

of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d)(1). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation. This administrative review and notice are in accordance with section 751(a)(1) of the Act 19 U.S.C. 1675(a)(1) and section 353.22 of the Department's regulations.

Dated: July 7, 1997.

**Joseph A. Spetrini,**

*Acting Assistant Secretary for Import Administration.*

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## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-122-047]

#### Elemental Sulphur From Canada; Final Results of Antidumping Duty Administrative Reviews

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of final results of antidumping duty administrative reviews.

**SUMMARY:** On August 30, 1996, the Department of Commerce (the Department) published in the **Federal Register** the preliminary results of the administrative reviews of the antidumping duty finding on elemental sulphur from Canada. The reviews cover the periods December 1, 1992 through November 30, 1993, and December 1, 1993 through November 30, 1994. We gave interested parties an opportunity to comment on our preliminary results. Based upon our analysis of the comments received we have changed the results from those presented in the preliminary results of review.

**EFFECTIVE DATE:** July 15, 1997.

**FOR FURTHER INFORMATION CONTACT:** Donald Little or Maureen Flannery, Antidumping/Countervailing Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482-4733.

## SUPPLEMENTARY INFORMATION:

### Background

On December 17, 1973, the Department of the Treasury published in the **Federal Register** (38 FR 34655) the antidumping finding on elemental sulphur from Canada. On November 26, 1993 and December 6, 1994, the Department published in the **Federal Register** notices of opportunity to request an administrative review of this antidumping finding for the periods December 1, 1992 through November 30, 1993 (58 FR 62326), and December 1, 1993 through November 30, 1994 (59 FR 62710), respectively.

With respect to the 1992/1993 administrative review, on December 30, 1993, Pennzoil Sulphur Company (Pennzoil), a domestic producer of elemental sulphur, requested that we conduct an administrative review of Alberta Energy Co., Ltd. (Alberta), Allied-Signal Inc. (Allied), Brimstone Export (Brimstone), Burza Resources (Burza), Fanchem, Husky Oil Ltd. (Husky), Mobil Oil Canada, Ltd. (Mobil), Norcen Energy Resources (Norcen), Petrosul International (Petrosul), Saratoga Processing Co., Ltd. (Saratoga), and Sulbow Minerals (Sulbow). On December 21, 1993, Petrosul requested revocation of the finding in part, with respect to itself. The review was initiated on January 18, 1994 (59 FR 2593).

With respect to the 1993/1994 administrative review, on December 29, 1994, Pennzoil requested that we conduct an administrative review of Alberta, Husky, Mobil, Norcen, and Petrosul. On December 28, 1994, Petrosul requested revocation of the finding, in part, with respect to itself, and, on December 30, 1994, Mobil requested an administrative review of its sales. The review was initiated on January 13, 1995 (60 FR 3193).

On August 30, 1996, the Department published in the **Federal Register** the preliminary results of these reviews of the antidumping finding on elemental sulphur from Canada (61 FR 45937). We held a public hearing on December 11, 1996. The Department has now conducted these reviews in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

### Scope of the Review

Imports covered by these reviews are shipments of elemental sulphur from Canada. This merchandise is classifiable under Harmonized Tariff Schedule (HTS) subheadings 2503.10.00, 2503.90.00, and 2802.00.00. Although the HTS subheadings are provided for convenience and for U.S. Customs

purposes, the written description of the scope of this finding remains dispositive.

The periods of review are December 1, 1992 through November 30, 1993, and December 1, 1993 through November 30, 1994. The 1992/1993 review covers eleven companies, and the 1993/1994 review covers five companies.

### Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute and to the Department's regulations are references to the provisions as they existed on December 31, 1994. Pursuant to section 291(a)(2)(B) of the Uruguay Round Agreements Act (URAA), the provisions of that Act apply only to reviews requested on or after January 1, 1995. Thus, although the 1993/1994 review was initiated after the effective date of the amendments pursuant to the URAA, those provisions do not apply to this review.

### Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results. We received case and rebuttal briefs from Pennzoil and Freeport-McMoRan Inc. (petitioners), Husky, and Mobil.

#### Comment 1

Husky argues that the Department incorrectly assigned all of the common costs for a particular Husky facility solely to liquid production when the majority of the work and the costs in that facility related to forming of sulphur for later sale. Husky argues that there are three "direct" functional units within this facility—remelt (remelting sulphur which has been poured to block), block (pouring sulphur on the ground when it cannot be sold) and forming (forming liquid sulphur into solid shapes). Husky asserts that the Department determined again in these reviews that of those three units, only the remelt and block units incur joint costs—i.e., costs applicable to the production of liquid sulphur. Husky argues that the "common" costs (e.g., cost associated with road maintenance) at the facility relate to the entire complex. Husky contends that those common costs cover all three direct functional units. Husky asserts that in its questionnaire responses in the 1992/93 and 1993/94 reviews, Husky defined all of the merchandise produced for this complex as formed sulphur. Husky contends that it was therefore unnecessary to split the common costs among the three direct functional units within the facility. Husky argues that if all of the costs, both direct and

common, were being allocated to the same product, the common cost at this facility did not need to be split by functional unit.

Husky argues that, in calculating the preliminary margin, the Department split Husky's submitted costs for the facility between liquid and formed sulphur. Husky contends that the Department correctly designated the direct cost centers as either joint or formed costs consistent with the structure of this facility and the same categories of costs incurred in another Husky facility. However, Husky argues that the Department erred by failing to allocate any common costs to formed sulphur. Husky argues that the common costs are not allocable solely to liquid, but are costs incurred to operate the three functional units. Husky asserts that allocating all of the common costs to liquid sulphur belies not only the fact that the majority of the common costs relate solely to forming the sulphur but also the Department's method of allocating the common costs at other Husky facilities. Husky argues that the Department should revise its calculation to (a) split the common costs among the direct units in this facility, and (b) allocate to liquid sulphur only the costs associated with the joint functional units.

Petitioners argue that Husky mischaracterizes the Department's treatment of the common costs at this facility, and that the Department properly treated the costs at this facility as costs common to the production of liquid and formed sulphur. Petitioners assert that the Department allocated the costs of this common cost center to liquid and formed sulphur equally on a per unit basis. Petitioners contend that the Department include the same per-unit amount of common costs in the cost of manufacturing (COM) of liquid and formed sulphur because it treated those as common costs incurred for both liquid and formed sulphur production, consistent with the Department's treatment of such costs in the 1991/92 review. Petitioners argue that the Department should reject Husky's argument that the Department should allocate the common costs to the other direct cost centers at this facility based on the costs in those cost centers.

