70 FR 13451, March 21, 2005

A-533-841
Investigation
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Office 1: SL/DCO

MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

DATE: March 14, 2005

SUBJECT: Issues and Decision Memorandum for the Final Determination of the Investigation of Bottle-Grade Polyethylene Terephthalate (PET) Resin from India

Summary

We have analyzed the comments in the case and rebuttal briefs submitted by interested parties in the investigation of PET resin from India. As a result of our analysis, we have made the appropriate changes in the margin calculation. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is a complete list of the issues in this investigation for which we have received comments from the parties.

Background

On October 28, 2004, the Department of Commerce (the Department) issued the Preliminary Determination Notice in the investigation of PET resin from India.[1] The period of investigation (POI) is January 1, 2004, through December 31, 2004. On January 24, 2005, we received case briefs from the petitioner[2] and from one respondent, South Asia Petrochem Ltd. (SAPL). On January 31, 2005, we received rebuttal briefs from the petitioner and SAPL.

[1] See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin from India, 69 FR 62856 (October 28, 2004) (Preliminary Determination Notice).

[2] The petitioner in this investigation is the United States PET Resin Producers Coalition.

List of Comments

Discussion of Issues

Comment 1: Unreported Home Market Transactions

In its case brief, the petitioner argues that the Department should include two unreported home market transactions discovered at verification in its calculation of normal value (NV).

SAPL agrees that it failed to report the two sales and points out that the sales were presented in its first day corrections at verification.

Department's Position: We agree and have included both sales in our final analysis.

Comment 2: **Date of Payment for Home Market Transactions**

In its case brief, the petitioner, citing the Memorandum from Daniel O'Brien and Saliha Loucif, International Trade Compliance Analysts, to Susan Kuhbach, Director, Office 1, Re: Verification of the Sales Response of South Asia Petrochem Ltd., in the Investigation of Bottle-Grade Polyethylene Terephthalate (PET) Resin from India , dated January 12, 2005 (Sales Verification Report) at page 2, argues that, for several home market transactions, SAPL's reported payment date did not match the payment date recorded in SAPL's financial records. The petitioner contends that "it is clear with respect to the reporting of the payment date, SAPL has failed this part of the sales verification."[3] Therefore, the petitioner requests that the Department disallow any positive imputed credit adjustments reported by SAPL.

In its case brief, SAPL argues that it reported the invoice date as the payment date for most home market sales, because, as the Department stated in the Sales Verification Report at 12, "payments that covered multiple invoices . . . cannot be matched up on a one-to-one basis. . ."[4] SAPL contends that early home market payments averaged two to three days before the sale date, even though the Department found that the earliest payment date for home market transactions was longer than this average. Consequently, SAPL argues, "if the Department intends to change the date of payment, the change should not be more than 2 to 3 days prior to date of the invoice."[5]

In its rebuttal brief, the petitioner argues that the Department found at verification "that in many instances SAPL's reported date of payment was not reliable" and reiterates its contention that "SAPL has failed this part of the sales verification."[6] As a result, the petitioner contends, the Department should disallow the credit expense and calculate an interest revenue using a longer period based on the earliest pre-payment found at the sales verification.

In its rebuttal brief, SAPL argues that the petitioner "misunderstood" what it reported. SAPL contends that it claimed a credit expense adjustment where sales were made against a usance letter of credit and that there were no discrepancies in any cases where it reported a credit adjustment.

Department's Position: The Department confirmed at verification that SAPL often receives lump payments from its home market customers that do not easily track to particular invoices and that SAPL normally requires payment prior to production and shipping of the subject merchandise within the home market. At the same time, while laborious, the task of assigning actual payment dates to home market

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[3] See petitioner's case brief at 5.

[4] See Sales Verification Report at 12.

[5] See SAPL's case brief at 5.

[6] See petitioner's rebuttal brief at 3.

observations was not impossible. Moreover, the Department found that payment is frequently not recorded in SAPL's general ledger on the same date as the invoice date. Therefore, the Department has decided, as neutral facts available, to calculate a weighted-average payment period for those sales for which it was able to verify payment date at verification, and to apply that period to all home market sales that SAPL had reported as having been paid on the same date as the invoice date. This calculation is proprietary and is included in the Memorandum from Daniel O'Brien and Saliha Loucif, International Trade Compliance Analysts, to Constance Handley, Program Manager, Re: Analysis Memorandum for SAPL (Analysis Memorandum), dated March 14, 2005.

