozen Warmwater Shrimp From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 40492 (Jul. 15, 2008)).

rather used facts available to create a market price where none existed on the record by, in the case of QTA, using the market price for MTA as a proxy for the market price of QTA, and in the case of PTA, adding the supplier's profit rate to the supplier's COP as a proxy for market price.

Huvis argues that, in applying the major input rule, the Department's consistent practice has been to test the arm's length nature of an input's transfer price based on market price or COP alone when only one of these values is available on the record of the proceeding. Huvis notes that the CIT, in Huvis v. United States ("Huvis I"), held "that Commerce established a practice with its repeated acceptance of cost of production data alone to verify Huvis's transfer prices of major inputs when market price data was not available" and thus, Commerce's change in methodology was "arbitrary."⁷⁹ Huvis contends that the Department has continued this arbitrary and unlawful methodology.

Huvis asserts that, in practice, the Department applies section 773(f)(3) of the Act (i.e., the major input rule) by using the highest value among transfer price, the market value, and the COP.⁸⁰ When either market price or COP is unavailable, however, 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. When no market price was on the record for the particular input, the Department's analysis was focused on transfer prices and COP.⁸¹ The Department followed the same practice by relying on market prices alone when the respondent's affiliated supplier refused to provide COP information.⁸²

In Huvis I, according to Huvis, the CIT described the Department's practice as follows: "when only market price or cost of production data was available, but not both, Commerce has verified the transfer price with whichever measure was available" and has not applied facts available.⁸³ According to Huvis, the CIT found that "Commerce established a practice with its repeated acceptance of cost of production data alone to verify Huvis's transfer prices of major inputs when market price data was not available."⁸⁴

Also, Huvis argues that the Department has failed to satisfy the requirements set forth in section 782(e) of the Act that must be met before facts available may be used in favor of usable information provided by a respondent. Sections 782(d)-(e) of the Act address 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.

⁷⁹ See Huvis Corp. v. United States, 525 F. Supp. 2d 1379, 1381 (Ct. Int'l Trade 2007) ("Huvis I").

⁸⁰ See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Mexico, 67 FR 55800 (Aug. 30, 2002), and accompanying Issues and Decision Memorandum at Comment 13.

⁸¹ 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 FR 18448, 18456 (Apr. 15, 1997).

⁸² See Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Preliminary Results of Antidumping Duty Administrative Review, 71 FR 53370, 53375 (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 FR 13086 (Mar. 20, 2007)).

⁸³ See Huvis I, 525 F. Supp. 2d at 1378.

⁸⁴ Id. at 1379.

According to Huvis, in this review, the record establishes unequivocally that Huvis has satisfied each of the requirements of section 782(e) of the Act. First, the information was submitted by the deadline established for its submission.⁸⁵ Second, Huvis asserts that the information it submitted was verifiable because the Department conducted a thorough verification in the 2004/05 administrative review and was fully satisfied with the reporting of Samnam's COP information.⁸⁶ Huvis notes that the Department has never found or even suggested that Samnam's COP information could not be verified.

Third, Huvis maintains that the information it submitted could be used without undue difficulties. Huvis notes that the Department used Samnam's COP data in the 2001/02 and 2002/03 administrative reviews for PTA and QTA, and in the 2003/04 administrative review and the preliminary results of the 2004/05 administrative review for PTA, and has relied on similar data in numerous prior cases. Finally, Huvis contends that it has acted to the best of its ability to provide the information to meet the requirements established by the Department with respect to the requested information.

According to Huvis, Samnam is 60 percent owned by unaffiliated companies. Therefore, neither Huvis nor its parent, Samyang, can compel Samnam to provide the requested information.⁸⁷ Huvis notes that, since Samnam conducts its sales price negotiations with Huvis at arm's length, Samnam is not willing to disclose to Huvis the prices that Samnam charges every other customer as that would give Huvis an advantage in its negotiations with Samnam.

Huvis contends that, pursuant to section 782(c)(1) of the Act, in this review, as in the previous reviews, Huvis 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 notes that the record does not provide a basis to conclude that Huvis had failed to act to the best of its ability.

Huvis argues that the Department may not penalize a respondent for failing to provide information that the respondent is unable to provide.⁸⁸ Huvis notes that, in a case involving a failure to cooperate by the Government of the People's Republic of China, the CIT stated:

Commerce's decision to apply {adverse facts available} is also unsupported by substantial evidence because it was based in considerable part on the lack of cooperation of the PRC entity. For the reasons discussed supra ... FMEC and SMC are entitled to separate rates. Therefore, it would be grossly unfair to hold them responsible for {the Chinese government}'s

⁸⁵ See Huvis's Sept. 14 DQR at 6 and Exhibit D-4; Huvis's Mar. 6 SQR at 9-11 and Exhibit D-31; and Huvis's Apr. 16 SQR at 13 and Exhibit D-55.

