

UNITED STATES COURT OF INTERNATIONAL TRADE

HUVIS CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant,

and

DAK FIBERS, LLC and WELLMAN, INC.,

Defendants-Intervenor.

BEFORE: GREGORY W. CARMAN, JUDGE

Court No. 06-00380

[Plaintiff's USCIT R. 56.1 Motion for Judgment upon the Agency Record is GRANTED; Plaintiff's Motion for Oral Argument is DENIED.]

McDermott Will & Emery LLC (Raymond Paretzky and Michael P. House) for Plaintiff.

Peter D. Keisler, Assistant Attorney General; Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Stephen C. Tosini) for Defendant.

Mark D. Lehnardt, of Counsel, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.

Kelley Drye Collier Shannon (David C. Smith, Jr. and Paul C. Rosenthal) for Defendants-Intervenor.

November 20, 2007

OPINION & ORDER

CARMAN, JUDGE: The motion before this Court is Plaintiff Huvis Corporation's ("Huvis") USCIT R. 56.1 Motion for Judgment upon the Agency Record. Huvis challenges the final results of the fifth administrative review of the antidumping duty order on certain polyester staple fiber from Korea. *Certain Polyester Staple Fiber from Korea*, 71 Fed. Reg. 58,581 (Dep't Commerce Oct. 4, 2006) (final results) and the accompanying Issues and Decision Memorandum (Dep't Commerce Sept. 28, 2006), Pub. Doc. 80 ("5AR Issues and Decision Mem.") (collectively, "Final Results"). For the reasons that follow, this Court remands the Final Results to the United States Department of Commerce ("Commerce") for further action consistent with this opinion.

BACKGROUND

Huvis is a Korean producer and exporter of polyester staple fiber ("PSF"), a synthetic fiber chiefly used for stuffing items such as clothing and pillows. *See Certain PSF from Korea*, 71 Fed. Reg. at 58,581. PSF is subject to an antidumping duty order, and Huvis has participated in many administrative reviews in connection therewith. The administrative review that is the subject of this action, the fifth, covered the period May 1, 2004, through April 30, 2005. *Id.*

PSF is made from chemical raw materials, the most important of which is terephthalic acid. Huvis uses three types (or grades) of terephthalic acid in its manufacture of PSF: qualified-grade terephthalic acid (“QTA”), middle terephthalic acid (“MTA”), and purified terephthalic acid (“PTA”). During the period of review, Huvis purchased all of the terephthalic acid it used from affiliated companies. Huvis purchased MTA from one of its two parent companies, SK Chemicals, while it purchased QTA and PTA from Samnam Petrochemical Company, Ltd. (“Samnam”).¹ (Br. of Pl. Huvis Corp. in Supp. of Pl.’s Mot. for J. upon the Agency R. (“Pl. Br.”) 3-4 (*citing* Confidential Record (“Confid. R.”) Doc. 3 at App. D-4 at 1); *see also* Confid. R. Doc. 7 at 30.)

During the fifth administrative review, Commerce requested that Huvis submit three values for the purchases of terephthalic acid made during the period of review: (1) the price Huvis paid to its affiliated suppliers (the “transfer price”); (2) the affiliated producer’s cost of production for the input; and (3) the price at which the affiliated producer made sales of the input to unaffiliated parties (the “market price”). For MTA, Huvis submitted all three of the requested measures: transfer price, cost of production, and market price. (Pl. Br. 4-5.) In contrast, for the inputs QTA and PTA, Huvis submitted only transfer price and cost of production, but not market price. (*Id.* at 4.)

¹Samnam is 40 percent owned by Huvis’s other parent company, Samyang, but is 60 percent owned by two companies unaffiliated with Huvis—Mitsubishi Chemicals Company (40 percent) and LG-Caltex Oil Company (20 percent).

Huvis explained that its supplier of the QTA and PTA, Samnam, was not willing to provide market price data to Huvis because Samnam considered it proprietary.

Further, Huvis explained to Commerce that it could not force Samnam to supply the market price data because neither Huvis nor its parent company, Samyang, exercised control over Samnam. As for the two measures that Huvis did submit, the data showed that the average transfer price was higher than Samnam's cost of production for both QTA and PTA. (*Id.* at 6-7 (*citing* Confid. R. Doc. 7 at 31).)