Petitioners argue that under Husky's allocation method the per-unit COM for liquid sulphur would fall. Petitioners argue that this result would be distortive because the record shows that the cost incurred for handling and storing liquid sulphur are significant. Further, Petitioners assert that Husky incurs most if not all of these common costs regardless of whether this facility's

sulphur is formed or sold in liquid form. Thus, Petitioners argue, the per-unit COM of liquid and formed sulphur should contain the same per-unit amount of these common costs based on the total costs divided by the volume of sulphur that is sold in either liquid or solid form.

Petitioners argue that, unlike the general facilities costs of the sulphur handling at another Husky facility, the common costs in this cost center are not merely indirect overhead costs incurred for the other cost centers. In addition, Petitioners contend that the sulphur handling at this other Husky facility has a larger number of separate direct cost centers than at this facility. Petitioners argue that the Department treated certain direct cost centers as common costs allocated equivalently to liquid and formed sulphur on a per-unit basis. Petitioners argue that the Husky facility that is the subject of this comment had rail facilities and liquid off-loading capability, but that Husky identified no separate cost centers for these operations at this facility. Petitioners contend that some or all of the direct costs associated with these facilities therefore must be recorded in the common cost center. Petitioners argue that these common costs should be properly treated as common costs included in the COM of liquid and formed sulphur on an equivalent per-unit basis.

Petitioners contend that Husky's assertions regarding the nature of this facility's cost centers are unsupported by the record because Husky failed to provide a description of each cost center at this facility and to identify the costs included in each cost center, as explicitly required by the supplemental cost questionnaire. Petitioners argue that the Department should reject Husky's argument that the Department should reallocate the common costs at this facility.

*Department Position:* We agree with Husky that the "common" costs for a particular facility should be allocated to all of the direct cost centers at that facility. For the preliminary results, common (general) costs for all facilities were allocated to sulphur based on the direct cost centers which relate to the functional units within the facility. While certain cost centers were considered joint or "common" at one Husky facility and allocated equivalently to liquid and formed sulphur on a per-unit basis, these cost centers contained direct expenses which were applicable to both liquid and formed sulphur. At the facility subject to this comment, it is appropriate to treat the costs in this "common" cost

center as indirect. The other reported sulphur cost centers at this facility are direct; because this facility must incur common (indirect) expenses, it is reasonable to conclude that those indirect expenses are included in the "common" cost center. Therefore, we have treated these costs as general expenses and allocated them to all functional units of the facility based on the direct cost centers.

#### *Comment 2*

Husky argues that the Department significantly overstated the amount of depreciation applicable to the sulphur production at the facility discussed above by categorizing the "common" costs for the facility as direct costs. Husky asserts that, consistent with what it expected to be the Department's final decision in the 1991/92 review, in this review it provided a depreciation allocation based on direct costs. Husky argues that the Department accepted the depreciation figures submitted on a direct cost basis for Husky's other facilities; however, for this facility the Department altered Husky's submitted calculation, which Husky argues was entirely consistent with its calculations at its other facilities, by reclassifying the common costs for this facility from a common cost to a direct cost category.

Husky points out that it allocated depreciation on the basis of the direct costs incurred at each facility. Husky argues that, like the sulphur costs, the gas/oil costs factored into the allocation ratio were limited to the direct costs charged to the leaseholds and, accordingly, do not include the common costs associated with those functional units. Therefore, Husky argues, by adding the common cost for this facility to sulphur costs for purposes of the depreciation allocation without adding the common costs for the gas facilities to total costs, the Department significantly overstated the ratio and allocated a disproportionate share of the depreciation expense to sulphur.

Petitioners argue that, if the Department were to exclude the common sulphur handling costs at this facility as Husky argues, the percentages of depreciation allocated to the sulphur handling at this facility would be drastically reduced from those used in the preliminary results of these reviews. Petitioners argue that the Department's operating cost method for allocating facility-wide depreciation is based on the assumption that the relative operating expenses incurred in a particular part of a plant is a measure of the relative significance of the physical plant, and thus depreciation, for that part of the plant.

Petitioners argue that, under the depreciation allocation methodology adopted by the Department in the 1991/92 review, the Department included all sulphur handling costs, including indirect costs, in the calculation of relative amounts of plant-wide depreciation allocated to gas processing assets and sulphur handling assets. Petitioners assert that the Department should reject Husky's argument that without adding the common costs for gas facilities to total facilities costs for purposes of the depreciation allocation, the Department significantly overstated the ratio of direct sulphur expenses to direct facility-wide expenses and allocated a disproportionate share of depreciation expenses to sulphur. Petitioners contend that Husky failed to report liquid sulphur storage costs incurred at the gas processing facility after the point of sulphur recovery, and that a portion of the general facilities costs at that facility are therefore attributable to liquid sulphur storage. Petitioners argue that including these liquid storage costs and the associated general facilities costs in the calculation of depreciation would increase the depreciation attributable to the sulphur handling assets at this facility. Petitioners also argue that the absence of gas processing general facilities costs from the calculation of depreciation is due to Husky's failure to report those costs. Petitioners argue that this failure should not result in the exclusion of these common sulphur handling costs from the calculation of depreciation. Petitioners argue that excluding the common costs for this facility from the depreciation calculation rewards Husky for its failure to allocate depreciation by the methodology adopted by the Department in the 1991/92 review. Petitioners contend that Husky's characterization of the common costs of this facility as indirect costs is unsupported by the record, as Husky identified those costs as direct in its supplemental questionnaire responses. Petitioners argue that Husky failed to provide a description for each cost center or functional unit, and to identify the costs included in each. Petitioners contend that, in light of Husky's failure to provide this information, there is absolutely no basis for any adjustment of the Department's allocation of depreciation based on Husky's unsupported assertions.

*Department Position:* We agree with Husky. Consistent with the Department's practice in these reviews, Husky allocated depreciation based on direct costs charged to each functional unit at each facility. Husky treated these

expenses as indirect in the cost calculation submitted to the Department. Absent any evidence on the record indicating that these expenses are direct, we believe it is reasonable to treat these common expenses as indirect. Accordingly, we did not include these expenses in the allocation of depreciation. We agree that including common costs for sulphur while excluding common costs for gas results in the allocation of a disproportionate share of depreciation expenses to sulphur. Therefore, we have not included the "common" cost center for this facility in the calculation of depreciation for these reviews.

#### *Comment 3*

Husky argues that the Department inadvertently included the block costs from one facility in the calculation of the costs of another Husky facility for the 1993/94 review. Husky argues that there is no basis to have done so. Husky argues that the Department must therefore deduct these expenses in the final results.

Petitioners argue that the Department determined in the preliminary results that "[s]ince [this facility] poured sulphur to block during this review period, and did not report block storage costs, we have added to the COM for [this facility] the block storage costs and depreciation expense calculated for the [other facility]." Petitioners argue that the record establishes that the Department's determination was entirely proper. Petitioners assert that block storage was not listed among the direct cost centers identified for the particular facility. Petitioners argue that the Department should not assume that a particular reported cost relates to pouring sulphur to block given Husky's failure to describe these costs as required by the Department's cost deficiency questionnaire. Petitioners argue that, accordingly, the Department should continue to include the block storage costs from the other facility in the cost calculation for this facility.