Comment 3: Home Market Sales Traces

In its case brief, the petitioner notes that the Department found at verification that the total payment for one sale did not match the total invoice value, and that three home market sales invoices had been incorrectly reported by SAPL. Consequently, the petitioner argues, the Department should use the highest gross unit price in the home market sales file and apply this to (1) the pre-selected sales examined at verification; (2) the additional home market transactions selected at verification; and (3) the three invoices incorrectly entered in the sales database discussed in the context of the sales reconciliation.[7]

In its rebuttal brief, SAPL notes that the Department found at verification that SAPL reported invoice date as payment date because tracking the actual payment date, especially for sales to distributors, who often made lump payments that covered multiple invoices, "was virtually impossible." SAPL adds that these payments cannot be matched up on a one-to-one basis. In response to the petitioner's reference to a specific sale for which the total payment did not match the total invoice value, SAPL claims that the invoice value was correctly reported and that the difference relates to the payment of a different invoice. Moreover, SAPL argues that the Department found at verification only a small unreconcilable difference between the database and its general ledger and that the three invoices incorrectly entered were "small discrepancies" that were reconciled. As a result, SAPL contends, "there is absolutely no reason to apply partial facts available to any transactions."[8]

Department's Position: We disagree with the petitioner. We did find that the payment for one invoice did not match exactly to the amount recorded in SAPL's accounts receivable ledger. However, this is evidence of the nature of SAPL's home market business, namely that payments are often received on a lump basis and cannot easily be matched to individual invoices; See Comment 2 above. Moreover, while noting an insubstantial unreconcilable discrepancy, the Department was satisfied that SAPL's total home market value reported in its database reconciled to its general ledger and financial statements at verification. See Sales Verification Report at 10. In regard to the three invoices cited by the petitioner found to have been incorrectly entered in SAPL's home market database, the Department considers those errors to be merely clerical and not unexpected during the course of a typical verification. The corrections for these errors have been made in the final determination. Accordingly, we have concluded that partial facts available is unwarranted in this case.

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[7] See petitioner's case brief at 5-6.

[8] See SAPL's rebuttal brief at 6-7.

Comment 4: Indirect Selling Expenses

In its case brief, the petitioner contends that SAPL "refused" to recalculate its indirect selling expenses based on the calendar year POI, as opposed to its April 1, 2003, through March 31, 2004, fiscal year, after being instructed to do so in a supplemental questionnaire issued by the Department. Moreover, the petitioner argues, SAPL's justification, as reported by the Department in its verification report, for not using the POI to calculate its indirect selling expenses as being "laborious work" should not be condoned by the Department. Instead, the petitioner contends, "it would not appear to be difficult to sum indirect selling expenses from the monthly trial balances for the twelve month POI and calculate the indirect selling expense ratio on the basis of 2003 POI data."[9] Consequently, the petitioner asserts, the Department should discard the indirect selling expenses as an offset adjustment to U.S. commissions in the calculation of NV and continue to deduct from the gross unit price the indirect selling expenses for the sales-below-cost test.

In its rebuttal brief, SAPL argues that it used its fiscal year to calculate its home market and U.S. indirect selling expense ratio because certain expenses were only booked at the end of the fiscal year (i.e., April 1, 2003, through March 31, 2004), which SAPL argues, was demonstrated to the Department during verification. SAPL contends that individually identifying all expenses up to December 2003 would have been "laborious and time consuming" and only accomplished by scrutinizing "each and every individual entry." Moreover, SAPL argues that summing indirect expenses from the monthly trial balance, as the petitioner suggests, would result in an inaccurate total since many of the expenses were booked after December 31, 2003; such a methodology, SAPL argues, would have even benefitted SAPL since some expenses, related to the period up to December 31, 2003, but booked at the year end, would not have been included in the calculation of the indirect selling expense ratio. Furthermore, SAPL contends that its calculation was based on expenses from May 2003 since the trial run had begun in May 2003 and its plant was still under construction in April 2003, thus eliminating any possible selling expenses during that month. SAPL concludes by stating that its methodology for calculating the indirect selling expense ratios is "more accurate and realistic" than the petitioner's suggested methodology.[10]