In the preliminary results, Commerce calculated Huvis's cost of manufacture for PSF by adding together, *inter alia*, the values of the chemical inputs to that merchandise—QTA, MTA, and PTA. Because Huvis bought QTA, MTA, and PTA from affiliated suppliers, and because they constituted "major inputs" to PSF, Commerce applied the "Major Input Rule" to determine their values.² For the input MTA, Commerce compared the transfer price, market price, and cost of production. Because the transfer price was higher than both market price and cost of production, Commerce made no adjustments to the value of MTA. For the input PTA, market price was not on

²When a respondent purchases a major input from an affiliated party, Commerce applies the Major Input Rule to determine whether the input was purchased at arm's-length. 19 U.S.C. § 1677b(f)(2) and(3) (2000). Commerce has interpreted the Major Input Rule to allow the agency to "determine the value of a major input purchased from an affiliated person based on the higher [*sic*] of" (1) transfer price, (2) market price, and (3) cost of production, 19 C.F.R. § 351.407(b) (2005), and the Court of Appeals for the Federal Circuit ("CAFC") has sustained this interpretation, *NTN Bearing Corp. of Am. v. United States*, 368 F.3d 1369, 1376 (Fed. Cir. 2004).

the record, and so Commerce compared only transfer price and cost of production. Because transfer price was higher, Commerce made no adjustment to the value of PTA. For the input QTA, Commerce followed the methodology it had used for that input in the previous administrative review. *Certain PSF from Korea*, 71 Fed. Reg. 30,867, 30,871 (Dep't Commerce May 31, 2006) (preliminary review results). After finding that QTA was "interchangeable" with MTA, Commerce filled in the missing QTA market price with the MTA market price Huvis had submitted. Because the MTA market price was higher than the QTA transfer price and cost of production, Commerce upwardly adjusted the value of QTA to reflect the arm's-length, or market, price.

Following Commerce's publication of the preliminary results, Huvis submitted information to Commerce that MTA and QTA were not, in fact, interchangeable. Commerce reevaluated its preliminary findings and agreed with Huvis that the two inputs were not interchangeable. Commerce also reevaluated its position regarding the missing market price for the input PTA. In the final results, Commerce applied facts available³ to fill in market prices for both QTA and PTA. To fill in the missing market prices, Commerce calculated a profit rate taken from the supplier's, Samnam's, submitted financial statements. (5AR Issues and Decision Mem., Comment 1, Pub. Doc.

³Section 1677e of title 19, U.S. Code, addresses situations where information is missing from the record. "If . . . necessary information is not available on the record," Commerce shall "use the facts otherwise available in reaching the applicable determination under this subtitle." 19 U.S.C. § 1677e(a) (2000); *see also infra*, Section I.

80.) Commerce added that profit rate to Samnam's cost of production data for QTA and PTA to come up with a calculated market value for each input. Because the calculated market prices were higher than the transfer prices (and, obviously, than the costs of production, as the market value was derived from the cost of production), Commerce upwardly adjusted the QTA and PTA values when calculating the cost of manufacture for Huvis's PSF. (*Id.*) Huvis argues that this had the effect of unfairly increasing the dumping margin applied to its imports. After Commerce published notice of the Final Results in the Federal Register, Huvis timely filed suit in this Court.

JURISDICTION

This Court has exclusive jurisdiction to review final results of administrative reviews pursuant to 28 U.S.C. § 1581(c) (2000).

STANDARD OF REVIEW

When reviewing Commerce's final results of administrative reviews, this Court must sustain Commerce's determinations, findings, or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000); *accord NTN Bearing Corp. of Am. v. United States*, 368 F.3d 1369, 1372 (Fed. Cir. 2004); *Micron Tech., Inc. v. United States*, 117 F.3d

1386, 1393 (Fed. Cir. 1997). To be in accordance with law, an agency's action or decision must be constitutional, and not contrary to statute, regulation, precedent, or procedures. *FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 300 (2003) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971) ("In all cases agency action must be set aside if the action . . . failed to meet statutory, procedural, or constitutional requirements.")).