*Department Position:* We disagree with Husky. The record shows that the facility in question incurred block storage costs. As noted by petitioners, we stated in the preliminary analysis memo that because block storage costs were not reported for the one facility, we used the block storage cost and depreciation allocated to block storage calculated for another Husky facility as best information available (BIA) and added it to the COM for the one facility for which Husky did not report block storage costs.

#### *Comment 4*

Husky argues that the Department's resort to BIA for a particular facility has no basis in fact or law. Husky contends that it explained in the 1991/92 review and subsequent reviews that, unlike its production at other facilities, sulphur formed at this facility was not actually produced by Husky. Husky argues that the sulphur at this facility is purchased from another company's gas production. Husky asserts that, in the 1991/92 review, it supplied the Department with all of its data from this facility and the Department refused to consider that data. Husky argues that the Department's decision to disregard its 1991/92 determination and impose BIA on Husky in these reviews was based in large part on the Department's mischaracterization of its prior decision to exclude that facility's costs. Husky contends that what the Department fails to mention in trying to distinguish 1991/92 from the reviews at issue here is that Husky did not base its reported costs at that facility in the 1991/92 review solely on its purchase price. Husky argues that it also provided the Department with lease statistics which Husky argues the Department was uninterested in using to account for that facility's costs. Husky argues that as it prepared questionnaire responses for the subsequent reviews, it had no reason to believe that the Department's position would change with regard to this facility, particularly when the facts did not.

Furthermore, Husky argues that, had the Department asked specifically for this facility's costs in these reviews, Husky would have provided whatever data was available, exactly as it had done in 1991/92. Husky asserts that the Department's request that Husky account for the costs of 90% of its production is not the same as a request for this particular facility's costs. Husky contends that the record in this case delineates clearly Husky's internal distinction between sulphur that is produced from Husky's own oil and gas and purchased sulphur. Husky argues that it is undisputed that purchased sulphur is not considered production by Husky in the normal course of business. Husky argues, "[b]efore [Commerce] may find any non-compliance on the part of the parties to the proceeding, there must be a clear and adequate communication requesting the information." *Usinor Sacyr, Sollac, and GTS v. United States*, 872 F.Supp. 100, 1010 (CIT 1994). Husky argues that as a matter of law, therefore, the Department's failure to distinguish its rejection of Husky's data from this

particular facility in the prior review or, under the circumstances, to make its request for the identical data more precise, limits the Department's discretion to penalize Husky with BIA, cooperative or otherwise. Accordingly, Husky argues that, as in 1991/92, this facility should be excluded from the analysis.

Husky argues that even if the Department's request for this facility's costs had been clear, allocating the highest costs to this facility is not reasonable. Husky asserts that the Department's statutory mandate with respect to calculating costs and constructed value is to base those calculations on the actual costs incurred. Husky contends that this edict does not wane merely because a respondent fails to spell out every nuance of its costs. Husky argues that even if the Department resorts to cooperative BIA, the Department is not relieved of the obligation to make an inference reflective of the respondent's actual costs (*i.e.*, a neutral inference). Husky argues that assuming the Department did make a clear request for this facility's data in these reviews, the Department was by no means compelled to penalize Husky by allocating to this facility the highest costs of any of Husky's facilities. Husky argues that the Department should determine the weighted-average cost of Husky's other reported facilities and allocate that per-unit cost over the volume of sulphur which flows through this particular facility. Husky asserts that the Department would, at the very least, calculate a weighted-average cost reflective of the apparent differences in Husky's various facilities and Husky's actual costs.

Petitioners argue that, regardless of what occurred in the 1991/92 review, the Department clearly required Husky in this review to report costs at all facilities accounting for 90% of Husky's sulphur production. Petitioners contend that, as the Department found, Husky's submitted sulphur production volume data show that it was necessary to report this facility's cost to satisfy that requirement. Petitioners argue that this facility's sulphur is Husky production under any normal definition of production. Petitioners assert that Husky owns and operates the facility's sulphur handling facilities, and thus incurred sulphur production costs under the Department's methodology. Moreover, Petitioners argue, in the cost deficiency questionnaire, the Department specifically requested that Husky provide the 1994 operating statements for this facility. Petitioners assert that by requesting the operating

statement for this facility, the Department not only clearly indicated that it considered costs at this facility necessary in this review, but that it required Husky to report those costs because this facility's operating statement contains sulphur handling costs.

Petitioners dispute Husky's claim that even if the Department's request for this facility's costs was not clear, assigning the highest COM calculated for any other Husky plant to this facility is not reasonable and the Department should instead base the cost at this facility on the weighted-average cost of the other Husky facilities. Petitioners argue that the Department's established practice is to use adverse BIA when a respondent fails to provide necessary and requested information; otherwise, respondents would have no incentive to provide information. Petitioners note that Husky cites the recent amendments to the statute for the proposition that the Department's statutory mandate with respect to calculating costs and constructed value is to base those calculations on the actual costs incurred. Petitioners argue that, in this case, Husky prevented the Department from calculating its cost of production and constructed value based on the actual costs Husky incurred by withholding its production costs at this facility. Furthermore, Petitioners assert that, in the recent amendments to the statute, Congress codified the Department's adverse BIA practice and added a provision that specifically permits the Department to make adverse inferences when a party fails to cooperate by withholding requested information, as Husky did in this review. Therefore, Petitioners argue, the Department should apply adverse BIA to determine costs at this facility.

*Department Position:* We disagree with Husky. It was appropriate for the Department to apply BIA to this particular facility because Husky failed to report costs for the facility. As the petitioner noted, we specifically asked for the operating statements for this facility in the supplemental cost questionnaire. We also asked for costs for facilities accounting for 90% of Husky's sulphur production. Although Husky purchased the sulphur from another company's gas production, the record shows that Husky owns and operates the sulphur handling facilities. As the Department determined in the 1991/92 review, the sulphur costs which should be reported are the sulphur handling costs (*i.e.*, those sulphur costs incurred after the sulphur recovery unit). Husky incurs these costs for the sales of its sulphur from this

facility. Therefore, sulphur from this facility would be considered Husky production and the costs should have been reported as Husky reported the production volume from this facility. Because the costs from this facility were not used in a previous administrative review does not mean that Husky can unilaterally decide that such costs need not be reported in another administrative review of the same case, especially when Husky was requested specifically to report such costs.

