

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 Final Results of the
Changed Circumstances Review of Polyethylene Terephthalate
Film, Sheet, and Strip from the Republic of Korea.

SUMMARY:

We have analyzed the comments and rebuttal comments of interested parties in the changed circumstances review of the antidumping duty order covering polyethylene terephthalate film, sheet, and strip (PET film) from the Republic of Korea. We recommend that you approve the positions described in the “Discussion of the Issues” section of this Issues and Decision Memorandum.

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

- Comment 1: Authority to Reinstate Kolon in the Antidumping Order
- Comment 2: Whether Changed Circumstance Reviews are a Suitable Vehicle for Reinstating Previously Revoked Companies Within an Order
- Comment 3: Whether Reinstating Revoked Companies is Consistent with the Court’s Decision in *Asahi Chemical*
- Comment 4: Authority of Department to Require Kolon to Sign Reinstatement Agreement
- Comment 5: Whether Procedures Applicable to Reviews or Investigations Should Govern this Proceeding

Comment 6: Zeroing
Comment 7: Model-Match Methodology
Comment 8: Calculation of General and Administrative Expenses
Comment 9: Calculation of Variable Cost of Manufacture
Comment 10: Adjustment for Kolon's Bank, and Postal Charges

BACKGROUND:

On October 2, 2007, the Department published the preliminary results of this changed circumstances review. *See Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea; Preliminary Results of Changed Circumstances Review and Intent To Reinstate Kolon Industries, Inc in the Antidumping Order*, 72 FR 56048 (October 2, 2007) (*Preliminary Results*). The merchandise covered by this order is PET film from Korea, as described in the "Scope of the Order" section of the *Federal Register* notice. The period of review (POR) is July 1, 2005, through June 30, 2006. This changed circumstances review covers Kolon Industries, Inc (Kolon).

In the *Preliminary Results* we invited parties to comment. In response, on November 5, 2007, the Department received case briefs from Kolon, and from DuPont Teijin Films (DuPont), Mitsubishi Polyester Film, Inc (Mitsubishi), and Toray Plastics America Inc. (Toray) (collectively Dupont, Mitsubishi, and Toray are the Petitioners). Kolon and Petitioners submitted rebuttal briefs on November 13, 2007. At Kolon's request, the Department held a public hearing on November 21, 2007. On February 6, 2008, we published a notice extending the time frame for completion of this changed circumstances review by 60 days, until March 31, 2008. *See Polyethylene Terephthalate Film Sheet and Strip from the Republic of Korea: Extension of Time Limit for Final Results of Changed Circumstances Review*, 73 FR 6931 (February 6, 2008).

CHANGES FROM THE PRELIMINARY RESULTS

Based upon our analysis of comments received, we made the following changes in the margin calculations for Kolon:

- We matched home market and U.S. sales of PET film by their actual thickness rather than by thickness ranges.
- We made a deduction from CEP to account for bank fees and postal charges incurred by Kolon's U.S. affiliate.
- We corrected a clerical error in our recalculation of variable cost of manufacture.

DISCUSSION OF THE ISSUES

Comment 1: Authority to Reinstate Kolon in the Antidumping Order

Kolon contends the Department lacks the authority to reinstate antidumping orders that have been revoked. Kolon notes the Department has long acknowledged that it cannot reinstate orders that have been revoked in whole. Kolon asserts there is nothing in the statute that distinguishes between reinstatement of an order that has been revoked “in part” from reinstatement of an order that has been revoked “in whole.” *See* Kolon’s November 5, 2007, brief (Kolon Case Brief), at 11. Kolon further argues that the plain meaning of the word “revocation” connotes that the order has been “annulled” or made “legally void.” *Id.* Kolon asserts there is nothing in the revocation schema that contemplates reinstating a respondent based upon a resumption of dumping by that respondent.

Kolon contends the Department’s actions in this instant proceeding in effect amount to a “suspension” of an antidumping order based upon the producer’s agreement to future reinstatement in the order if the producer is found to be dumping. Kolon notes that section 734 of the Tariff Act of 1930, as amended (“the Act”), sets forth the rules under which the Department may suspend investigations. Kolon further notes that under those rules, the Department may suspend an investigation only prior to the International Trade Commission (ITC) issuing its final determination. Additionally, Kolon asserts that section 734 of the Act limits the type of suspension agreements which the Department may accept, and directs that such suspension agreements apply to all exporters. Kolon concludes that the reinstatement procedures set forth by the Department in this review constitute an attempt by the Department to “expand the scope of the suspension agreements beyond the specific limits set forth in the statute.” *Id.*, at 13.

Petitioners contend that “revoke” connotes a separate meaning than does “revocation in part.” *See* Petitioners’ November 13, 2007 Rebuttal Brief (Petitioners’ Rebuttal Brief), at 3. Petitioners assert that “revocation in part” is conditioned on the respondent’s agreement not to resume dumping in the future. Petitioners argue the “revocation in part” connotes a situation wherein the revocation no longer applies if the conditions on which the revocation in part was originally based have been violated. Petitioners also argue that unlike suspension agreements, the authority given the Department to revoke orders in part is deliberately broad “both in its scope and the conditions that may be attached to it.” *Id.* Petitioners assert the Department’s authority to conduct the instant review emanates from the Department’s authority to “revoke in part.”

Department’s Position:

As we noted in the *Initiation of Antidumping Duty Changed Circumstance Review: Polyethylene Terephthalate Film, Sheet, and Strip from Korea*, 72 FR 527 (January 5, 2007) (*Initiation Notice*), as part of its request for revocation, on June 28, 1996, Kolon agreed to immediate reinstatement in the order pursuant to 19 CFR 353.25(b) (1989) in effect at the time. 19 CFR 353.25(b) has subsequently been superseded by 19 CFR 351.222(b)(2)(i)(B). However, as

explained in the *Initiation Notice*, the language in 19 CFR 351.222(b)(2)(i)(B) is largely unchanged from 19 CFR 353.25(b). *Id.* at 530. The Department’s authority to reinstate a revoked company into an antidumping order is derived from sections 751(b) and (d) of the Act and 19 CFR 351.222(b) and (e). In particular, the Department’s authority to partially revoke an order is set forth in section 751(d) of the Act. As we noted in the *Initiation Notice*:

The statute, however, provides no detailed description of the criteria, procedures, or conditions relating to the Department’s exercise of this authority. Accordingly, the Department has issued regulations setting forth in detail how the Department will exercise the authority granted to it under the statute. In particular, the Department has reasonably interpreted the authority to partially revoke the antidumping duty order with respect to a particular company it finds to be no longer dumping to include authority to impose a condition that the partial revocation may be withdrawn (*i.e.*, the company may be reinstated) if dumping is resumed. To interpret the statute otherwise would permit the Department to abdicate its responsibility to ensure that injurious dumping is remedied by imposition of offsetting antidumping duties.