DISCUSSION

Huvis challenges Commerce's application of facts available evidence to fill in the missing market prices for the inputs QTA and PTA. Huvis claims that Commerce's use of facts available evidence was not supported by substantial evidence on the record or otherwise in accordance with law for three reasons. Huvis claims that Commerce's use of facts available, first, violated 19 U.S.C. § 1677m(e), and second, was inconsistent with Commerce's established practice in the context of the Major Input Rule. (Pl. Br. 11-12.) Third, Huvis claims that the values Commerce selected to apply as facts available were "so high that they must be characterized as 'adverse' under the antidumping law." (*Id.* at 31.)

The Government and Defendants-Intervenor defend Commerce's application of facts available as consistent with statutory requirements and Commerce's prior practice,

and contend that the particular values selected as facts available are supported by substantial evidence on the record. (Def.'s Resp. to Pl.'s Mot. for J. upon the Admin. R. ("Def. Br.") 8-14; Defs.-Intervenor's Br. in Resp. to Huvis'[s] Mot. for J. on the Agency R. ("Defs.-Int. Br.") 23-35.) This Court agrees with the Government and Defendants-Intervenor that Commerce's use of facts available was consistent with statutory requirements, and that the values Commerce applied as facts available were supported by substantial evidence. However, as explained below, this Court holds that Commerce's application of facts available was not consistent with the agency's established practice. As a result, this Court grants Huvis's Motion for Judgment upon the Agency Record, and remands the Final Results to Commerce for further action consistent with this opinion.

I. Application of Facts Available in Accordance with Statute

Section 1677e of title 19, U.S. Code, governs the use of facts available. Section 1677e provides that if "necessary information is not available on the record" Commerce "shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle." 19 U.S.C. § 1677e(a) (2000). To determine what information is necessary for Commerce to make its determination, this Court looks to the applicable substantive statutory provision, the Major Input Rule, 19 U.S.C. § 1677b(f)(2) and (3) (2000). As mentioned above, *supra*, footnote 2, the CAFC

has affirmed that Commerce, in applying the Major Input Rule, may select as the value of a major input the highest of transfer price, market price, and cost of production. *NTN Bearing Corp. of Am.*, 368 F.3d at 1376. Accordingly, in the underlying administrative review, Commerce solicited from Huvis transfer price, market price, and cost of production information for Huvis's major inputs of QTA, MTA, and PTA.

Huvis—with explanation, but nonetheless—failed to submit market price data for the inputs QTA and PTA and there was therefore a gap in the record on this issue. Commerce may apply facts available whenever there is a gap in the record. *Id.* at 1377 (“All that is required [to apply facts available] is that necessary information be unavailable on the record.”). The CAFC explained that, in applying facts available:

[t]he focus . . . is [on a] respondent's failure to provide information. The reason for the failure is of no moment. The mere failure of a respondent to furnish the requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1381 (Fed. Cir. 2003) (emphasis omitted). As a result, because there was a gap in the record on the issue of market price for QTA and PTA, the statute gave Commerce the discretion to apply facts available evidence to Huvis.

Huvis argues that “Commerce violated [19 U.S.C. § 1677m(e)] by declining to consider . . . [the cost of production] evidence submitted by Huvis in this review,”

which Huvis argues “proved that Huvis’s purchase prices [i.e., transfer prices] for the inputs PTA and QTA were legitimate, arm’s-length prices.” (Pl. Br. 19.) Section 1677m(e) provides that Commerce

shall not decline to consider information that is submitted by an interested party and is necessary to the determination . . . if

- (1) the information is [timely] submitted . . . ,
- (2) the information can be verified,
- (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
- (4) the interested party has demonstrated that it acted to the best of its ability in providing the information . . . , and
- (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e) (2000). Yet, Commerce did not decline to consider Huvis’s submitted cost of production data. On the contrary, Commerce accepted the cost of production data and relied on it to calculate proxy market prices for QTA and PTA. (See 5AR Issues and Decision Mem., Comment 1, Pub. Doc. 80)(Commerce “calculated the supplier’s profit rate from the supplier’s [fiscal year ending] 2004 financial statements, and added the amount for profit to the supplier’s [cost of production] to arrive at a market value.”) Undoubtedly, Huvis would have preferred Commerce to verify the arm’s-length nature of the QTA and PTA transfer prices with cost of production data alone. However, Commerce’s decision to fill in proxy market prices for those inputs, and compare all three values, does not constitute rejection of the cost of

production data. As a result, Commerce's application of facts available was not inconsistent with 19 U.S.C. § 1677m(e).