We agree with petitioners that the COM applied to the production from this facility should be adverse since Husky did not report the required cost, but disagree that we should use the highest cost for each component of the COM from the other Husky facilities to determine the COM for this facility. Therefore, we have continued to apply the highest COM from a facility which was reported to this facility's production volume.

#### *Comment 5*

Husky argues that the costs of pouring liquid sulphur to block are not logically allocated to sulphur production. Husky argues that, in the preliminary decision in these reviews, the Department allocated sulphur block costs at a particular Husky facility over the total of the volume of sulphur poured to block and the volume of liquid and formed sulphur produced. Husky argues that the Department did not allocate sulphur handling costs over this same volume. Husky asserts that the Department ignored the block volumes in allocating the sulphur handling costs but then included block volumes in weight averaging the COM. Husky contends sulphur poured to block cannot be sulphur production for purposes of weighing costs if it is not production for purposes of allocating those costs. Husky argues that sulphur block is a cost associated with Husky's primary operations of oil and gas production. Husky argues that it pours sulphur to block to produce natural gas and/or oil. Husky argues that the costs incurred to pour sulphur to block are indistinguishable from costs incurred to convert corrosive hydrogen sulphide to elemental sulphur. Husky contends that, while the Department has said that Husky's block costs should be allocated to sulphur because Husky has the choice of either selling the liquid sulphur, forming it for overseas sale, or pouring it to block, Husky's only real choice is to sell the sulphur. Husky argues that if it does not sell the sulphur it must either cease natural gas or oil production or pour the resultant sulphur on the ground. Husky asserts

that the Department itself acknowledged in the prior review that ceasing gas/oil production is not a realistic choice.

Further, Husky argues that the fact that it maintains no inventory value for block sulphur and has not remelted significant volumes of block in years undermines the inference that Husky pours sulphur to block as a means of long-term storage. Husky contends that it pours to block as a means of disposal, the only means currently available to Canadian gas/oil producers. Husky argues that the Department's decision to allocate block costs to sulphur is further complicated by the fact that sulphur is not sold at many Canadian gas/oil facilities but instead poured to block as an unavoidable consequence of gas/oil production. Husky contends that sulphur handling facilities do not exist at some plants and the sulphur must be poured to block because it cannot be sold. Husky argues that for the Department to allocate block costs to sulphur at a plant that contains sulphur handling facilities, yet ignore block costs incurred at facilities where there are no sulphur handling facilities, is inconsistent with the Department's prior decision to make cost determinations on a company-wide basis. Husky argues that block cost is either a gas/oil cost or a sulphur cost, and that if a facility cannot allocate the cost over sulphur (because none is sold), the cost allocation methodology will invariably differ from facility to facility. Husky argues that, based on these inherent inconsistencies, the Department should eliminate the block cost from the sulphur cost and treat the cost as a cost of Husky's primary operation.

Petitioners argue that the Department unequivocally rejected Husky's argument that block storage costs should be associated with oil and natural gas production in the final results of the 1991/92 review. Petitioners argue that Husky has not raised any new arguments or cited new facts that would warrant reconsideration of this determination. Petitioners contend that, although Husky claims that it pours sulphur to block as a means of disposal, Husky has publicly acknowledged that its sulphur storage facilities are designed to enable it to stockpile sulphur for later sale. Petitioners contend that, in light of the foregoing, the Department should reject Husky's argument that its sulphur block storage costs should not be attributed to sulphur production.

**Department Position:** We disagree with Husky. Consistent with the Department's decision in the 1991/92 review, we determined that block costs are appropriate to include as part of the

cost of producing sulphur. We stated, in the 1991/92 review, that:

\* \* \* inclusion of the direct operating and general facility costs related to sulphur block storage in CV is appropriate \* \* \* all costs incurred after the liquid sulphur recovery unit relate to the production of sulphur. At this point in the production process, Husky has the choice of either selling the liquid sulphur, forming it for overseas sale, or pouring it to block for long-term storage. All of these choices relate to selling sulphur, either currently or in the future. Accordingly, we consider it appropriate to include, as part of the cost of producing sulphur, all costs incurred in the block storage lease.

*Elemental Sulphur From Canada; Final Results of Antidumping Finding Administrative Review, 61 FR 8239 (March 4, 1996) (1991/92 Final)*

Husky has not raised new arguments or presented new evidence that would warrant a reconsideration of this determination.

We disagree with Husky that the Department would be inconsistent with its decision to make cost determinations on a company-wide basis by including the block from some facilities and ignoring block costs from facilities which do not have sulphur handling facilities. Because sulphur poured to block must be remelted and then processed through either liquid or forming facilities before it can be sold, block sulphur is not considered finished production. We required Husky to account for at least 90 percent of its total production volume in reporting costs. A facility which does not have sulphur handling facilities and, therefore, does not produce sulphur for sale, would not be a facility Husky was required to report. Therefore, the Department would not be inconsistent because the weighted-average cost of manufacturing of sulphur would include the sulphur costs from facilities representing 90 percent of Husky's sulphur production as required.

#### *Comment 6*

Husky argues that if the sulphur poured to block is considered production, as the Department preliminarily decided in these reviews, it should be treated consistently. Husky contends that either sulphur poured to block must be considered a separate type of liquid sulphur, with only block costs allocated to the block production, or, at the very least, the total costs incurred for sulphur production at a particular facility must be allocated over total production, including the quantity of sulphur poured to block. Husky argues that, in its cost responses in the current reviews, it allocated the costs charged to the functional unit associated

with block over the total sulphur handling throughput and block production. Husky maintains that the remaining costs were allocated over the sulphur handling throughput quantity to arrive at a single cost for marketable sulphur. Husky argues that it used the sulphur handling throughput quantity in the calculation of the weighted-average cost for all Husky-produced sulphur. Husky argues that because block sulphur does not flow through any units other than the sulphur block leasehold, it is in effect, a different product and accordingly Husky calculated a separate per-unit cost for this product. Husky argues that if block sulphur is to be considered production at all, it should be defined as a separate product with separate costs. Husky argues that, under that approach, only the costs of the lease associated with block costs would be charged to block sulphur. Husky contends that, if block sulphur is not treated as a separate liquid product, the Department must reallocate all costs over the block and sulphur handling throughput volumes. Husky contends that it is a well-established principle of accounting that costs increase when throughput decreases. Accordingly, Husky contends, if the block volume had been processed at the sulphur handling facility the cost would have decreased significantly. Husky argues that the Department's failure to allocate all sulphur production costs over the total of block volume and sulphur handling throughput volume and its decision to include the block volume in weight averaging the COM significantly distort the facility's actual costs and must be remedied.