Department's Position: We agree with SAPL. While we acknowledge that SAPL did not comply with the Department's instructions to report its indirect selling expenses based on the POI, we note that SAPL provided a reasonable alternative. At verification, the Department confirmed that SAPL booked expenses incurred during the POI at the end of its fiscal year; as noted in the Sales Verification Report, "SAPL officials utilized the fiscal year. . . to derive SAPL's home market and U.S. indirect selling expense ratios because certain expenses were booked at the end of the fiscal year even though the expenses were incurred during the POI."
See Sales Verification Report at 18. Given this practice, the Department finds that SAPL's methodology did not discount or otherwise distort SAPL's indirect selling expenses incurred during the POI, especially considering the fact that SAPL did not incur any indirect selling expenses prior to the

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[9] See petitioner's case brief at 7.

[10] See SAPL's rebuttal brief at 7-8.

start of its fiscal year since it was not yet in operation. Accordingly, the Department considers SAPL's methodology to be reasonable for the purposes of this investigation.

Comment 5: Bank Charges for U.S. Sales

In its case brief, the petitioner indicates two discrepancies as described in the Sales Verification Report at page 15. First, the petitioner states that the Department noted in its review of SAPL's accounts receivable ledger "that the amount debited did not always directly match up to the amount credited due to minor exchange rate differences." Secondly, the petitioner notes that the Department discovered that SAPL reported the incorrect amount of bank charges for one U.S. sales observation. The petitioner concludes that, due to these discrepancies, as partial facts available, the Department should apply the highest amount reported for banking charges in the U.S. sales file for all reported U.S. transactions.[11]

In its rebuttal brief, SAPL denies any discrepancies in its reporting of the bank charges on U.S. sales. Citing the Sales Verification Report at 15, SAPL argues that the actual exchange rates will naturally differ between the day that the bank makes funds available to SAPL and the date that payment is actually received by the bank. As a result, SAPL contends, "there is bound to be a very slight difference in the exchange rates between the two dates."[12] Finally, SAPL remarks that the discrepancy for the observation highlighted by the petitioner was a "very minor clerical error" which does not justify the application to every U.S. transaction of the highest bank charge reported.

Department's Position: We disagree with the petitioner. We found at verification that the exchange rate differences noted in the verification report are a routine aspect of SAPL's normal business. In addition, the error found in the bank charges field for the observation in question was a minor clerical error which does not warrant the application of partial facts available. The correction of this error has been made for the final determination.

Comment 6: Cash Deposit Rate for Non-Selected Producer

In its case brief, the petitioner contends that the Department should calculate a separate cash deposit rate for Futura Polyesters Ltd. (Futura) (an Indian producer of PET resin and a respondent in the companion countervailing duty (CVD) investigation of PET resin from India). The petitioner argues that SAPL's export subsidies should not apply to Futura since no countervailing duties were imposed on Futura by reason of its *de minimis* subsidy preliminary determination. See Notice of Preliminary Affirmative Countervailing Duty Determination and Alignment With Final Antidumping Duty Determination: PET Resin From India, 69 FR 52866 (August 30, 2004). The petitioner contends that the Department's regulations at section 1677a(c)(1)(c) mandate that the cash deposit rate will be adjusted for export subsidies only when a countervailing duty is imposed.[13]

No other parties commented on this issue.

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[11] See petitioner's case brief at 8.

[12] See SAPL's rebuttal brief at 9.

[13] See the petitioner's case brief at 8-10.

Department's Position: We disagree with the petitioner. Futura is not a respondent in this investigation. The Department establishes individual cash deposit rates only for companies that have been "individually investigated;" See section 735(c)(1)(B)(I) of the Tariff Act of 1930, as amended (the Act). Companies that have not been investigated, such as Futura in this investigation, are assigned the "All Others" rate. See section 735(c)(5)(A) of the Act. There is no statutory authority for establishing an individual cash deposit rate for a non-investigated company, and we have not done so here.

Comment 7: Treatment of Non-Dumped Sales

Citing the Appellate Body of the World Trade Organization's (WTO) Report regarding Softwood Lumber from Canada, SAPL argues that the Department's treatment of non-dumped sales "is contrary to recent WTO findings."[14] Therefore, SAPL argues that, should the Department find non-dumped sales in its final determination, that it should not set the margins for such sales to zero.