II. Facts Available Applied to Huvis Were Supported by Substantial Evidence

Huvis also claims that the facts available market prices for QTA and PTA were "so high that they must be characterized as 'adverse' under the antidumping law." (Pl. Br. 31.) Huvis argues that Commerce did not establish that the company failed to cooperate, a prerequisite for applying adverse facts available to a respondent, and therefore, that the use of "adverse" facts available was not supported by substantial evidence on the record or otherwise in accordance with law. (*Id.*) Huvis is correct that before Commerce may apply adverse facts available to a respondent, it must find that the respondent "failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]." 19 U.S.C. § 1677e(b). However, Huvis cites no statute, regulation, or case law for its claim that the facts available Commerce applied to Huvis were effectively "adverse."

All the statute requires in applying facts available is that Commerce select "information . . . which is reasonable to use under the circumstances." Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, at 869-70 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198. Here, Commerce calculated the facts available market prices for QTA and PTA from two

verified sources, contemporaneous to the period of review: the supplier Samnam's Fiscal Year End 2004 financial statements, and Samnam's cost of production data from the period of review. Further, the methodology Commerce employed, adding together the supplier's cost of production and the supplier's reported profit level, is consistent with statutory instructions regarding calculation of constructed value. *See* 19 U.S.C. § 1677b(e) (constructed value calculated by adding together the cost of inputs, selling, general, and administrative expenses, and an amount for profits). While the constructed value provision is not directly applicable to the issue at hand, it is instructive on the question of the reasonableness of Commerce's methodological choice. The reasonableness of the methodology coupled with the verified data used establishes that the market price data Commerce selected as facts available are not unsupported by substantial evidence on the record.

III. Application of Facts Available Not in Accordance with Commerce's Practice

While Commerce may have the *statutory* discretion to apply facts available to a respondent like Huvis, that discretion can be curbed in the face of a consistent contrary agency *practice*. *See INS v. Yang*, 519 U.S. 26, 32 (1996) ("Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy . . . could constitute action that must be

overturned as ‘arbitrary, capricious, [or] an abuse of discretion . . .”). Huvis contends that “Commerce’s consistent prior practice, both in this proceeding and in other cases, has been to test the arm’s-length nature of a transfer price for a major input based on market price or [cost of production] alone when only one of those variables was available.” (Pl. Br. 11.) This Court must address two questions: (A) Does Commerce have an established practice of testing the arm’s-length nature of a transfer price for a major input with market price or cost of production alone, when only one of those values is available?; and (B) If so, did Commerce adequately justify its departure from the established practice?

A. Commerce’s Practice

This Court first addresses whether Commerce has an established practice of testing the arm’s-length nature of a transfer price for a major input with market price or cost of production alone, when only one of those values is available. Huvis points out that in the second, third, and fourth administrative reviews of the antidumping duty order on PSF from Korea, as well as in the preliminary results of the fifth administrative review, Commerce verified transfer price with cost of production data alone for some of Huvis’s major inputs. Huvis also cites to other antidumping proceedings where Huvis argues Commerce did the same thing.⁴

⁴Commerce cites to *Carbon and Certain Alloy Steel Wire Rod from Mexico*, 67 Fed.

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In contrast, the Government and Defendants-Intervenor insist that Commerce does not have such a consistent practice, either in the proceedings involving Huvis or otherwise. With respect to the proceedings involving Huvis, the Government contends that Commerce “has used four different methodologies for valuing major inputs over the course of the investigation and five administrative reviews.” (Def. Br. 11.)

Defendants-Intervenor similarly argue that Commerce does not have a consistent practice with respect to Huvis: “In the second and third [administrative] reviews, the Department compared *all three* elements of the major input rule for Huvis’[s] purchases of MTA from SK Chemicals, but only relied on *two of the three* elements . . . for Huvis’[s] purchases of QTA and PTA from Samnam (the transfer price and the affiliate’s cost of production).” (Defs.-Int. Br. 18.)

The Government and Defendants-Intervenor essentially argue that in applying the Major Input Rule, Commerce did not *always* test Huvis’s transfer prices with cost of production data alone. However, they misinterpret the relevant universe of facts.