Petitioners assert that, contrary to Husky's allegations, there is nothing inconsistent about the Department's treatment of block storage volume. Petitioners argue that it is the Department's longstanding practice to calculate the weighted-average COM based on the respondent's production volume at each facility whose costs are included in the weighted-average COM. Petitioners argue that the volume of liquid sulphur production at a plant is the volume of liquid sulphur produced, regardless of whether that sulphur is sold in liquid form, formed for the purpose of overseas shipments, or inventoried in block form for later sale. Petitioners contend that contrary to Husky's argument that block sulphur inventory is not marketable, the Department determined in the 1991/92 review that liquid sulphur poured to block has inventory value and that Husky has publicly acknowledged its

sulphur storage facilities are designed to enable it to stockpile sulphur for later sale. Accordingly, petitioners argue, the Department properly included block volume in its calculation of the weighted-average COM of Husky sulphur.

Petitioners argue that the Department calculated per-unit sulphur handling costs in a manner that is both logical and consistent with its longstanding practice. Petitioners assert that the Department calculated per-unit sulphur handling costs by dividing the total cost incurred at each sulphur handling leasehold by the quantity of sulphur passing through that leasehold. Petitioners assert that this approach properly recognizes that direct operating costs are a function of throughput. Petitioners contend that the record establishes that the sulphur poured to block passes exclusively through the sulphur block leasehold and does not pass through the other sulphur handling leaseholds. Petitioners argue that volumes that do not pass through the sulphur handling leaseholds cannot be included in the calculation of per-unit costs; to do so would artificially reduce Husky's per-unit sulphur handling costs. Petitioners argue that Husky's claim that per-unit direct operating costs at the various sulphur handling leaseholds would decrease if block volume were to pass through them is purely speculative. Petitioners assert that, as throughput increases, total operating costs will increase as well. More importantly, petitioners assert, if the Department were to adopt Husky's methodology and include the volume poured to block in calculating per-unit sulphur handling costs, the portion of sulphur handling costs allocated to block storage would never be included in the COM of sulphur. Petitioners argue that block sulphur is sold only after it is remelted and because the costs of the block storage are not included in the costs of remelting block sulphur, the portion of sulphur handling costs allocated to the quantity of sulphur poured to block would never be captured.

Petitioners contend that Husky's argument that the Department should treat block sulphur as a separate product would be directly inconsistent with the Department's treatment of block storage costs in the 1991/92 review. Petitioners assert that there is no legal or factual basis for treating block sulphur as a separate product. Petitioners contend that Husky's proposed treatment of block storage costs artificially reduces the COM of sulphur.

*Department Position:* We have determined that block storage costs are

appropriately included in the cost of producing sulphur and that sulphur poured to block is not considered production. See our response to comment 5. Further, we do not consider sulphur poured to block to be a separate liquid sulphur product. Because we do not consider sulphur poured to block sulphur production, we have not included the volume of sulphur poured to block in allocating sulphur costs and weight-averaging the COM, and, therefore, have not allocated any sulphur costs to sulphur poured to block.

#### *Comment 7*

Petitioners argue that Husky's failure to report crucial data and to follow the Department's methodology in calculating the COM and constructed value (CV) of its sulphur requires the use of total BIA to establish Husky's margin. Petitioners contend that the statute requires the Department to use BIA "whenever a party \* \* \* refuses or is unable to produce information requested in a timely manner and in a form required, or otherwise significantly impedes an investigation." Section 776(c) of the Act.

Petitioners argue that, in view of the wholesale nature of Husky's failure to report required cost data and its general failure to follow the Department's methodology in calculating the COM and CV of its liquid and formed sulphur despite the Department's repeated explicit instructions to do so, the Department must resort to total (not partial) BIA for Husky. Petitioners assert that the Department applies partial BIA when a respondent's submission is deficient in limited or minor respects but as a whole is still considered reliable. Petitioners contend that the deficiencies in Husky's reported data are not limited or minor. First, petitioners argue that Husky failed to provide its production volume of liquid sulphur at all facilities, as required by the cost and supplemental cost questionnaires. Second, Husky did not provide the sulphur handling, storage and forming costs for the facilities accounting for 90% of its liquid and formed sulphur production. Third, Husky excluded the liquid sulphur handling costs at a particular facility from its weighted-average COM for liquid sulphur. Fourth, Husky did not include in its reported costs all of the sulphur production costs required by the Department's methodology, including costs associated with liquid storage at a particular facility. Fifth, Husky did not provide requested information to support the sulphur costs it elected to provide. Sixth, Husky did

not follow the Department's methodology in allocating plant-wide depreciation expenses to sulphur and natural gas, and did not directly assign the cost of very significant sulphur handling assets to sulphur. Finally, Husky reported a COM for liquid sulphur that is based entirely on one particular facility. Petitioners argue that in such circumstances the Department does not apply partial BIA.

Petitioners argue that, in the 1993/94 review, Husky reported a weighted-average COM and a CV for liquid sulphur in this review which is less than the public CV reported in the 1991/92 review, which the Department adjusted upward.

Petitioners argue that Husky has not claimed its real sulphur production costs have decreased. Accordingly, petitioners assert, using the same methodology in this review as in the 1991/92 review should yield comparable CVs. Petitioners argue that Husky failed to even offer an explanation for the massive decrease in its reported costs in this review period. Petitioners argue that the enormous reduction in Husky's reported CV is in part attributable to identifiable fundamental deficiencies in Husky's reported data.

Petitioners argue that, in selecting total BIA, the Department applies its established two-tier methodology. When a respondent submits questionnaire responses but fails to provide the information in a timely fashion or in the form required, Husky notes, the Department will normally assign to that company the higher of (1) the highest rate ever applicable to that company from the less-than-fair-value investigation or a prior administrative review, or (2) the highest calculated rate in the current review for any respondent. Petitioners assert, however, that the Department is not constrained by this methodology, particularly when use of an alternate source is necessary to make adverse inferences sufficient to induce cooperation and ensure that the application of BIA does not reward noncompliance. Petitioners argue that the 1992/93 review presents such a case. Petitioners contend that applying the Department's sulphur cost methodology to the 1992/93 data reported by Husky, even without the costs Husky failed to provide, shows that the margin is dramatically higher than the highest rate previously assigned to Husky. Petitioners urge the Department to continue to apply its cost methodology to Husky for the final results, but as total BIA, making appropriate adverse inferences where Husky failed to provide requested information.

Petitioners assert that the Department only departs from its two-tier methodology in limited circumstances, *i.e.*, where the application of that methodology would reward a respondent's noncompliance and therefore would not induce cooperation. Petitioners assert that such circumstances are not present in the 1993/94 review and that the Department departed from its two-tier method in establishing what petitioners term a BIA margin for Husky in the preliminary results. Petitioners argue that, if the Department calculates a rate for Husky in the 1992/93 review which is at all reflective of the actual margin, that rate will be the highest for Husky in any current or any preceding segment of this proceeding. Therefore, petitioners claim, that rate will be the proper rate to assign to Husky in the 1993/94 review under the two-tier methodology, even if Husky is deemed to be a cooperative respondent in the 1993/94 period. Petitioners urge the Department to assign to Husky, for the 1993-94 period, the rate calculated for Husky for the 1992-93 period. Petitioners contend that responses in the 1993/94 review are at least as deficient as in the 1992/93 review yet the BIA margin in the 1993/94 review for Husky is less than one-third the margin for Husky in the 1992/93 review. Petitioners argue that Husky has no incentive to report its complete sulphur costs as required if the Department departs from its normal two-tier methodology and calculates a margin for Husky.