In its rebuttal comments, the petitioner notes that the Department "has outlined its position" on its treatment of non-dumped sales in several Federal Register notices and issues and decision memoranda, and that the Department's practice was recently approved by the Court of Appeals for the Federal Circuit in Coral Staal B.V. and Corus Steel USA Inc. v. United States, Case No. 04-1107 (Fed. Cir. January 21, 2005).[15]

Department's Position: We disagree with SAPL and have not changed our calculation of the weighted-average dumping margin as suggested by the respondent for this final determination. As we have discussed in prior cases, our methodology is consistent with our obligations under the Act. See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 66 FR 50408 (October 3, 2001), and accompanying Issues and Decision Memorandum at Comment 1; Final Results of Antidumping Administrative Review: Certain Welded Carbon Steel Pipes and Tubes from Thailand, 69 FR 61649 (October 20, 2004), and accompanying Issues and Decision Memorandum at Comment 7; and Final Results of Antidumping Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada, 69 FR 68309 (November 24, 2004), and accompanying Issues and Decision Memorandum at Comment 8. Furthermore, the CIT has consistently upheld the Department's treatment of non-dumped sales. See, e.g., SNR Roulements v. United States, Consol. No. 01-00686,slip op. 04-100, at 21 (CIT August 10, 2004); Corus Engineering Steels, Ltd. v. United States, Slip Op. 03-110 at 18 (CIT 2003); Timken Co. v. United States, 354 F.3d 1334, 1341(CAFC 2004) (Timken); and See also Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 926 F. Supp. at 1150 (1996). Finally, the Federal Circuit in Timken has affirmed the Department's methodology as a reasonable interpretation of the statute.

With regard to U.S.-Softwood from Canada, in implementing the URAA, Congress made clear that reports issued by WTO panels or the Appellate Body "will not have any power to change U.S. law or

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[14] See SAPL's case brief at 9.

[15] See the petitioner's rebuttal brief at 4-5.

order such a change." See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, at 870 (1994) (SAA) at 660. The SAA emphasizes that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures. . ." See id. To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 U.S.C. Part 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. Part 3538(b)(4) (implementation of WTO reports is discretionary); See also SAA at 354 ("After considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is 'not inconsistent' with the panel or Appellate Body recommendations.")

As discussed below, we include U.S. sales that were not priced below NV in the calculation of the weighted-average dumping margin as sales with no dumping margin. The value of such sales is included in the denominator of the weighted-average margin along with the value of dumped sales. We do not, however, allow U.S. sales that were not priced below NV to offset dumping margins found on other sales.

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

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

Furthermore, this is a reasonable means of establishing estimated duty-deposit rates in investigations and assessing duties in reviews. The deposit rate we calculate for future entries must reflect the fact that the U.S. Customs and Border Protection (CBP) is not in a position to know which entries of subject merchandise are dumped and which are not. By spreading the liability for dumped sales across all

reviewed sales, the weighted-average dumping margin allows the CBP to apply this rate to all merchandise subject to an antidumping order.

Comment 8: Ministerial Error Allegations

In its case brief, SAPL alleges that the Department made two ministerial errors in its preliminary determination. First, SAPL argues that the Department failed to accurately convert bank charges reported in the DIRSEL1U field, thereby considering the charges to have been incurred in U.S. dollars, and not Indian rupees, the currency in which they were incurred. Second, SAPL contends that the Department failed to deduct commissions from home market and U.S. sales.

In its rebuttal brief, the petitioner argues that the Department correctly deducted home market commissions from the calculation of net home market price. In addition, the petitioner contends that the Department "double counted the home market commission by setting the commission offset...to equal the amount of the U.S. commission" thereby failing to deduct U.S. commissions from NV.

Department's Position: We agree with SAPL. We failed to accurately convert bank charges reported in the DIRSEL1U field and failed to deduct commissions from home market sales; we have made these corrections in the final determination. See Analysis Memorandum. Moreover, as SAPL notes, we did not deduct U.S. commissions from U.S. sales. This is because SAPL made only EP sales. Pursuant to sections 772(c) and 772(d) of the Act, the Department only deducts U.S. commissions from U.S. sales for CEP transactions. For EP sales, the Department deducts home market commissions and adds U.S. commissions to normal value, which was rendered correctly at section 9B of the margin program. We disagree with the petitioner that we double-counted the commission. The SAS language referenced by the petitioner effects the Department's methodology, under section 351.410(e) of the regulations, for situations where the commission paid in one market does not equal the commission paid in the other market. The SAS language referenced by the petitioner does not result in a canceling of U.S. commissions in the calculation of NV. Instead, when the commissions between the two markets are not equal, the Department offsets the commission by the lesser of the indirect selling expenses or the commission.