Id. at 530.

While section 751(d) of the Act provides the statutory authority to revoke orders either in whole or in part, the statute does not define the term “revocation in part.” Specific procedures governing “revocations in part” are set forth in 19 CFR 351.222. These regulations constitute a reasonable exercise of the authority granted by Congress to the Department under section 751(d) of the statute. Moreover, as Petitioners have noted, Government agencies have the authority to “fill in the gaps” through issuing regulations in areas where the statute does not provide specific instruction. As noted by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, a court may not substitute its own conclusion of a statutory provision for a reasonable interpretation by the administrator of an agency.

We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by the Court whenever decision as to meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

467 U.S. 837, 843-44 (notes and citations omitted).

As previously indicated, direction as to how the Department would proceed with Kolon's "revocation in part" was set forth specifically in 19 CFR 353.25(b)(2), which states:

The Secretary may revoke an antidumping order in part if the Secretary concludes that:

- (i) One or more producers or resellers covered by the order have sold the merchandise at not less than foreign market value for a period of at least three consecutive years;
- (ii) It is not likely that those persons will in the future sell the subject merchandise at less than foreign market value; and
- (iii) For producers or resellers that the Secretary previously has determined to have sold the subject merchandise at less than foreign market value, the producers or resellers agree in writing to their immediate reinstatement in the order, as long as any producer or reseller is subject to the order, if the Secretary concludes under § 353.22(f) that the producer or reseller, subsequent to the revocation, sold the subject merchandise at less than foreign market value.

Kolon qualified for revocation based upon making sales in the United States for three consecutive years at not less than foreign market value (normal value). The Department confirmed Kolon was not dumping in the course of three consecutive administrative reviews: the June 1, 1992 through May 31, 1993, review; the June 1, 1993 through May 31, 1994, review, and the June 1, 1994, through May 31 1995, review. On June 5, 1996, we published the final results of the June 1992 through May 31, 1993, and the June 1993 through May 31, 1994, administrative reviews. *See Polyethylene Terephthalate Film, Sheet, and Strip Korea; Final Results of Antidumping Duty Administrative Review and Notice of Revocation in Part* 61 FR 35177, (July 5, 1996) (second and third administrative reviews). We published our revocation of Kolon, along with the final results of the June 1, 1994 through May 31, 1995, administrative review, on November 14, 1996. *See Polyethylene Terephthalate Film, Sheet, and Strip Korea; Final Results of Antidumping Duty Administrative Review and Notice of Revocation in Part*, 61 FR 58374, (November 14, 1996) (fourth administrative review). Previously, the Department calculated an above *de minimis* margin (0.60 percent) in the November 30, 1990 through May 31, 1992, review of Kolon. *See Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea; Final Results of Antidumping Duty Administrative Review* 60 FR 42835, (August 17, 1995) amended by *Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea; Amended Final Results of Antidumping Duty Administrative Review*

61 FR 5375, (February 12, 1996) (first administrative review). Based upon Kolon's first review margin, we required a statement from Kolon agreeing to immediate reinstatement of the order should the Department determine that Kolon, subsequent to revocation, sold PET film at less than foreign market value (normal value). Kolon submitted a letter on June 28, 1996, in which it agreed to immediate reinstatement in the order pursuant to section 353.25(b) of the regulations in effect at the time.¹ See Kolon's June 28, 1996, letter to the Department requesting revocation. (Kolon's June 28, 1996 letter is attached as Attachment 1 of Petitioners July 19, 2006, letter, requesting that the Department initiate a changed circumstance review of Kolon.)

The Department is responsible for ensuring that parties adhere to the terms of revocation agreements into which they enter. As noted in our *Initiation Notice*, we initiated this changed circumstances review based upon evidence that Kolon, in violation of the terms of its June 28, 1996, revocation agreement, had resumed selling PET film in the United States at prices below normal value. See *Initiation Notice* at 531. Moreover, as noted in our *Initiation Notice*, "one basic principle of administrative law is that an administering agency must abide by its own rules to safeguard expectations." *Id.* at 530. Implicit in Kolon's agreement to immediate reinstatement in the order, should it be found to be selling at less than normal value in the future, is the expectation that the Department would in fact reinstate Kolon in the order should the Department indeed determine that Kolon had resumed dumping. These final results indicate Kolon violated the terms of its June 28, 1996, revocation agreement by selling PET film in the United States at prices below normal value during the period July 1, 2005, through June 30, 2006. Based upon the foregoing, we continue to maintain that our reinstatement of Kolon in this review as well as our conduct of this proceeding is a legitimate exercise of the authority governing revocations granted to us by Congress under sections 751(b) and (d) of the Act.²

Comment 2: Whether Changed Circumstance Reviews Are Suitable Vehicles for Reinstating Previously Revoked Respondents Within an Order

Kolon argues that a changed circumstance review is an unsuitable vehicle for reinstating revoked respondents within the scope of the order. Kolon asserts that section 751(b) of the statute applies only to three types of determinations: (1) a final affirmative determination resulting in an antidumping duty order, (2) a suspension agreement, or (3) a final determination resulting from an investigation that is continued after a suspension agreement. Kolon asserts that, because 751(b)(1) "does not address reviews of revocation determinations, that provision is, on its face, inapplicable." See Kolon's Case Brief at 14.

¹ For these reasons, we disagree with Kolon that the partial revocation determination made the antidumping order "legally void" with respect to Kolon. By its own agreement, Kolon was to be reinstated in the order if it resumed dumping.