Husky argues that there is no basis for imposing any BIA penalties on Husky. Husky asserts that, as the Department recognized in preparing the preliminary decision, Husky provided more than sufficient data for calculating Husky's cost of production. Husky cites the preliminary results of these reviews where the Department stated, " \* \* \* we are able to calculate a margin for Husky in each review using data which has been provided \* \* \*." Husky contends that petitioners' request that additional BIA be applied or total BIA replace Husky's verifiable responses has no basis in law. Husky asserts that it is well established that the Department will rely on information submitted by the respondent even if the Department must make small adjustments to the data. *See, e.g., Certain Fresh Cut Flowers from Mexico; Final Results of Antidumping Administrative Review*, 57 FR 19597 (1992); *Final Determination of Sales at Less Than Fair Value: Certain Small Business Telephone Systems and Subassemblies Thereof from Taiwan*, 54 FR 42543 (1989). Moreover, Husky notes

that the Department has stated: "in cases where the respondent has substantially cooperated with the Department \* \* \*, we [the Department] do[es] not typically apply total BIA, but rather partial BIA to the particular deficiencies in a respondent's questionnaire response." *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Administrative Review*, 61 FR 20216 (1996). Husky argues that it provided all data necessary for the Department's analysis and to the extent that data required the Department's adjustment, the Department had the requisite information.

**Department Position:** We agree with Husky that total BIA for Husky is not warranted. Husky has cooperated with the Department and provided sufficient information for the Department's analysis. In comments 8 through 12, we have discussed the particular deficiencies alleged by petitioners. The Department's two-tier methodology does not apply in cases where we are applying partial BIA to particular deficiencies in a respondent's questionnaire responses, and therefore is inapplicable here. Thus, there is no question of the Department departing from its standard two-tier methodology in this case. In those instances where sufficient information was not provided, we applied partial BIA.

Petitioners' comparison of Husky's public CV figure for 1991/92 with its CV for 1993/94 is irrelevant. Each review is based on the facts specific to that review, and it is not unreasonable to conclude that Husky's costs changed significantly from one period to the next.

#### Comment 8

Petitioners argue that the Department failed to account for sulphur general facilities costs in the calculation of depreciation expenses for Husky. Petitioners assert that in the 1991/92 review the Department included the general facilities costs assigned to sulphur and general facilities costs assigned to natural gas in the calculation of the relative amounts of plant-wide depreciation allocated to gas processing assets and sulphur handling assets. Petitioners argue that the Department failed to account for the sulphur general facilities costs in the calculation of depreciation expenses in the preliminary results. Petitioners argue that the department may have decided to depart from the 1991/92 methodology because Husky failed to report the general facilities costs it

assigned to natural gas. Petitioners argue that this failure to report the natural gas general facilities costs should not result in the exclusion of the sulphur general facilities costs from the calculation of depreciation. Petitioners argue that the failure to account for the sulphur general facilities costs in the allocation of depreciation between sulphur and natural gas results in a misallocation of plant-wide depreciation expenses and rewards Husky for failure to provide the general facilities expense assigned to natural gas. Petitioners contend that this result runs contrary to the Department's BIA practice which holds that the application of BIA must be adverse and cannot reward a respondent for failing to provide requested information.

Husky argues that the exclusion of general facilities costs in the calculation of depreciation in no way distorts the allocated ratio. Husky contends that, because it does not maintain a separately identifiable depreciation expense for sulphur handling assets, it was necessary for Husky to allocate a portion of plant-wide depreciation expenses to sulphur. Husky maintains that for that reason, it allocated depreciation at all of its reported facilities on the basis of sales value and, alternatively, on the basis of direct operating costs. Husky asserts that the Department accepted Husky's cost-based allocation and then applied the ratio in its preliminary decision. Husky argues that petitioners suggest that the Department add the general facilities expenses allocated to sulphur to the total cost figure for sulphur handling and add no equivalent gas/oil general facilities expenses to the total cost figure for the gas/oil plant. Husky contends that petitioners suggest this as punishment for Husky's failure to provide general facilities expenses related solely to gas and oil. Husky contends that gas/oil costs were not requested or needed by the Department in this review and are not subject to this or any other dumping order. Husky maintains that it cannot be penalized for its interest in protecting information sensitive to its primary commercial operations and outside the scope of the Department's jurisdiction. Husky asserts that, as the Department verified in the 1991/92 review and Husky explained in detail in a separate letter to the Department, separate general facilities expenses are maintained for sulphur handling at one of Husky's facilities. Husky argues that the Department has no basis to knowingly distort the calculation of depreciation by adding a cost to the numerator (sulphur handling costs) without making a corresponding



adjustment to the denominator (plant-wide costs). Husky maintains that its exclusion of the general facilities expenses in the allocation does not distort the resultant ratio. Husky argues that it excluded general facilities expenses from both the total, plant-wide direct cost figure and from the sulphur direct cost total. Husky argues that its allocation is reasonable and undistorted.

*Department Position:* We agree with Husky. Excluding the general facilities expenses from the allocation of depreciation is not distortive and is reasonable. The general facilities expenses are indirect costs incurred to operate the plant which are not directly related to a particular function or product. When separate depreciation is not maintained for particular assets, using direct costs as the basis for the allocation of depreciation is reasonable. Even if we were to include indirect expenses in the allocation of depreciation, including the general facilities expenses related to sulphur handling while excluding general facilities expenses related to oil/gas from the calculation would be distortive. Therefore, we are continuing to use direct costs to allocate plant-wide depreciation for the final results.

#### *Comment 9*

Petitioners argue that the Department understated depreciation for a particular complex. Petitioners assert that Husky failed to report whether it records separate depreciation for sulphur assets at that complex, including sulphur handling and storage facilities at Facility X and the pipeline connecting the gas plant to the sulphur handling facility. Petitioners assert that, in the 1991/92 review, the Department determined that it is distortive for antidumping purposes not to assign sulphur handling costs to sulphur, even if the respondent does not assign these costs to sulphur in its normal accounting records.