Comment 9: Incorrectly Stated Amount for the Pre-operative Period

SAPL asserts the Department's verification report incorrectly identifies the amount of pre-operative expenditures as relating to the five months of the pre-operative period that fall within the POI (i.e., April through August 2003). SAPL contends that the amount stated in the Department's verification report relates to the entire pre-operative period not just the five months. See SAPL's case brief at 5.

The petitioner contends that the Department's description of the pre-operative amount is correct based on cost verification exhibit four. See petitioner's rebuttal brief at 5.

Department's Position: We agree with SAPL that the pre-operative expenditures, as stated in the Department's verification report, relate to the entire pre-operative period. However, due to the fact

that we are relying on SAPL's normal books and records for the start-up adjustment amount included in the reported costs, this issue is moot.

Comment 10: Imputed Depreciation for the Trial-Run Period

SAPL argues that while it is correct that it calculated and reported an imputed depreciation expense for the trial-run period (i.e., May 1 through August 31, 2004), it should not have done so. SAPL argues that under Indian generally accepted accounting principles (GAAP), a company is not supposed to calculate any depreciation for the trial-run period. Accordingly, SAPL contends that the imputed depreciation should not be included in the cost calculation for the final determination. See SAPL's case brief at 6.

The petitioner maintains that the imputed depreciation costs were incurred during the POI and should be included in the cost of production. The petitioner contends that there is no legal support for SAPL's claim that production costs incurred during the trial-run should not be included in the production costs. Therefore, for the final determination, petitioner maintains that the imputed depreciation costs should be included in the production costs. See petitioner's rebuttal brief at 6.

Department's Position: We agree with the petitioner that imputed depreciation expenses should be included for the trial-run period in the calculation of the production costs. SAPL argues that the Department should not use the imputed depreciation expenses for the trial-run period because Indian GAAP does not mandate depreciation be calculated during the trial-run period. The statute directs the Department to calculate costs based on the records of the producer of the merchandise, if such records are kept in accordance with the GAAP of the producer's home country and reasonably reflect the costs associated with the production and sale of the merchandise. See section 773(f)(1)(A) of the Act. If the records do not reasonably reflect costs, then the Department will adjust the costs using a method that reasonably reflects and accurately captures all of the actual costs incurred in producing the product under investigation. See SAA at pages 164-165. During the cost reporting period, SAPL reported depreciation expenses as an element of the cost of manufacturing (COM) based on its normal books and records for the period September 2003 through March 2004 (i.e., subsequent to the trial-run period). For the trial-run period (i.e., May through August 2003), SAPL's normal books and records did not record depreciation expenses in accordance with Indian GAAP which mandates that assets are not to be capitalized and depreciated until the commencement of commercial production. See Statements of Accounting Standards (AS 10), Accounting for Fixed Assets, issued by the Institute of Chartered Accountants of India. During the trial-run period, the fixed assets (i.e., plant and equipment) were fully operational and produced measurable quantities of finished goods that were sold to end-users during this period. For this investigation, SAPL reported an imputed amount for depreciation expenses for the trial-run period. See SAPL's response to the Departments section D questionnaire, dated September 12, 2004, at page 14.

Companies recognize depreciation expense as a way to systematically spread the cost of each plant asset over its useful life. As the fixed assets are typically productive over many years, depreciation enables the matching of the fixed asset cost with the revenues associated with the products they

generate. The plant assets in this case were fully constructed and operational, as evidenced by the production and sale of finished merchandise during the trial-run period. Excluding depreciation expenses for the trial-run period in this case does not reasonably reflect the cost associated with the production and sale of the subject merchandise during this period. Moreover, if the Department were to exclude the reported imputed depreciation expenses, we would be inconsistent in our calculation of the COM for the cost reporting period by including depreciation expenses for only a portion of the period when the assets were in use for the entire period. Thus, for this issue, we have determined that Indian GAAP, in this regard, does not reasonably reflect the costs associated with the production and sale of the merchandise. Therefore, for the final determination we have continued to include the imputed depreciation expenses reported by SAPL for the trial-run period in the calculation of its COM.