⁸⁶ See Petitioners' Nov. 15, 2007, submission, Enclosure 5 at 44-46.

⁸⁷ See Huvis' Mar. 6, 2008, SQR at 10.

⁸⁸ The CIT has often considered this issue in the context of the analogous "acting to the best of its ability" standard that appears in the statutory provision concerning adverse facts available.

non-responsiveness to a separate rates inquiry.⁸⁹

In order to conclude that a respondent failed to act to the best of its ability in providing requested information, “Commerce must show that {the respondent} had the ability to comply but did not do so.”⁹⁰ Huvis argues that, as the CIT has stated, “[i]n cases where the interested party claims an inability to comply with Commerce’s request, Commerce must minimally find that the party had the ability to comply but did not do so.”⁹¹ Huvis maintains that the Department itself held that a respondent should not be penalized when it “made reasonable attempts” to acquire major input information from an uncooperative affiliated supplier.⁹²

Huvis asserts that it complied with the Department’s information requests to the best of its ability, and that Huvis’s submission of information on its TPA purchases from Samnam satisfied the requirements of section 782(e)(4) of the Act. Since the record establishes that Huvis satisfied each of the five requirements of section 782(e) of the Act, the Department should use the COP information submitted by Huvis as the basis for its assessment of whether Huvis’s transactions with Samnam should be disregarded under the major input rule.

Petitioners’ Argument: The petitioners argue that the Department properly calculated proxy market prices for the missing market prices of QTA and PTA in applying the major input rule and transactions disregarded rule.

The petitioners contend that the CIT, in Huvis I, did not find the Department’s decision in the 2004/05 administrative review to be unlawful, but rather allowed the Department to adequately explain its decision.⁹³ On remand, according to the petitioners, the Department reiterated the CIT’s affirmation of use of facts available, its methodology to calculate proxy market prices, and its reasons for relying on market prices.⁹⁴

In the instant review, the petitioners contend that the Department consistently developed proxy market prices for QTA and PTA as it did in the 2005/06 administrative review, because it determined that Huvis failed to submit the requisite market prices in spite of two requests. Therefore, contrary to Huvis’s claim, the petitioners assert that the Department did not depart from its established practice in this proceeding.

Furthermore, the petitioners note that similar issues were examined in SKF USA Inc. v. United

⁸⁹ Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States, 178 F. Supp. 2d 1305, 1335 (Ct. Int’l Trade 2001).

⁹⁰ Id. at 1333; see also Pac. Giant, Inc. v. United States, 223 F. Supp. 2d 1336, 1342 (Ct. Int’l Trade 2002); Mannesmannrohren-Werke AG v. United States, 77 F. Supp. 2d 1302, 1316 (Ct. Int’l Trade 1999).

⁹¹ Reiner Brach GmbH v. United States, 206 F. Supp. 2d 1323, 1337 n.3 (Ct. Int’l Trade 2002) (holding that the Department must use information submitted by a respondent that meets the requirements of Section 782(e) even if the agency is not fully satisfied with the respondent’s efforts to supply more complete information). See Borden, Inc. v. United States, 4 F. Supp. 2d 1221, 1245 (Ct. Int’l Trade 1998) (“Subsection (e) may require use of the respondent’s information notwithstanding that a remedy or explanation is unsatisfactory.”).

⁹² Carbon Products from Korea, 71 FR at 53375.

⁹³ Huvis I, 525 F. Supp. 2d at 1381.

⁹⁴ See Department of Commerce’s “Redetermination Pursuant to Court Remand,” dated February 25, 2008 at 1, 3, 8, filed in the 2004/05 administrative review of this case.

States (“SKF”),⁹⁵ where the CIT held that the statutory construction of section 773(f)(3) of the Act gives the Department discretion as to how it applies the major input rule, including whether some or all of the elements of the major input rule are considered.⁹⁶ The petitioners point out that the CIT determined in SKF that the Department has the discretion to determine how it will apply the major input rule in a particular review and from review-to-review.⁹⁷ According to the petitioners, the CIT considered and rejected an argument similar to Huvis’s argument. The petitioners maintain that, the SKF Court focused on the word “may” in sections 773(f)(2) and (3) and found that it implied some discretion.⁹⁸ Further, the petitioners note that the SKF Court also pointed out that “AK Steel ... ‘leaves possible application of the ... major-input provisions to the discretion {of} the agency.’”⁹⁹ The petitioners note that the CIT 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.”¹⁰⁰