Petitioners argue that, in light of this failure, the Department should conclude, in accordance with its BIA practice, that separate depreciation expenses are recorded. Petitioners contend that the correct amount of depreciation for the pipeline greatly exceeds the amount allocated by the Department and that such an allocation is distortive. Petitioners argue that, for the final results, the Department should recalculate the depreciation expenses for this complex by (1) reducing Husky's share of total depreciation at this complex by Husky's share of depreciation on the pipeline and (2) attributing Husky's share of

depreciation on the pipeline exclusively to sulphur production.

Furthermore, petitioners argue that Husky failed to report liquid storage costs at this complex. Petitioners contend that as a result of this failure, less of the complex-wide depreciation expenses at this complex are being allocated to sulphur production than would be the case if Husky had reported these costs. Petitioners argue that the Department should require Husky to report the liquid storage costs at this facility and should include such costs in the sulphur costs used in allocating plant-wide depreciation and in its calculation of COM and CV of Husky's liquid and formed sulphur in the final results.

Husky argues that the Department overstated depreciation at this facility. Husky argues that petitioners assumes that Husky allocates a separate depreciation expense for sulphur handling at this facility in the normal course of business and should, therefore, not be permitted to allocate the cost. Husky asserts that it submitted actual costs to the Department and certified the reliability of that data to the Department. Husky argues that it clearly stated that "[d]epreciation is not allocated to any products in the normal course of business." March 1, 1996 Husky Supplemental Questionnaire Response. Husky maintains that it cannot produce a separate depreciation expense for sulphur handling at this facility if one does not exist.

Husky contends that it has reported all of the costs associated with sulphur handling at this facility, including its portion of the sulphur pipeline. Husky argues that a newspaper article describing this facility generally, and cited by petitioner in support of its argument in no way substitutes for Husky's certified submissions of factual data. Husky asserts that the numbers that appear in that article are not recorded or in any way related to Husky's books and cannot be verified by the Department and that the Department cannot base Husky's depreciation expense on a newspaper article when Husky has provided actual data. Husky argues that the depreciation at that facility was actually overstated because the Department included certain indirect, general facilities expenses in the allocation of depreciation. Husky asserts that the Department should recalculate the expenses in accordance with the allocation in Husky's case brief and supplemental cost response. See comment 2.

*Department Position:* We agree with Husky. The record does not indicate that Husky maintains a separate

depreciation expense for the sulphur handling facility at this particular facility. We agree with Husky that there is no basis in these reviews to use information from a newspaper article rather than information submitted by the respondent which is subject to verification. Therefore, it was appropriate for Husky to allocate depreciation to sulphur handling at this facility based on costs.

#### *Comment 10*

Petitioners argue that the Department failed to use appropriate BIA for the COM for a sulphur-producing facility for which Husky failed to report costs. Petitioners point out that the Department used the highest COM calculated for a facility for which Husky reported cost data and applied that COM to this facility. Petitioners contend that, under the Department's established practice the COM of sulphur produced at the facility for which Husky did not report costs is considered higher than the COM of sulphur produced at the facilities for which Husky elected to provide cost data. (Otherwise, petitioners assert, Husky would have reported cost data for this facility.)

Furthermore, petitioners argue, Husky incurred liquid loading and block storage costs (plus associated depreciation expenses) at the facility during the period of review (POR), and the COM calculated for the liquid sulphur facility which the Department used as BIA did not include amounts for these expenses. Petitioners argue that, accordingly, the Department improperly excluded costs that the record demonstrates were incurred at the facility in question. Petitioners assert that the Department has recognized that a calculated BIA margin may not exclude costs that the record shows the respondent incurred, citing the *Notice of Amended Preliminary Determinations of Sales at Less Than Fair Value: Antidumping Duty Investigations of Pure and Alloy Magnesium from The Russian Federation and Pure Magnesium from Ukraine*, 60 FR 7519, 7520 (February 8, 1995). Petitioners argue that, in light of the fact the COM for this facility is presumed to be higher than the calculated COMs and the fact that the calculated liquid sulphur COM used by the Department as BIA does not include the costs of liquid loading, block storage and associated depreciation expenses incurred at the facility, the Department should recalculate COM for this facility by using the highest costs on record for each component of the COM of liquid sulphur as calculated at other Husky facilities for the final results.



Husky argues that it did not "elect" facilities for which to report costs. Husky contends that it responded to the Department's request for costs accounting for 90% of Husky's production. Husky asserts that, based on the Department's lack of clarity regarding this facility and refusal to accept Husky's full and verifiable cost data at that facility in the 1991/92 review, Husky did not provide costs at that facility in this review. Husky argues that, given the confusion regarding the term "production" in this case and conflicting messages concerning the Department's interest in costs at this facility, there is no basis for inflating Husky's costs as petitioners suggest. Husky argues that the Department should reverse its decision to impose any BIA at this facility and to penalize Husky for confusion which Husky did not create.

**Department Position:** We disagree with petitioners and, in part, with Husky. Husky should have reported the costs for this facility. In the supplemental cost questionnaires of February 2, 1996, we stated that Husky must account for at least 90% of its total production volume in reporting its costs. Furthermore, in those supplemental cost questionnaires, we specifically asked Husky to provide the operating statements for this facility:

Please provide the 1993 operating statements for [ ]. If no operating statements are prepared for the facilities, or if such statements do not exist, provide complete expense, revenue, and production data, and provide copies of all internal management reports showing revenues, expenses, and production volumes of all products manufactured by the facilities during 1993.

**Supplemental Questionnaire** Concerning the 1992/93 Administrative Review of the Antidumping Duty Finding on Elemental Sulphur from Canada, February 2, 1996. Language in the supplemental questionnaire for the 1993/94 period includes the same language, but requests information for 1994. The name of the facility under discussion in this comment appears in brackets in both questionnaires.

Furthermore, our decision not to use costs from this facility during the 1991/92 review period was based on the facts of that review, and in no way negates our requests for information regarding the facility in subsequent reviews, or precludes us from using the costs from that facility in future reviews. Further, use of the highest calculated COM from among facilities for which Husky reported costs is sufficiently adverse.

#### *Comment 11*

Petitioners argue that the Department should exclude the production costs from a certain Husky facility from the weighted-average COM for the final results. Petitioners assert that Husky 1) failed to report labor costs for the sulphur handling facility, and 2) did not state whether the total depreciation amount determined for this particular facility was allocated to particular sections in the normal course of business, so that the Department cannot determine whether Husky records separate depreciation for the sulphur handling facility. Petitioners argue that, by utilizing this facility's cost, the Department permits Husky to manipulate foreign market value by self-selecting the facilities for which it is willing to provide cost data. The inclusion of this facility in the calculation of weighted-average COM, petitioners argue, further rewards Husky's failure to provide cost data for the facility discussed in Comment 10.