² We also disagree with Kolon's argument that the Department's actions are inconsistent with section 734 of the Act. This determination does not implicate the Department's authority under section 734 to "suspend" investigations, as indicated by the fact that the Department conducted and completed an investigation of Kolon in addition to conducting multiple administrative reviews.

Kolon also suggests the Department's reinstatement procedures as outlined in the *Preliminary Results* are inconsistent with the statutory provisions governing the review and revocation of antidumping orders through sunset reviews. Kolon argues that following revocation in part of the antidumping order, exports by revoked companies are classified by the ITC as "fairly traded" rather than as "subject merchandise." As such, Kolon asserts, revoked respondents lack standing to participate in sunset reviews pursuant to section 771(9) of the statute.

Kolon notes that in two separate sunset reviews of this case, both the Department and the ITC determined the Korean producers had not provided adequate responses and, therefore, determined to keep the order in place. See Kolon's Case Brief at 15 (citing *Commission Determination: Polyethylene Terephthalate (PET) Film from Korea*, Inv. No. 731-TA-459, Pub. No. 3800 (February 2000) (*First Sunset Review*), and *Commission Determination: Polyethylene Terephthalate (PET) Film from Korea*, Inv. No. 731-TA-459, Pub. No. 3800 (September 2005) (*Second Sunset Review*)). Kolon claims it could not participate in either the *First Sunset Review* or the *Second Sunset Review*, and asserts that had it been allowed to participate in either the *First* or *Second Sunset Review* the outcome of either review might have been different. Kolon further asserts that had it been allowed to participate in either sunset review, the Department may have determined that the responses of Korean producers were "adequate," resulting in revocation of the order in whole.

Petitioners contend the Department's decision to conduct this changed circumstances review merely constitutes clarification by the Department of the circumstances under which the Department will revoke an order with respect to a particular exporter. Petitioners note that 19 CFR 351.222(2)(i) sets forth the conditions under which the Department issues revocations in part. Petitioners further note that revocation in part is conditioned on a company's agreement to reinstatement in the order should it be found to have resumed dumping. Moreover, Petitioners point out that the Department's actions in this review are fully consistent with the precedent established in *Sebacic Acid from the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement of the Antidumping Order*, 70 FR 16218 (March 30, 2005) (*Sebacic Acid*). Petitioners note that in *Sebacic Acid* the Department reinstated a company despite its prior revocation based upon the Department's determination that the company had resumed dumping. Moreover, Petitioners assert that section 751(b)(1) of the Act provides for changed circumstances reviews of affirmative final determinations which result in an antidumping order. Petitioners assert that "the order's coverage is part and parcel of that determination." See Petitioners' Rebuttal Brief at 4.

Department's Position:

We agree with Petitioners. As noted in our Initiation Notice:

Pursuant to section 751(b) of the Act, the Department will conduct a changed circumstances review upon receipt of a request "from an interested party for review of an antidumping duty order which shows changed circumstances sufficient to warrant a review of the order."

Initiation Notice at 530.

This changed circumstances review is to determine whether Kolon has resumed dumping (*i.e.*, the circumstances alleged to have changed) and should, therefore, be re-instated under the existing antidumping order on PET film. Consistent with the practice established in *Sebacic Acid*, the Department properly initiated this changed circumstances review to determine whether Kolon had adhered to the terms of its July 28, 1996, revocation agreement.

Kolon's suggestion that it was barred from participating in the two sunset reviews is factually incorrect. Kolon, despite its revocation, had standing to participate in either sunset review. Our regulations provide for participation in sunset reviews by any "foreign manufacturer, producer, or exporter, or the United States importer of subject merchandise." See 19 CFR 351.218 and 19 CFR 351.102(b).³ Thus, by virtue of Kolon being both a foreign manufacturer of subject merchandise and a U.S. importer of Korean PET film, Kolon would have been permitted to participate in either the *First* or *Second Sunset Review* under our regulations. In any event, speculating on the hypothetical response of the Department or the ITC to a respondent's hypothetical participation in separate sunset proceedings constitutes pure conjecture. More to the point, as noted in our response to Comment 1, we initiated this review to determine whether Kolon had adhered to the terms of its June 28, 1996, agreement. Whether Kolon (along with other respondents) might have secured a sunset revocation had Kolon remained subject to the order constitutes speculation and is irrelevant to the question of whether Kolon adhered to the terms of its June 28, 1996, revocation agreement or, rather, has resumed dumping.

Comment 3: Whether Reinstating Revoked Respondents is Consistent with the Court's Decision in *Asahi Chemical*

Kolon contends the Court of International Trade has determined that the reinstatement provisions of the Department's pre-1989 regulations were invalid. Kolon asserts that changes in the Department's regulations since 1989 have failed to address the concerns set forth in *Asahi Chemical Industries Co., Ltd. v. United States*, 727 F. Supp. 625 (CIT 1989) (*Asahi Chemical*). Kolon asserts that the *Initiation Notice* focused exclusively upon whether the pre-1989 regulations were "impermissibly vague." See Kolon's Case Brief at 16. However, Kolon asserts that *Asahi Chemical* went further:

³ 19 CFR 351.218 specifies that "respondent interested parties" may participate in sunset reviews. In defining "respondent interested parties", 19 CFR 351.102(b) refers to "section 771(9)(A) or (B) of the Act. Section 771(9)(A) defines "interested party" to include a "foreign manufacturer, producer or exporter, or the United States importer of subject merchandise."

The regulatory provision for reinstatement of a revoked order presents other problems. 19 U.S.C. § 1675(c) authorizes Commerce to “revoke in whole or in part, a countervailing duty order or an antidumping duty order” but does not specify whether such revoked orders may be reinstated. On the other hand, the conclusion that a revoked order may not be administratively reinstated finds support in the legislative history. The term “proceeding” [as in an antidumping duty proceeding] applies to that activity which begins when a petition is filed...and ends upon the final disposition of the case, up to revocation of an antidumping duty order, if any...as the case may be.” S. Rep. No., 96-249, 96th Cong., 1st Sess. 62 (1979), reprinted in 1979 U.S. Code Cong. & Admin. News 381, 448. This corresponds with the statutory scheme which provides only one means for imposing antidumping duties: investigations pursuant to 19 U.S.C. §§ 1671-1677g. *Therefore, once Commerce makes a revocation determination, the antidumping duty order ceases to be operative and may not be reinstated pursuant to 19 CFR §353.54*

See Kolon case brief at, 7 (quoting *Asahi Chemical* at 627-628 (Kolon’s emphasis) (alteration in the original)).