Comment 11: Miscellaneous Tax

SAPL argues that the miscellaneous tax at issue should not be added to the COM, and that SAPL did not deduct the tax to calculate COM. SAPL contends that under Indian GAAP, the valuation of the closing stock of finished goods inventory has to be inclusive of the tax. According to SAPL, the amount of tax noted in the Department's cost verification report was calculated on the closing stock of finished goods. See schedule 12 of SAPL's audited financial statement for the 2003-2004 fiscal year. SAPL also notes that the final value of the finished goods includes this tax. See schedule 10 of SAPL's audited financial statement for the 2003-2004 fiscal year. SAPL argues that since the closing stock of finished goods does not form part of the COM, the tax on the closing stock is not related to the COM. SAPL states that since the tax has not been deducted from the COM, the Department should not add this amount back to SAPL's reported COM. See SAPL's case brief at 6.

The petitioner maintains that SAPL failed to provide justification or documentation to support the exclusion of the taxes from the reported COM. Therefore, for the final determination, the petitioner argues that the COM should be increased by the amount of taxes claimed. See petitioner's rebuttal brief at 6.

Department's Position: We agree with the petitioner that the miscellaneous taxes should be included in SAPL's reported costs. The miscellaneous taxes at issue formed part of SAPL's COGS. These taxes were included as an expense in SAPL's audited financial statements as manufacturing, administrative and other expenses. See SAPL's response to the Department's supplemental section A questionnaire, exhibit 8, fiscal year 2003-2004 financial statements, schedule 12. These taxes were not included as part of the reported COM. See Verification Report on the Cost of Production and Constructed Value Data Submitted by South Asia Petrochem Ltd. Dated January 10, 2005 (SAPL Cost Verification Report).

We disagree with SAPL's argument that the closing stock of finished goods does not form part of the COM. SAPL's cost reporting period represents its initial year of production. Therefore, the COM is equal to the COGS plus the ending inventory (i.e., finished goods in stock), noting that there was no beginning inventory. As the miscellaneous taxes are a manufacturing expense related to the finished goods, it is also related to the COM during the cost reporting period. Therefore, for the final determination we have included the expense for the miscellaneous taxes as part of SAPL's COM.

Comment 12: Duty Drawback

SAPL argues that duty drawback on fuel oil has been accounted for on an accrual basis and, thus, the expected refund has been deducted from the fuel oil expense. SAPL contends that the duty drawback refund receivable is certain to be received and, therefore, in accordance with the accounting concept of matching revenue and expense and GAAP, the cost to which the drawback relates should be net of the duty drawback receivable. SAPL argues that this is similar to any other accrual item, which, although incurred in the cost reporting period, is settled after the cost reporting period. SAPL contends, in such a case, the duty is accounted for as a cost in the cost reporting period. Therefore, SAPL maintains that the Department should allow the offset of duty drawback accrued against the fuel cost. See SAPL's case brief at 8.

The petitioner contends that SAPL did not receive any credits for the duty drawback during the cost reporting period and, therefore, the offset to fuel cost should be disallowed. See petitioner's rebuttal brief at 7.

Department's Position: We disagree with SAPL that its claimed duty drawback adjustment should be used as an offset to fuel costs. The law specifically addresses how duty drawback is to be treated in the dumping calculation. Section 772(c)(1)(B) of the Act provides that duty drawback will be applied as a sales adjustment to the export price or constructed export price. The law dictates such treatment because the drawback is tied to the export sale, not the cost of production. If respondents cannot establish they are entitled to this adjustment, we deem it inappropriate to permit them to receive as a fall back an equivalent adjustment as an offset to the cost of production (COP) or constructed value (CV). It would not be appropriate to reduce COP, which is used for testing whether home market sales were made at or below cost prices, since the duties were not rebated on those sales. See Final Results in the Antidumping Duty Administrative Review on Top-of-the-Stove Stainless Steel Cooking Ware from the Republic of Korea, 68 FR 7503 (February 14, 2003) and accompanying Issues and Decision Memorandum at comment 4 and Final Results in the Antidumping Duty Administrative Reviews of Certain Forged Stainless Steel Flanges from India, 67 FR 62439 (October 7, 2002) and accompanying Issues and Decision Memorandum at comment 5. Therefore, for the final determination, we have not included the duty drawback receivable as an offset to the fuel costs.