The petitioners assert that, whether to rely on two or three values is based on available record evidence, and the Department has consistently applied this rule since the original investigation. In the original investigation, where COP data were withheld from the record, the petitioners contend that the Department articulated its practice, followed in this segment, for instances when major input values were not available on the record.¹⁰¹ The petitioners contend that the Department stated it would invoke its “facts available” authority to search the record for non-adverse, gap-filling information.¹⁰² According to the petitioners, when no reasonable surrogate was available on the record, the Department’s default position was to rely on only two values – in the original investigation, the two values were market and transfer prices – under its facts available authority.¹⁰³ Following its practice in the instant review, the petitioners note that the Department was able to develop non-adverse, gap-filling facts available information from record evidence, and therefore, utilized this information consistent with its articulated policy and prior reviews.

The petitioners argue that the Department satisfied the five requirements of sections 782(e)(1)-(5) of the Act. The petitioners contend that the major input rule instructs the Department to gather three elements of value to rely on the highest value of the three elements. The petitioners maintain that the Department’s decision not to limit its analysis to the COP and transfer price does not equate to the Department “unlawfully” rejecting usable information under section 782(e). The petitioners assert that the CIT adopted this same conclusion in the appeal of the 2004/05 administrative review.¹⁰⁴

⁹⁵ See SKF USA, Inc. v. United States, 116 F. Supp. 2d 1257 (Ct. Int’l Trade 2000) (“SKF”).

⁹⁶ Id. at 1267-68.

⁹⁷ Id. at 1267.

⁹⁸ Id. (quoting United States v. Rodgers, 461 U.S. 677, 706 (1983) (footnote omitted)).

⁹⁹ Id. at 1267 (citing AK Steel Corp. v. United States, 203 F.3d 1330, 1343 (Fed. Cir. 2000)).

¹⁰⁰ Id. at 1267 (citing AK Steel Corp., 203 F.3d at 1343).

¹⁰¹ See Notice of Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber From the Republic of Korea, 65 FR 16880 (Mar. 30, 2000), and accompanying Issues and Decision Memorandum at Comment 13.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Huvis I, 525 F. Supp. 2d at 1376.

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 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.

In Huvis I, the CIT recognized that the Department “may apply facts available {under section 776(a)} whenever there is a gap in the record.”¹⁰⁵ The CIT noted that Huvis's failure to submit market price data for PTA and QTA provides such a gap. Under the facts of the instant review, Huvis again failed to submit these market price data and, thus, the Department is justified in applying facts available pursuant to section 776(a) of the Act.

In applying facts available, the CIT, in Huvis I, stated that the Department must select “‘information ... which is reasonable to use under the circumstances.’”¹⁰⁶ For calculating PTA and QTA, the CIT considered it reasonable to use “two verified sources, contemporaneous to the period of review: the supplier Samnam's Fiscal Year End ... financial statements, and Samnam's cost of production data from the period of review.”¹⁰⁷

For PTA, we continue to apply the methodology affirmed by the CIT. 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 2006, 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's COP.

On the other hand, similar to the 2005/06 administrative review, the record of the instant review does contain a market price for SKC's sales of MTA, a comparable input. In SSWR from Taiwan,¹⁰⁸ 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.”¹⁰⁹ Because QTA and MTA can be substituted in place of one another using similar quantities,¹¹⁰ we have used the market price of MTA as a proxy for the market price of QTA. Further, using the market price of MTA is reasonable under the circumstances because the information is on the record of this review and it is contemporaneous to the POR. Under section 773(f)(3), we continue to use the higher of transfer price, COP, and proxy market price, and make the appropriate adjustment to Huvis' COP.

¹⁰⁵ Id. at 1375.

¹⁰⁶ Id. at 1376 (citing to Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, at 869-70 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4198.

¹⁰⁷ Huvis I, 525 F. Supp. 2d at 1376.

¹⁰⁸ Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Taiwan, 63 FR 40461 (Jul. 29, 1998) (“SSWR from Taiwan”).

¹⁰⁹ SSWR from Taiwan, 63 FR at 40471.

¹¹⁰ See Preliminary Results, 73 FR 31058.

Huvis seizes upon the language in Huvis I that “Commerce established a practice with its repeated acceptance of cost of production data alone to verify Huvis’s transfer prices of major inputs when market price data was not available” to argue that the Department did not sufficiently explain its departure from the methodology used in prior administrative reviews. However, in Huvis II,¹¹¹ the CIT sustained the Department’s redetermination holding that “an agency like Commerce is generally free to change its methodology to improve accuracy.”¹¹² In reference to the Department calculating market prices for PTA and QTA, the CIT stated “that Commerce has realized that it is possible to calculate a proxy market price using the facts available on the record, the Court will not force Commerce to ignore that capability and use a less-preferable methodology.”¹¹³ Therefore, we have continued to apply facts available to supply the missing market prices for PTA and QTA.