Based upon the foregoing, Kolon argues, revocation either in whole or in part “is an action with finality that cannot be transformed into temporary ‘suspension’ through the use of reinstatement agreements.” Kolon’s Case Brief at 17.

As to *Asahi Chemical*, Petitioners contend that as the Department indicated in its *Initiation Notice* the Department’s current regulations governing reinstatement (as well as the 1989 regulation) address the very concerns highlighted in *Asahi Chemical*. Moreover, Petitioners note that in *Tokyo Kikai Seisakusho Ltd. v. United States*, 473 F. Supp. 2d 1349 (CIT 2007) (*Tokyo Kikai*) the Court of International Trade sustained the Department’s reinstatement of a revoked respondent in an antidumping order covering large newspaper printing presses pursuant to 19 CFR 353.222(b)(2)(i). (The basis for reinstatement in *Tokyo Kikai* was fraud on the part of the respondent.) *See* Petitioner Rebuttal Brief at 3 and 4.

Department’s Position:

Kolon has misconstrued *Asahi Chemical* through its attempt to apply the Court’s decision on “revocation in whole” to the instant proceeding which pertains to “revocation in part.” The passage to which Kolon cites involves an order that had been revoked in whole. In *Asahi Chemical*, the “proceeding” had ended by virtue of revocation of the order. In contrast to *Asahi Chemical*, however, the order concerning PET film from Korea remains in force. Also as noted in the *Initiation Notice*:

The partial revocation of the order with respect to Kolon did not nullify the validity of the underlying injury and less than fair value determinations that resulted in issuance of an antidumping order which remains in force, particularly when the partial revocation is the result of behavior subsequent to those earlier determinations.

Initiation Notice at 530.

Furthermore, we continue to find that the current regulation governing reinstatement addresses the concerns enumerated by the Court in *Asahi*. As noted in the *Initiation Notice*, we hold that our current regulation governing reinstatement (as well as the earlier 1989 regulation in effect at the time of Kolon's revocation) addresses the concerns set forth by the court in *Asahi*. This is because our reinstatement regulation "places exporters and producers which the Department has previously found to be dumping, on notice that they are subject to immediate reinstatement once they are revoked from the order, if the Secretary later concludes that they have resumed dumping." See *Initiation Notice* at 530. Additionally, as Petitioners have noted, the Court of International Trade in *Tokyo Kikai* upheld the Department's authority to reinstate within an order respondents who were previously revoked under 19 CFR 353.222(b)(2)(i). *Tokyo Kikai*, 473 F. Supp. 2d at 1357. Finally, as noted in our response to Comment 2, the reinstatement procedures set forth in this proceeding are consistent with the course taken in *Sebacic Acid*. Based upon the foregoing, we continue to maintain that our reinstatement of Kolon in this order is consistent with the statute and the governing regulation.

Comment 4: Authority of Department to Require Kolon to Sign a Reinstatement Agreement

Kolon contends the Department lacked the authority to require Kolon to sign the July 28, 1996, reinstatement agreement. Kolon contends that as "a matter of law" the Department "cannot by agreement with a private party extend its authority beyond the limits established by Congress." See Kolon's Case Brief at 18. Kolon further asserts that such a reinstatement agreement is not required from an exporter that has never been found to have dumped. Kolon insists that its one above *de minimis* margin was invalid and, thus, it was never found to have dumped.

Kolon notes it was not investigated during the less-than-fair-value investigation of this proceeding. Kolon maintains the Department conducted its first analysis of Kolon in the first administrative review, covering the period November 30, 1990, through May 1, 1992, where the Department calculated a margin of 0.60 percent. Kolon insists, however, that the Department erred in its treatment of value added taxes in this first review, and duly appealed the final results to the Court of International Trade. Kolon notes that at the time it filed its June 28, 1996, request for revocation, the litigation over the first review was still pending. Kolon further asserts that it signed the June 28, 1996, revocation agreement only because of the calculated above-*de minimis* margin of 0.60 percent in the first review.

Kolon argues, however, that after Kolon submitted its June 28, 1996, revocation request, the Department requested a remand from the Court of its first review results in order to recalculate Kolon's margin using the appropriate tax-adjustment methodology. Kolon claims the Department never completed this remand because the Department was never able to locate the data sets necessary to recalculate Kolon's margins. Kolon contends the Department asked Kolon to withdraw its pending appeal of the first review results in light of its intervening revocation in the fourth review. Kolon asserts that it acceded to the Department's request, but subject to the proviso that Kolon's withdrawal not be construed as an admission that Kolon had dumped in the first review.

Based on the case history set forth above, Kolon contests the Department's characterizations in the *Initiation Notice* that Kolon "dropped" its challenge of the first review's 0.60 percent margin (see *Initiation Notice* at 531) and that "Kolon *voluntarily* agreed to reinstatement in the order upon evidence that it had resumed dumping in the United States". *Id.* (Kolon's emphasis). Kolon contends that both of these statements mischaracterize the history of this proceeding. Kolon maintains it did not "drop" its appeal of the first review. Rather, Kolon argues, it acceded to the Department's request to withdraw its appeal "because the Department had lost the files needed to perform the recalculation that all parties agreed was necessary." See Kolon's Case Brief at 20. Based upon these circumstances, Kolon argues, the Department "cannot in good faith infer from Kolon's withdrawal of the first review appeal that Kolon actually dumped during the first review." *Id.* Kolon also disputes the Department's suggestion that Kolon "voluntarily" entered into the reinstatement agreement. Kolon asserts it submitted the agreement in the course of the fourth review only because the Department would not have proceeded with Kolon's revocation otherwise. In any event, Kolon continues, the reinstatement agreement is unenforceable because Kolon did not actually dump at any time prior to its revocation. Finally, Kolon asserts the Department's treatment of the reinstatement agreement is contrary to the basic "principles of contract law." *Id.* at 22. Kolon suggests the reinstatement agreement by Kolon was, "in legal terms," merely an "offer," and as such not binding until that offer was accepted by the Department. Kolon contends, however, that while the Department may have accepted the offer by virtue of granting Kolon's its revocation, Kolon would have rescinded that offer once it became evident that Kolon had not dumped during the first review period. *Id.* at 22-23.