Comment 13: Start-Up Costs

SAPL argues that according to Indian GAAP, the entire amount of pre-operative costs (including the start-up cost) is accumulated and added to the fixed cost, and it is on this increased fixed cost that depreciation has been calculated and recorded. SAPL contends that since the pre-operative expenses include the start-up costs, the start-up costs have been depreciated, and any separate amortization will double count the cost. Therefore, SAPL argues that the Department should not separately amortize the start-up cost. See SAPL's case brief at 8.

The petitioner points out that the Department's verification report noted a different net start-up amount than reported by SAPL. See SAPL Cost Verification Report. Therefore, for the final determination,

the petitioner maintains that the Department should decrease SAPL's start-up adjustment by the percent of COM stated in the Department's cost verification report. See petitioner's rebuttal brief at 7.

Department's Position: We disagree with the petitioner that SAPL's reported costs should be adjusted for the differences noted in calculating the start-up adjustment. Section 773(f)(1)(A) of the Act directs the Department to calculate costs based on the normal records of the producer of the merchandise, if such records are kept in accordance with the GAAP of the producing country and reasonably reflect the costs associated with the production and sale of the merchandise. Indian GAAP allows pre-operative expenditures, which include start-up costs, to be capitalized and amortized over the life of the related assets once commercial production begins. See SAPL's response to the Department's supplemental section A questionnaire, exhibit 8, fiscal year 2003-2004 financial statements, note 3(a) of schedule 14.

SAPL's normal books and records capitalize start-up costs until commercial production commences, at which time these costs are amortized over the life of the related assets. Section 773(f)(1)(C) of the Act specifies how the Department should normally calculate start-up costs, however, this methodology is typically applied to respondents whose home country GAAP either does not recognize specific treatment for start-up costs or produces an unreasonable cost associated with a start-up. See Notice of Final Determination of Sales at Less than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate Products from Korea, 64 FR 73196, 73207 (December 29, 1999). In the instant case, SAPL's home country GAAP allows the company to recognize and depreciate start-up costs in its normal books and records. SAPL is a producer using a new production facility whose production levels were limited by technical factors associated with the initial phase of commercial production. This treatment helps eliminate the unreasonably high production costs typically associated with operating during a start-up period. SAPL's reported start-up adjustment and methodology, in accordance with its home-country GAAP, did not significantly differ from the Department's normal methodology; See Cost Verification Report at 17. For the final determination we have relied on SAPL's normal books and records and determined that they reasonably reflect the costs associated with the production and sale of the merchandise. Therefore, we have not adjusted SAPL's reported start-up cost adjustment.

Comment 14: G&A and Financial Expense Ratio Denominators

SAPL argues that it is correct to use the COM as the denominator in calculating the general and administrative (G&A) and financial expense ratios, because these expenses incurred during the cost reporting period relate to the goods manufactured and not to the COGS. SAPL contends that adjusting the G&A and financial ratios by the start-up adjustment results in an immaterial amount and, therefore, the Department should not adjust the ratio calculations. See SAPL's case brief at 9.

The petitioner maintains that for the final determination the Department should calculate the G&A and financial expense ratios based on the COGS. Additionally, the petitioner contends that the G&A and financial ratios should be applied to SAPL's COM excluding the start-up adjustment, because the reported COGS denominator used to calculate the ratios does not include an adjustment for the start-up costs. See petitioner's rebuttal at 8.

Department's Position: We agree with the petitioner that the G&A and financial expense ratios should be calculated based on the COGS rather than the COM. Using the COGS as the denominator is consistent with the Department's well-established practice of calculating the G&A or interest rates. Section 773(b)(3) of the Act provides the general description of calculating G&A expense for COP. However, the Act does not prescribe a specific method for calculating the G&A expense rate. Because there is no bright line definition in the Act of what a G&A expense is or how the G&A expense rate should be calculated, the Department has, over time, developed a consistent and predictable practice of calculating and allocating G&A expenses. This practice is to calculate the rate based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide cost of sales. It is identified in the Department's standard section D questionnaire, which instructs that the G&A expense rate should be calculated as the ratio of total company-wide G&A expenses divided by the cost of goods sold. See, e.g., 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 Thailand, 69 FR 76918 (December 23, 2004) and accompanying Issues and Decision Memorandum at comment 12; and Polyester Staple Fiber from Korea: Final Results of Antidumping Duty Administrative Review, 68 FR 59366 (October 15, 2003) and accompanying Issues and Decision Memorandum at comment 6.