⁴(...continued)

Reg. 55,800 (Dep’t Commerce Aug. 30, 2002) (final determination), *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 62 Fed. Reg. 18,448, 18456 (Dep’t Commerce Apr. 15, 1997) (final review results), and *Certain Corrosion-Resistant Carbon Steel Flat Products from Korea*, 71 Fed. Reg. 53,370, 53,375 (Dep’t Commerce Sept. 11, 2006) as examples of “Commerce’s consistent practice” of “test[ing] the arm’s length nature of an input’s transfer price based on market price or [cost of production] alone when only one of these values was available on the record of the proceeding.” (Pl. Br. 13, 14-15.)

Huvis does not claim that in *every* application of the Major Input Rule to the company, Commerce has required only market price or cost of production data. Rather, Huvis claims that, when only market price or cost of production data was available, but not both, Commerce has verified the transfer price with whichever measure was available. This is correct.

In each of the three prior administrative reviews, Huvis failed to submit market price data for its major inputs QTA and PTA. If this Court describes each comparison of transfer price, market price, and cost of production for each input as a separate instance, Commerce accepted cost of production data alone to verify the arm's-length nature of transfer prices in *five* out of *six* instances (for both inputs in the second and third administrative reviews, while only for PTA in the fourth administrative review).⁵ In the

⁵In the final results of the antidumping duty investigation, Commerce followed a similar course where the respondent Samyang (one of Huvis's parent companies) submitted transfer price and market price, but not cost of production, for its purchases of QTA and PTA. Because Commerce "determined that Samyang did, to the best of its ability, attempt to obtain the affiliates' [cost of production] data" the agency "valued PTA and QTA based on the higher of the transfer price or the market price for each input." *Issues and Decision Mem. for the Final Determination in the Antidumping Duty Investigation of Certain PSF from the Republic of Korea*, Comment 6 (Mar. 22, 2000), available at <http://ia.ita.doc.gov/frn/> (last visited November 10, 2007).

It is not lost on this Court that the company Huvis now claims is unwilling to release market price data for the inputs QTA and PTA, Samnam, is the same company willing to give Samyang—one of Huvis's parent companies—market price data for the same inputs (but not cost of production data!). However, if Commerce is suspicious of Huvis's avowed inability to obtain market price data from Samnam, the agency must directly address this in its results. Commerce is not free to treat Huvis differently than

(continued...)

one counterexample, Commerce explained that there was record evidence suggesting that QTA and MTA were interchangeable, and, therefore, filled in the missing QTA market price with Huvis's submitted MTA market price. Further, in the preliminary results of the instant administrative review, Commerce continued to test the arm's-length nature of the transfer price for PTA by comparing it to the affiliated supplier's cost of production alone.

"An action . . . becomes an 'agency practice' when a uniform and established procedure exists that would lead a party, in the absence of notification of a change, reasonably to expect adherence to the [particular action] or procedure."

Ranchers–Cattlemen Action Legal Found. v. United States, 23 CIT 861, 884-85, 74 F. Supp. 2d 1353, 1374 (1999). At one end of the spectrum, the court has held that "two prior determinations [in separate administrative proceedings] are not enough to constitute an agency practice that is binding on Commerce." *Shandong Huarong Machinery Co., Ltd. v. United States*, 30 CIT __, __, 435 F. Supp. 2d 1261, 1282 n.23 (2006). On the other hand, the court has held that a methodology used in five consecutive segments of an antidumping proceeding became the law of the proceeding, from which Commerce

⁵(...continued)

it has in past administrative reviews without justification. *See Hussey Copper, Ltd. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993) ("It is a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure.") (internal quotation and citation omitted).

could not depart. *Shikoku Chems. Corp. v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 422 (1992).

Commerce's actions here are more analogous to those in *Shikoku Chemicals*, 16 CIT 382, 795 F. Supp. 417, than those in *Shandong Huarong Machinery*, 30 CIT ___, 435 F. Supp. 2d 1261. While Commerce has not *exclusively* accepted cost of production data alone to test transfer price, the history of the prior administrative reviews here establishes that Commerce has repeatedly and regularly done so, and Huvis could "reasonably . . . expect adherence to the" particular agency action. *Ranchers–Cattlemen Action Legal Found.*, 23 CIT at 885, 74 F. Supp. 2d at 1374. As a result, this Court finds that Commerce established a practice with its repeated acceptance of cost of production data alone to verify Huvis's transfer prices of major inputs when market price data was not available.⁶

Defendants-Intervenor cite *SKF USA Inc. v. United States*, 24 CIT 822, 116 F. Supp. 2d 1257 (2000), for the proposition that Commerce "has the discretion to determine how it will apply the major input rule in a particular review and from review-to-review."