Petitioners reject Kolon's arguments as "not ris[ing] to the level of serious argument." Petitioners' Rebuttal Brief at 4. Petitioners insist there is no question as to whether Kolon was subject to the initial antidumping order. Petitioners also reject Kolon's assertion that Kolon was never found to have dumped during the first review. It is also clear, Petitioners aver, that Kolon chose to accept "conditional revocation, agreeing to reinstatement under the Order if it resumed dumping." *Id.*

Department's Position;

The Department properly required Kolon to provide a reinstatement agreement in this proceeding pursuant to 19 CFR 353.25(b), the regulation in effect at the time. While Kolon has asserted that its calculated margin for the first review period should have been *de minimis*, the eventual results of any incomplete appeal Kolon may have undertaken are simply not known, and are not on the record of the instant review. Moreover, Kolon, on its own volition, and for its own reasons, withdrew its appeal of the first review period. Kolon was not compelled by any party to drop its appeal. Kolon could have resubmitted the missing data sets necessary to complete the calculations associated with its appeal of the first review results. However, for its own reasons, Kolon chose not to pursue that appeal.

Moreover, the effects that Kolon's withdrawal of its appeal would have on Kolon's pursuit of revocation were known to Kolon at the time Kolon withdrew its appeal. Upon withdrawal of its appeal, Kolon's 0.60 percent margin became final and definitive, and no longer subject to future

agency or judicial review. Because the effect of Kolon withdrawing its appeal was to leave Kolon's above-*de minimis* margin of 0.60 percent intact, the Department properly required Kolon to agree to reinstatement in the order should Kolon be found to be selling at less than foreign market value (*i.e.*, normal value) in the future. Furthermore, Kolon agreed to reinstatement of the order in the event that it resumed dumping and this factual predicate has been confirmed in our Reinstatement Determination.

Comment 5: Whether Procedures Applicable to Reviews or Investigations Should Govern this Proceeding

Kolon argues that in order to calculate a dumping margin in this changed circumstances review, the Department is obliged to use methodologies applicable to less-than-fair-value investigations conducted pursuant to section 733 of the Act. Kolon asserts that this proceeding is not an "administrative review" within the meaning of the statute. *See* Kolon's Case Brief at 23 and n. 31. Rather, Kolon suggests, this proceeding is more akin to an investigation than to a review. As such, Kolon asserts that i) the "averages to averages" method should govern comparisons of U.S. price to normal value (rather than the "transactions to averages" method characteristic of administrative reviews); and ii) a *de minimis* margin should be defined using the investigation threshold of two percent rather than the review threshold of 0.50 percent.

Petitioners note this proceeding was initiated as a changed circumstances administrative review, pursuant to section 751(b) of the Act, rather than an investigation conducted under section 733. As such, Petitioners insist that procedures governing reviews rather than those governing investigations should apply in this changed circumstances review.

Department's Position:

This proceeding is a changed circumstances administrative review conducted pursuant to section 751 of the Act, and not an investigation conducted pursuant to section 731 of the Act. Accordingly, this proceeding is governed by procedures applicable to administrative reviews. As we noted in the *Initiation Notice*, in this case the less-than-fair-value investigation has been completed, the Department has made a final determination of dumping, the ITC has made its final injury determination, and the antidumping order on PET film from Korea remains in place. *See Initiation Notice* at 531. Moreover, as noted in the *Initiation Notice*, Kolon's revocation was "premised on the absence of dumping rather than the absence of injury and was expressly conditioned on the possibility of reinstatement should dumping resume." *Id.* In this proceeding, Petitioners provided credible evidence suggesting Kolon may have resumed dumping. *Id.* at 529. As such, we initiated a changed circumstances review pursuant to section 751(b) of the Act to determine whether Kolon has adhered to the terms of its revocation. Finally, as noted in our response to Comment 2, the review procedures employed in this proceeding are consistent with the procedures employed in *Sebacic Acid*. The Department requested, and Kolon provided, transactions for the relevant period of review, and the agency's analysis of these sales was consistent with its review procedures.

Comment 6: Zeroing

Kolon asserts that in calculating weighted average dumping margins, the Department should give full weight to negative dumping margins found on Kolon's U.S. sales rather than treating negative margins as zero margin sales. Kolon asserts that the World Trade Organization (WTO) has determined that the practice of "zeroing" is inconsistent with the "fair comparison" requirement of the WTO Antidumping Agreement.

Petitioners note that both the Court of International Trade and the Court of Appeals for the Federal Circuit have upheld the Department's authority to use zeroing in its dumping calculations. Moreover, Petitioners argue, WTO decisions do not constitute international obligations of the United States. Petitioners also insist the Department is under no obligation to follow WTO decisions.

Department's Position:

We have not changed our calculation of the weighted-average dumping margin as suggested by Kolon in these final results. Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 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 normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, 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 (Federal Circuit) has held that this is a reasonable interpretation of the statute. *See, e.g., Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004); *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), cert. denied; 126 S. Ct. 1023, 163 L. Ed. 2d 853 (Jan. 9, 2006) (*Corus I*).

Kolon has cited WTO dispute-settlement reports (WTO reports) finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement. As an initial matter, the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements Act (URAA). *Corus I*, 395 F.3d at 1347-49; *accord Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (*Corus II*); *NSK, Ltd. v. United States*, 510 F.3d 1375, ***, 2007 U.S. App. LEXIS 28917, at *8 (Fed. Cir. Dec. 14, 2007).