As with many cost allocation issues that arise during the course of an antidumping proceeding, there may be more than one way to reasonably allocate the costs at issue. This is precisely why we have developed a consistent and predictable approach to calculating and allocating G&A costs. Specifically, in this case, the only difference between the COM and COGS is the change in ending inventory. We note that the change in the inventory could have either a favorable or unfavorable effect on the expense ratios depending on whether the inventory balance increases or decreases at the year-end. The Department's normal practice of calculating the ratios based on the COGS rather than COM affords consistency across cases. We recognize a unique fact pattern may present itself where it may be appropriate to deviate from our normal practice. However, that fact pattern does not exist in this case. We also agree with the petitioner that the G&A and financial expense ratios should not be applied to the start-up adjustment. It is the Department's normal practice to calculate and apply the G&A and financial expense ratios on the same basis. See Notice of Final Results of Antidumping Duty Administrative Review of Elemental Sulphur from Canada, 64 FR 37737, 37740 (July 13, 1999). In the instant case, the COGS used as the denominator to calculate the ratios does not include an adjustment for the start-up costs, therefore, the calculated expense ratios should not be applied to a COM that is inclusive of a start-up adjustment. Therefore, for the final determination we have continued to calculate the G&A and financial expense ratios using the COGS as the denominator. Moreover, we have applied the G&A and financial expense ratios to the COM exclusive of the start-up adjustment.

Comment 15: Purchased Technical Services

The petitioner contends that SAPL's reported costs do not reflect certain purchased technical services. Therefore, the petitioner argues that since these costs consist of actual costs incurred by SAPL during the POI, they should be included in the cost of production. Petitioner contends that for the final determination, as adverse facts available, the Department should include in SAPL's cost of production the amount of technical services purchased. See petitioner's case brief at 2.

SAPL contends that the payments for technical know-how costs were pursuant to an agreement for the construction of the plant. Therefore, since these costs were for the construction of the plant and not for the operations, they should not be included in SAPL's cost of production. SAPL contends that these costs were properly reported as being capitalized in accordance with Indian GAAP. SAPL contends that the majority of the technical know-how costs were paid prior to the POI and only a small payment was made during the POI. See SAPL's rebuttal brief at 1.

Department's Position: We agree with SAPL that the engineering costs were properly reported. In accordance with section 773(f)(1)(A) of the Act, the Department normally relies on data from respondent's books and records where those records are prepared in accordance with the home country's GAAP, and where they reasonably reflect the cost of producing the merchandise. These costs relate to engineering services provided for the initial construction and trial-run phase of the plant. SAPL is correct that these costs were predominantly incurred prior to the cost reporting period which supports the claim that they were part of the costs of constructing the plant. See SAPL's Cost Verification Report at page 3. Additionally, in accordance with Indian GAAP, these costs were capitalized as part of the initial plant assets (i.e., as part of the building and machinery) in the pre-operative expenses and amortized once commercial production began. As the engineering costs directly relate to the construction of the new plant, we find SAPL's treatment in its normal books and records to be in accordance with the home country's GAAP and reasonable. Therefore, for the final determination we have made no adjustment to the reported engineering expenses.

Comment 16: Fixed Overhead Costs for Depreciation

The petitioner contends that the Department's cost verification report noted that the depreciation expenses for certain items were only allocated to the amorphous chip stage (CCP stage) of production and not to the PET resin stage (SSP stage) of production. See SAPL's Cost Verification Report. Therefore, for the final determination, the petitioner maintains that the Department should increase SAPL's COM by the percent stated in the Department's cost verification report related to the allocation of fixed overhead costs. See petitioner's case brief at 3.

SAPL contends that the depreciation costs included in the fixed overhead were treated properly and that the impact on the COM is immaterial and should not be adjusted. See SAPL's rebuttal brief at 2.

Department's Position: We agree with the petitioner that certain depreciation expenses reported in the fixed overhead should be allocated to both the CCP and SSP stages of production. At verification we observed that both the CCP and SSP production facilities benefit from the assets in question for this issue. See SAPL's Cost Verification Report at 16. Therefore, for the final determination we have allocated the depreciation expenses for certain assets to both the CCP and SSP stages of production.

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 determination of this investigation and the final weighted-average dumping margins for all firms reviewed in the Federal Register.

AGREE _____ DISAGREE _____

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Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____

Date