⁶Because this Court has already determined that, within Huvis's administrative proceeding, Commerce tested the arm's-length nature of transfer price with cost of production or market price data alone when only one of those values was available, this Court need not address Huvis's allegations that Commerce also did so in other proceedings (Pl. Br. 11). See *Shikoku Chems. Corp.*, 16 CIT at 388, 795 F. Supp. at 422 (practice established by Commerce's actions within the plaintiff's proceeding).

(Defs.-Int. Br. 19; *see also* Def. Br. 9.) In *SKF*, the plaintiff failed to report the market price of a major input in the form and manner requested by Commerce, and, therefore, Commerce was unable to verify the market price. As a result, Commerce applied partial facts available to fill in the gaps for the missing market price information. In the face of the plaintiff's argument that applying facts available for the missing market price data was contrary to the agency's practice in prior administrative reviews, the court held:

Commerce properly determined that it had discretionary authority to use the highest of transfer price, market price or [cost of production] in valuing SKF's reported major inputs. . . . Moreover, the fact that Commerce may not have applied the provisions in prior . . . reviews, does not make Commerce's exercise of discretion to apply them in this review unreasonable.

SKF, 24 CIT at 834, 116 F. Supp. 2d at 1267.

Yet, *SKF* is distinguishable from the case at bar for two reasons. First, this was not a case where the plaintiff represented to Commerce that it was not able to report market price data because the company did not possess it. Rather, *SKF* had the market price data, but did not submit it in a form and manner that Commerce could use. On that ground alone, *SKF* is significantly different from *Huvis*. Furthermore, Commerce's actions in *SKF* were not contrary to an established agency practice, as is the case here. Consequently, *SKF* does not inform on this issue.

B. Commerce's Explanation for Departing from its Established Practice

The second question for this Court is whether, in the Final Results, Commerce adequately justified the departure from its established practice. "When an agency decides to change course . . . it must adequately explain the reason for a reversal of policy." *Nippon Steel Corp. v. U. S. Int'l Trade Comm'n*, 494 F.3d 1371, 1378 n.5 (Fed. Cir. 2007); see also *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 57 (1983) ("an agency changing its course must supply a reasoned analysis") (internal quotation and citation omitted). The Government and Defendants-Intervenor contend that Commerce satisfied this burden by giving Huvis notice in the fourth administrative review that the agency would now require both cost of production and market price to test the arm's-length nature of transfer price. (Def. Br. 12; Defs.-Int. Br. 18.)

In the fourth administrative review, Commerce substituted-in MTA market price data for the missing QTA market price data. The Government and Defendants-Intervenor argue that, through this action, Commerce notified Huvis that cost of production data alone would no longer be sufficient to verify transfer price. Yet, in that very administrative review, Commerce continued to test the arm's-length nature of the PTA transfer price with cost of production data alone. Further, Commerce again accepted only cost of production data to verify the transfer price of PTA in the

preliminary results of the fifth administrative review. Therefore, Commerce's assertion that it gave notice to Huvis that cost of production data alone would no longer suffice is not supported by substantial evidence on the record.

Furthermore, Commerce is required to explain *why* it is changing course, not merely *that* it is changing course. See *Nippon Steel Corp.*, 494 F.3d at 1378 n.5.

"Commerce has the flexibility to change its position providing that it explains the basis for change and providing that the explanation is in accordance with law and supported by substantial evidence." *Cultivos Miramonte, S.A. v. United States*, 21 CIT 1059, 1064, 980 F. Supp. 2d 1268, 1274 (1997). Here, Commerce's proffered explanation for its change in practice with respect to Huvis falls short of the mark.

Commerce first tries to distinguish its treatment of Huvis in the Final Results from antidumping proceedings covering other merchandise. Commerce states that "unlike *Steel Wire Rod from Mexico*[, Fed. Reg. 67 Fed. Reg. 55,800,] and *Certain Carbon Products from Canada*, [62 Fed. Reg. 18,448,] the facts on the record in this case demonstrate that market prices do exist for the inputs at issue: Huvis stated that its supplier makes sales to unaffiliated customers." (5AR Issues and Decision Mem., Comment 1, Pub. Doc. 80.)