With respect to *United States-Final Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004) (US-Softwood Lumber), the Appellate Body's finding only related to the denial of offsets in the Softwood Lumber from Canada antidumping investigation. That report, and the Department's implementation of that report, did not address the Department's denial of offsets in other antidumping investigations or in any administrative review. *See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada*, 70 FR 22636

(May 2, 2005). Moreover, ultimate resolution of that WTO dispute was achieved through a mutually agreed solution, and not through an elimination of the denial of offsets. Notification of Mutually Agreed Solution, *United States-Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/29/Add.1 (March 9, 2007).

With respect to *United States-Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/AB/R (April 18, 2006) (*US-Zeroing (EC)*), the Department has modified its calculation of weighted-average dumping margins 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 FR 77722 (December 27, 2006) (*Zeroing Notice*). In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See *id.*, at 77724.

With respect to *United States-Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (Dec. 15, 2003) (*US-Corrosion-Resistant Steel*) and *EC-Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (March 1, 2001) (*EC-Bed Linens*), the Federal Circuit refused to find the Department's interpretation of the Act unreasonable on the basis of these reports. See, e.g., *Corus I*, 395 F.3d at 1348-49. As discussed above, the Federal Circuit found that WTO reports are without effect under U.S. law until they are implemented pursuant to the statutory scheme provided in the URAA. *Id.* Additionally, the Federal Circuit noted that in *US-Corrosion Resistant Steel*, the Appellate Body never made a finding regarding the Department's denial of offsets. *Id.* Further, the Federal Circuit noted that, in *EC-Bed Linens*, the United States was not a party to the dispute. *Id.*

With respect to *United States-Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (January 9, 2007) (*US-Zeroing (Japan)*), and as discussed above, Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, e.g., 19 USC 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 USC 3533(g); see, e.g., *Zeroing Notice*. With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure. With regard to *US-Zeroing (Japan)*, it is the position of the United States that appropriate steps have been taken in response to that report and those steps do not involve a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review. Furthermore, in response to *US-Zeroing (Japan)*, the Federal Circuit has repeatedly affirmed the permissibility of denying offsets in administrative reviews. *Corus II*, 502 F.3d at 1374-75; *NSK*, 510 F.3d at ***, 2007 U.S. App. LEXIS 28917, at *7-10.

For all these reasons, the various WTO Appellate Body reports regarding “zeroing” do not establish whether the Department's denial of offsets in this administrative review is consistent

with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, the Department has continued to deny offsets to dumping based on export transactions that exceed normal value in this review.

Comment 7: Model-Match Methodology

Kolon contends the Department should employ the same model match methodology in this proceeding that it employed in past reviews of this order. Specifically, Kolon notes that in past reviews of this order, the Department based its product comparisons, in part, upon the actual thickness of the film. Kolon notes that in this proceeding the Department departed from this methodology and instead adopted the model-matching methodology employed in the Indian PET film case. That is, the Department matched PET film according to four ranges of thicknesses: 1) thicknesses of less than 100 microns, 2) thicknesses between 100 and 199 microns, 3) thicknesses between 200 and 299 microns, and 4) thicknesses greater than 300 microns. This grouping of products of differing thicknesses and defining them as identical, Kolon argues, distorts the dumping calculation. Kolon asserts that products with different thicknesses are *not* identical, have different applications and costs, and sell at different prices. Kolon further asserts that by treating products with different thicknesses as identical matches, the Department penalized Kolon for selling a different mix of products in Korea than in the United States. Kolon contends it sold a greater number of products with varying thicknesses in Korea than it sold in the United States. Kolon further asserts that sales in Korea involved "relatively larger quantities of more specialized products" than it sold in the United States. *See* Kolon's Case Brief at 32. By collapsing many individual products into thickness ranges, Kolon contends the Department compared dissimilar products sold at dissimilar prices.

Moreover, Kolon notes that neither Kolon nor any other Korean producers of PET film were ever afforded the opportunity to comment on the model-match methodology employed in the Indian PET film case. Kolon asserts that had it indeed made a commitment agreeing to reinstatement in the order, it might reasonably have monitored its prices to ensure compliance with that reinstatement agreement. Kolon asserts that as part of any such price monitoring program, it would have relied on the model-match methodology employed in reviews in which Kolon itself participated.

Kolon further contends that model match criteria constitute the "law of the case" for these proceedings, and asserts the Department may not depart from the "law of the case" absent compelling reasons. Kolon cites to *Top of the Stove Stainless Steel Cooking Ware from Korea: Final Results and Recession in Part of the Antidumping Review* 66 FR 45664, (August 29, 2001) and accompanying Issues and Decision Memorandum at Comment 1, and to *Circular Welded Non-Alloy Steel Pipe from Korea: Final Results of Antidumping Duty Administrative Review*, 62 FR 55574, 55582 (October 27, 1997) to support its assertion that the Department has articulated no such compelling reason for changing its model-match procedures in this proceeding.

Petitioners assert that the evolution of the Department's model match criteria is a matter of public record, and contend the Department's current model-match procedures now constitute the "law" of the case. Although this shift in model matching methodologies was a matter of public

record, Petitioners aver, Kolon cannot now claim it was denied due process by the Department. See Petitioners' Rebuttal Brief at 7. Petitioners further note the Court of International Trade has upheld "reasonable changes" to the Department's model match criteria. Petitioners cite to *SKF USA Inc. v. United States*, 491 F. Supp. 2d 1354 (CIT 2007) and to *Luoyang Bearing Corp. v. United States*, 347 F. Supp 2d 1326, 1339 as two examples where the Court has upheld the Department making "reasonable" changes to its model-match procedures. Petitioners further assert "it was up to Kolon to monitor its export pricing under the most recent PET film model-matching criteria; that it *chose* not to do so cannot be blamed on the Department." *Id.*, emphasis in original.

Department's Position:

Kolon is correct in arguing that we used exact product thicknesses to determine identical matches in all prior segments of the Korean PET film case. Petitioners are also correct in noting we have opted to use thickness ranges to determine exact matches in the more recent reviews of PET film from India. See *Certain Polyethylene Terephthalate Film, Sheet and Strip from India: Final Results of Antidumping Duty Administrative Review*, 71 FR 47485, August 17, 2006) and accompanying Issues and Decision Memorandum at Comment 6. See also, *Certain Polyethylene Terephthalate Film, Sheet and Strip from India: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review*, 69 FR 49877 (August 12, 2004) (unchanged in final results, 70 FR 8072 (February 17, 2005)).