Comment 11: Adjustment for the Cost of Paraxylene

Huvis’s Argument: Huvis contends that the Department is not authorized to adjust Samnam’s COP for both PTA and QTA by increasing the cost of the paraxylene (“PX”). Huvis argues that application of the major input rule (section 773(f)(3) of the Act)¹¹⁴ is limited to transactions involving a major input to the merchandise being investigated. According to Huvis, the Department’s implementing regulation, 19 CFR 351.407(b), clearly limits the application of the major input rule to “the value of a major input purchased from an affiliated person.”

Huvis argues that PX is not an input into the production of PSF and Huvis has no transactions involving the purchase of PX from any supplier, whether affiliated or unaffiliated.¹¹⁵ As Huvis is not affiliated with GS Caltex Co., Ltd. (“GSCO”), the producer of the PX, the major input rule does not apply. Huvis maintains that neither the statute nor regulation provides that the Department will apply the major input rule anew to inputs used by the affiliated supplier in its own production process. Huvis argues that application of the major input rule in this manner would lead to a potentially infinite succession of its application.

Huvis asserts that the Department’s methodology violates both the express terms and the underlying purpose of the major input rule. Huvis maintains that the Department has violated the terms of the major input rule by increasing the value of the QTA used in the COP/CV analysis to an amount that is higher than all three values of the major input rule. Huvis contends that the purpose of the major input rule is to insure that the COP analysis will not be skewed by the possibility that an affiliate has supplied the input at less than arm’s length prices, or at a price that is less than the COP. Lastly, Huvis notes that no legitimate statutory object is served by increasing the value of Huvis’s QTA to an amount that is higher than both Samnam’s actual COP and what the Department has determined to be the market price (*i.e.*, what the Department’s

¹¹¹ Huvis Corp. v. United States, 2008 WL 2977890, at *3 (Ct. Int’l Trade 2008) (“Huvis II”).

¹¹² Id.

¹¹³ Id. at *4.

¹¹⁴ For the PTA input analyzed under the transactions disregarded rule (section 773(f)(2) of the Act), the same reasons discussed in the text demonstrate that there is no basis to increase the market value of PTA by increasing Samnam’s actual COP.

¹¹⁵ See Huvis’s AQR at A-17-18 and Exhibit A-17; Huvis’s Sept. 14, 2007, section D response at D-2.

regulation terms “the amount usually reflected in sales of the major input in the market under consideration”).

Petitioners’ Argument: The petitioners argue that the Department should continue to increase Samnam’s COP of QTA and PTA because the prices paid by Samnam’s upstream affiliate for PX were lower than the prices it paid to unaffiliated parties. The petitioners note that Huvis established that PX from GSCO is an input into Samnam’s production of QTA and PTA.¹¹⁶ Consistent with past practice in Coated Free Sheet Paper from Indonesia¹¹⁷ and PSF from Taiwan,¹¹⁸ the petitioners contend that the Department’s methodology is to apply the major input rule to each upstream input. Because the prices from unaffiliated parties were higher than prices from GSCO,¹¹⁹ the Department properly adjusted the cost of PTA and QTA to reflect the highest value (market price) under the major input rule.

Department’s Position: In a change from the Preliminary Results, we are not making an adjustment to the COP for QTA or PTA based upon Samnam’s purchases of paraxylene from GSCO. Based on our review of the information regarding Samnam’s purchases of paraxylene from GSCO and Samnam’s purchases of paraxylene from unaffiliated suppliers, we find that the prices paid by Samnam for paraxylene from GSCO reasonably reflect market prices. Therefore, although we agree with Huvis that it is not affiliated with GSCO, we do not reach the issue of whether the type of adjustment made in the Preliminary Results would be appropriate in other circumstances.

¹¹⁶ See Memorandum to File, Preliminary Results Calculation Memorandum for Huvis, dated May 23, 2008, at Attachment 3 (“Huvis Preliminary Calc Memo”) (citing Huvis’ Mar. 6, 2008 SQR at Appendix D-26).

¹¹⁷ See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from Indonesia, 72 FR 60636 (Oct. 25, 2007), and accompanying Issues and Decision Memorandum at Comments 2 and 3.

¹¹⁸ Notice of Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber from Taiwan, 65 FR 16877 (Mar. 30, 2000), and accompanying Issues and Decision Memorandum (“PSF from Taiwan”) at Comment 11.

¹¹⁹ See Huvis’s Apr. 29, 2008, SQR at Appendix D-60.

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 _____

David M. Spooner
Assistant Secretary
for Import Administration

Date