There are two problems with this justification. First, it is incorrect. In the above-cited administrative proceedings, the relevant fact was not that there was no market

price data *in existence*, but rather that market price data was not *on the record*. See *Issues and Decision Mem. for the Final Determination of the Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Mexico*, at 30, available at <http://ia.ita.doc.gov/frn/> (last visited Nov. 10, 2007) (“In past cases where a comparable market price for an input purchased from an unaffiliated supplier was *unavailable*, the Department has accepted the actual [cost of production] incurred by the related supplier as a surrogate.” (emphasis added)); *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 62 Fed. Reg. 18,448, 18,456 (Dep’t Commerce Apr. 15, 1997) (“There is no market price *on the record* for this input. Therefore, the Department’s analysis was focused on the transfer prices and cost of production.” (emphasis added)). The second, and more fundamental, shortcoming is that the reasoning does not explain the disparate treatment of Huvis in the Final Results as compared to its treatment in the second, third, fourth, and preliminary results of the fifth administrative review, when market price data for QTA and PTA existed, but was not on the record.

Commerce’s other purported explanation also falls short. Commerce says that it stopped accepting cost of production data alone to verify transfer price because “the second administrative review involved a shift from comparing an average [terephthalic acid] market price to evaluating each form of [terephthalic acid] separately.” (5AR Issues

and Decision Mem., Comment 1 , Pub. Doc. 80.) Yet, Commerce's change in practice occurred in the fifth, not the second, administrative review. If the change in methodology necessitated the change in Commerce's practice, one would expect the change in practice to coincide with the change in methodology, not to lag the change by three years. Moreover, Commerce failed to explain why the shift from comparing an average terephthalic acid market price to evaluating each form of terephthalic acid separately necessitates the change in practice. *See State Farm*, 463 U.S. at 43 (explanation needs "a 'rational connection between the facts found and the choice made.'" (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))).

Because the reasons Commerce gave for its change in practice with respect to Huvis are not supported by substantial evidence, Commerce's change is arbitrary. *Cultivos Miramonte S.A.*, 21 CIT at 1064 n.7 ("A change is arbitrary if the factual findings underlying the reason for change are not supported by substantial evidence."); *see also SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("[A]n agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.") (internal quotation and citation omitted). As a result, the Final Results are not in accordance with law. Therefore, this Court will remand the Final Results to Commerce to either (1) test the arm's-length nature of Huvis's major inputs of QTA and PTA with cost of production data alone, or (2) adequately explain the reason for treating

Huvis differently in this administrative review than the agency has in prior administrative reviews.

CONCLUSION

Because the Final Results are inconsistent with Commerce's established practice, and Commerce failed to adequately explain why it departed from its established practice in this instance, the Final Results are not in accordance with law. As a result, this Court grants Huvis's USCIT R. 56.1 Motion for Judgment upon the Agency Record and remands the Final Results to Commerce for further action consistent with this Opinion and Order.

Upon consideration of the papers filed by the parties, and upon due deliberation, it is hereby

ORDERED that Plaintiff's Motion for Oral Argument is denied; it is further

ORDERED that Plaintiff's Motion for Judgment upon the Agency Record is granted; it is further

ORDERED that the Final Results are remanded to Commerce to either (1) test the arm's-length nature of Huvis's major inputs of QTA and PTA with cost of production data alone, or (2) adequately explain the reason for treating Huvis differently in this administrative review than the agency has in prior administrative reviews; it is further

ORDERED that the remand results shall be filed no later than February 11, 2008; it is further

ORDERED that Huvis may file papers with this Court indicating whether they are satisfied with the remand results no later than March 17, 2008; that the Government and Defendants-Intervenor may file responses to Huvis's comments no later than April 11, 2008.

SO ORDERED.

____/s/_Gregory_W._Carman_____
Gregory W. Carman

Dated: November 20, 2007
New York, N.Y.

ERRATUM

Huvis Corp. v. United States, Court No. 06-00380, Slip-Op. 07-170, dated November 20, 2007:

Page 13, footnote 1, change “Commerce cites to” to “Huvis cites to”

January 11, 2008