We continue to maintain that matching PET film according to a range of thicknesses can be reasonable and in accordance with law. However, the record documenting the change in model match procedures employed in these recent Indian PET film reviews is not on the record of any segment of the Korean PET film order, nor were Korean PET film producers afforded opportunity to comment on their development. Thus, Kolon had no advance notice or explanation from the Department prior to our issuance of the *Preliminary Results* that we would alter our model match from that employed in prior segments of the Korean PET film order. Furthermore, as a conditionally revoked company, Kolon could not reasonably be expected to monitor developments in an unrelated case involving PET film from India. Based upon the foregoing, we have revised the model match methodology for the final results and have matched PET films by their actual thickness rather than by thickness ranges. We will, if necessary, revisit the appropriate model match methodology in any future segment of the Korean PET film proceeding.

Comment 8: Calculation of General and Administrative Expenses

Kolon claims the Department incorrectly adjusted Kolon's general and administrative (G&A) expenses by excluding Kolon's gain on the disposition of certain assets. These gains arose from the sale of Kolon's headquarters building, employee apartment buildings and employee health and entertainment facilities. (This gain was recorded on Kolon's 2005 financial statements as part of the line item titled "Gains on Disposition of Property, Plant, and Equipment.") Kolon argues that, because the costs of maintaining and operating these facilities included depreciation as part of the reported cost, any gain on the disposition of these assets should also be included in

the Department's cost calculation. Kolon further suggests that if the Department were to exclude the amount associated with "Gains on Disposition of Property, Plant, and Equipment" from the G&A calculation, it should also exclude the corresponding losses recorded in the financial statements as "Losses on Disposition of Property, Plant, and Equipment" and "Impairment Losses on Property, Plant, and Equipment."

Petitioners maintain the Department correctly excluded the gain from the sale of the above facilities while correctly including losses on the disposition of assets and impairment losses on assets in its calculation of G&A expense. Petitioners state that when evaluating whether gains or losses on a sale of assets should be included in the reported costs, the Department considers the nature, significance, and the relationship of that activity to the general operations of the company. *See* Petitioners Rebuttal Brief at 9 (citing *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From India*, 69 FR 76916 (December 23, 2004) (and accompanying Issues and Decision Memorandum at Comment 16 (*Shrimp From India*))). Petitioners cite to the Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results - Kolon Industries, Inc., (September 24, 2007) at 2, and note the Department found Kolon's disposition of the assets at issue was a non-recurring event that 1) was not part of the company's normal business operations, 2) were significant transactions, both in form and value, and 3) were unrelated to the general operations of the company. Based on the foregoing, Petitioners argue the gain on disposition of these assets should be excluded from Kolon's reported costs. *See* Petitioners Rebuttal Brief at 9. Additionally, Petitioners dispute Kolon's attempt to justify allowance of the gain to offset G&A expenses on the basis that the cost of maintaining and operating the facilities were included in Kolon's reported costs. Petitioners contend the sale of the land and buildings are extraordinary transactions that were not incurred in the normal course of business. Petitioners therefore assert that such expenses should be excluded.

Finally, Petitioners dispute Kolon's claim that consistency requires that the Department also exclude from the G&A calculation Kolon's losses on the disposition of assets and Kolon's impairment losses on property, plant and equipment. Petitioners contend that the Department normally includes gains and losses from the routine sale of fixed assets, as well as asset impairment losses, in the G&A expense calculation. *See* Petitioners' Rebuttal Brief at 10 (citing *Final Results of the Antidumping Duty Administrative Review of Stainless Steel Wire Rod From Korea*, 67 FR 6685 (February 13, 2002) and accompanying Issues and Decision Memorandum at Comment 4B (*Steel Wire Rod From Korea*) and the *Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper From the Republic of Korea*, 72 FR 60630 (October 25, 2007) and accompanying Issues and Decision Memorandum at Comment 7 (Hansol company) (*Coated Free Sheet Paper from Korea*)).

Department's Position:

We agree with Petitioners. When determining if an activity is related to the general operations of the company, the Department considers the nature, the significance, and the relationship of that activity to the general operations of the company. *See Shrimp From India*. Kolon is in the

business of manufacturing and selling merchandise. The sale of Kolon's headquarters building, employee apartment buildings, and employee health and entertainment facilities are unrelated to Kolon's normal business operations. In contrast, routine sales of machinery and equipment constitute a normal part of Kolon's day-to-day business operations. Accordingly, any resulting gains or losses related to sales of machinery and equipment are normally included as part of the Department's G&A calculation. Unlike the sale of machinery and equipment, however, the sales of the headquarters building, employee apartments, and employee health and entertainment complex constitute significant transactions, both in form and value. Moreover, the resulting gain from this transaction generates non-recurring income that is not part of the company's normal business operations and is unrelated to the general operations of the company. *See Notice of Final Results of the Antidumping Duty Administrative Review and Notice of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products From Canada*, 69 FR 75921 (December 20, 2004), and accompanying Issues and Decision Memorandum at Comment 9. Therefore, for the final results, we have not included the gain from the disposition of these assets in the G&A expense calculation.

We also disagree with Kolon's contention that because the operating costs and depreciation of the facilities were included in the reported costs, the gain on the sale should also be included in the calculation. Prior to their sale, the operating costs and depreciation of Kolon's facilities were normal, recurring costs. However, because these gains were nonrecurring, significant and unrelated to the general operations of the company, we excluded Kolon's gains on the sale of these assets from our calculation of G&A expenses. *See, e.g., Certain Steel Concrete Reinforcing Bars from Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part*, 70 FR 67665 (November 8, 2005) and accompanying Issues and Decision Memorandum at Comment 25, where the Department disallowed the gain on a sale of a ship while including various costs related to the ship.

We further disagree with Kolon's argument that if the Department excludes the amount of "Gains on Disposition of Property, Plant, and Equipment" from the G&A calculation, the amounts recorded in the financial statements as "Losses on Disposition of Property, Plant, and Equipment" and "Impairment Losses on Property, Plant, and Equipment" should also be excluded from the reported costs. First, we note that we did not disallow the entire amount of the "Gains on Disposition of Property, Plant, and Equipment" recorded in Kolon's financial statements. Rather, we only disallowed the amount of the gain from the disposition of certain assets as described above. Second, we found nothing on the record to suggest the amount of "Losses on Disposition of Property, Plant, and Equipment" included anything other than losses from the routine disposition of assets. As previously stated, these assets are part of the ongoing operations for a manufacturing company and, as such, are normally included in the G&A expense. *See Steel Wire Rod From Korea*. Finally, as for the amount of the "Impairment Losses on Property, Plant, and Equipment," we note that impairment loss is an ordinary loss recognized by the company upon the determination that the recorded historical value of an asset is unrecoverable through future use of the asset (*i.e.*, that the asset's productive value is impaired). *See, e.g.*, Statement of Financial Accounting Standards 144. Because the impairment loss represents the loss in value incurred by assets during the current period, it is like most general expenses a period cost. Accordingly, impairment losses are normally treated by the Department

as general expenses which are included in G&A expenses. *See Coated Free Sheet Paper from Korea.* We have therefore included the amounts from “Losses on Disposition of Property, Plant, and Equipment” and “Impairment Losses on Property, Plant and Equipment” in the calculation of G&A expenses for the final results.

Comment 9: Calculation of Variable Cost of Manufacture

Kolon notes that in its recalculation of variable cost of manufacture (VCOM), the Department failed to include the direct cost of materials (DIRMAT) and direct labor (DIRLAB). Kolon asserts the Department should correct this error in its final results.

Petitioners did not comment on this issue.

Department’s Position:

We agree with Kolon. In these final results we have revised our recalculation of VCOM to include DIRMAT and DIRLAB.

Comment 10: Adjustment for Kolon’s Bank and Postal Charges

Petitioners contend the Department should reduce both export price (EP) and constructed export price (CEP) for various bank and postal charges incurred by Kolon. Petitioners note that on EP sales, Kolon receives the proceeds from the sale less the document against acceptance charges (D/A charges) that Kolon’s bank charges Kolon for the discounting of the invoice. Petitioners note that for EP sales, Kolon reported D/A charges under the variable CREDITKU. Petitioners further note that D/A charges reflect charges from Kolon’s bank for 1) default risk, 2) financing cost and 3) postal charges. Petitioners assert that to properly account for D/A charges, the Department should deduct CREDITKU from EP.

For CEP sales, Petitioners note that Kolon reported no D/A charges and set the variable CREDITKU equal to zero. However, Petitioners assert that documents collected at verification establish that Kolon’s D/A charges constitute an appropriate deduction from CEP. As with EP sales, Petitioners contend Kolon incurred D/A charges from its bank on CEP transactions. Petitioners argue these D/A charges involve an element of “pure credit expense,” “other charges associated with facilitation of the transaction” (such as postage fees), and “the assumption of risk by the receiving U.S. bank that it may not be able to collect from the buyer.” *See* Petitioner’s Case Brief, at 5. Petitioners contend these D/A charges constitute a reasonable circumstance of sale adjustment. Petitioners further assert that such D/A charges represent an expense to Kolon from its U.S. bank. Because Kolon failed to provide the actual D/A charges that it incurred on its CEP sales, Petitioners suggest the Department should use the highest selling expense rate calculated in Petitioners July 24, 2007, letter to represent Kolon’s D/A charges.

Kolon contends that for EP sales, the Department properly accounted for its D/A charges by adding CREDITKU to normal value. For CEP sales, Kolon asserts that its D/A charges merely

amount to a “financing mechanism that bears no relation to the sale to the unaffiliated U.S. customer.” Kolon’s Rebuttal Brief at 1. Kolon argues the D/A transactions are entirely internal transactions between Kolon and its U.S. subsidiary. Kolon further asserts that when inventory carrying costs and credit costs are reported for CEP transactions, the Department’s practice is to make no further deduction for actual interest expenses as such a deduction would amount to double counting of credit expenses. Kolon cites to *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 FR 32492 (June 10, 2004) and accompanying Issues and Decision Memorandum at Comment 3 as precedent for the Department not deducting actual financing charges from CEP.

Department’s Position:

We agree with Petitioners in part. For EP sales, Kolon reported D/A charges within the variable CREDITKU. In our *Preliminary Results*, we properly added the variable CREDITKU to normal value consistent with the statutory provision that U.S. direct selling expenses be added to normal value rather than subtracted from EP.

However, for CEP sales we have determined that Kolon did incur D/A charges which constitute a direct selling expense to Kolon. Thus, in these final results we have made a deduction from CEP to account for the D/A charges that Kolon incurred on its CEP sales. As petitioners have noted, on CEP sales Kolon’s sales contract stipulates a “special condition” with the bank of Kolon USA, Kolon’s US subsidiary. D/A charges are associated with this “special condition”. See, e.g., verification exhibit SVE 8 to the Department’s October 3, 2007, verification report. While there is an element of financing charge in the D/A charges that Kolon’s bank assesses to Kolon as part of the “special condition” provision of the contract, Kolon’s U.S. bank also charges Kolon for postage charges and for factoring charges which compensate Kolon’s bank for assuming any risk that Kolon’s U.S. customer will fail to pay the invoice. The Department generally considers factoring charges to be a direct selling expense. See, e.g., *Purified Carboxymethylcellulose from Finland: Notice of Final Results of Antidumping Duty Administrative Review*, 72 FR 70568, 70569 (December 12, 2007). Because Kolon’s postage and factoring charges represent direct expenses to Kolon, and because these D/A charges are distinct and separate from Kolon’s reported inventory carrying cost and imputed credit expenses, in these final results we have made a deduction from CEP to account for Kolon’s D/A charges. We have based this adjustment on the average postal and factoring charges reported by Kolon for three CEP transactions in its June 29, 2007, letter. See March 31, 2008 memo from Mike Heaney, Senior Import Compliance Specialist, to the file, at page 2.

RECOMMENDATION

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

Agree_____

Disagree_____

David Spooner
Assistant Secretary
for Import Administration

Date