Petitioners assert that, if the Department continues to include this facility's production costs in the calculation of the COM and CV of Husky's sulphur, it should adjust the reported production volume so that it reflects only Husky's share of the facility's production. Petitioners contend that, in the preliminary results calculations, the Department erred by using the total volume of liquid and formed sulphur sold at the facility, rather than Husky's share of total production, in its calculation of the weighted-average COM of Husky's liquid sulphur.

Husky argues that the costs at this particular facility are legitimate and relevant to these reviews. Husky contends that Petitioners have themselves pointed out that it is established Department practice to calculate a weighted-average COM for subject merchandise based on the respondent's costs at all plants producing the subject merchandise. Husky argues that the Department must reject what it characterizes as petitioners' attempt to manipulate the Department into inflating and distorting Husky's verifiable, weighted-average costs.

**Department Position:** We agree with Husky that it is the Department's practice to calculate a weighted-average COM for the subject merchandise based on the respondent's costs at all plants producing the subject merchandise. Therefore, we will continue to include costs from this facility in our calculation of the weighted-average cost of Husky's sulphur production. However, we agree

with petitioners that, in calculating that weighted-average cost for the preliminary results, we erred in assigning to this facility a weight based on all sulphur production at the facility; for the final results, we have assigned it a weight based on Husky's share of sulphur production at the facility, as we have done with other facilities in our calculation.

#### *Comment 12*

Petitioners argue that the Department should make two adjustments to the calculation of Husky's general and administrative (G&A) expenses. First, the Department should exclude Husky's nonoperating income in its calculation of Husky's G&A expenses. Petitioners contend that Husky improperly offset its G&A expenses with nonoperating income which consists of rental income (for both review periods) and gains realized on the disposal of certain unidentified assets (for 1993/94). Petitioners assert that rental income represents income from a separate line of business and, in accordance with Department practice, should not be deducted from G&A expenses. Petitioners argue that, because there is no evidence on record that the gains realized on the disposal of certain assets were realized on the sale of sulphur assets and thus were linked to the production of subject merchandise, those gains should not be deducted from G&A.

Petitioners argue that Husky failed to explain why reducing its G&A expenses with non-operating income is appropriate. Petitioners contend that it is Department practice, which has been upheld by the Court of International Trade, to require respondents to bear the burden of proving their right to adjustments. *Koyo Seiko v. United States*, Ct. No. 93-08-00448, slip op. 95-171 (CIT 1995); *NSK, Ltd. v. United States*, 825 F. Supp. 315, 321 (CIT 1993).

In addition, petitioners contend that the Department improperly failed to include, in the calculation of G&A expenses for Husky, G&A expenses incurred by Husky on behalf of its parent, Husky Oil Operations Ltd. (HOOL).

Husky contends that the Department properly included Husky's nonoperating income in, and excluded certain G&A expenses from, the calculation of Husky's G&A expenses. Husky argues that it reported G&A expenses in this review in accordance with the Department's decision in the 1991/92 review. Husky contends that, in that review, the Department included the nonoperating income amount for rental

income, after verifying that associated expenses were included in the reported cost. Husky contends that the Department was not concerned with inclusion of the rental income, as can be seen from the public verification report in that review. Husky argues that petitioners' general discussion of Department practice disregards the Department's practice in this case, the most relevant of the Department's recent decisions.

Husky maintains that the Department also determined in the 1991/92 review that it was unnecessary for Husky to include in G&A the G&A expenses considered to be insignificant. Husky maintains that, contrary to petitioners' understanding, HOOL performs all sale related services for Husky, which is the corporate parent. Husky argues that, based on the Department's decision to exclude the G&A expense incurred by Husky, the corporate parent, in the prior review and the overall insignificance of the expense, the Department should reject petitioners' request to include it.

**Department Position:** We agree with Husky. For these reviews, Husky reported that these non-operating expenses were related to production. Because we have no evidence to the contrary, we have continued to include these items in the calculation of G&A.

Because sales of subject merchandise are handled by HOOL, a portion of G&A incurred by HOOL is relevant to sulphur production. The corporate parent, Husky, does not maintain its own personnel and the portion of Husky G&A expenses which are not incurred by a Husky subsidiary and which could be allocated to sales of all Husky merchandise including sulphur is not significant in these reviews. Therefore, we have continued to exclude the G&A incurred by Husky from the calculation of G&A allocated to sulphur.

#### Comment 13

Petitioners argue that the Department should include at least a portion of sulphur recovery costs in its calculation of the COM and CV of Husky's sulphur. Petitioners argue that the Department should require Husky to report the costs of sulphur recovery at each of the facilities for which it reported costs, in accordance with: (1) 19 U.S.C. section 1677b(e)(1)(A), which expressly requires that the cost of "fabrication or other processing of any kind" be included in CV; (2) generally accepted cost accounting principles, which require all post-split-off costs to be included in the cost of producing by-products; (3) the Department's practice in cases in which by-products are the subject merchandise, which requires that all-

after separation costs be included in CV; (4) the Department's practice in cases in which by-products are not the subject merchandise, which requires that all after-separation costs be assigned to the by-product; (5) the Department's cost initiation memorandums in the 1992/93 and 1993/94 administrative reviews in which the Department included the cost of the "sulphur plant" (sulphur recovery unit) and "plant supporting facilities" (sulphur handling) in its calculation of the cost of producing sulphur; (6) record evidence that the sales values of sulphur and natural gas on a per metric ton basis were roughly equivalent from the mid-1980s through the early 1990s; and (7) the extensive record evidence that sulphur revenues were, and continue to be, important considerations in decisions to develop and operate major sour gas facilities.

Petitioners contend that, although the Department determined not to include all such costs in the COM and CV of sulphur in the 1991/92 administrative review, it did not consider whether a portion of sulphur recovery costs should be allocated to sulphur production. Petitioners argue that at least a portion of sulphur recovery costs should be allocated to sulphur production for the reasons enumerated above and because Husky made the decision to sell sulphur in both the home market and the United States during the POR and derived significant revenues from those sales. Accordingly, petitioners argue, the Department should require Husky to submit sulphur recovery cost data and include at least a portion of these costs in the COM and CV calculated for Husky for the final results.

Husky argues that petitioners suggest that the Department resurrect the most fundamental of all of the decisions made in the 1991/92 review—the split-off point for the sulphur by-product. Husky contends that, contrary to petitioners' allegations, the Department absolutely and unequivocally considered whether a portion of the sulphur recovery costs should be allocated to sulphur production in the 1991/92 review. Husky argues that the first half of the Department's decision in the 1991/92 review was that the only costs allocable to sulphur are those incurred subsequent to the split-off point, the point at which sulphur exits the sulphur recovery unit. Husky contends that petitioners have not supported and cannot support its position that costs incurred prior to the split-off point are in any way allocable to the sulphur by-product, particularly when the facts have not changed.

**Department Position:** We agree with Husky. In the 1991/92 review, we

determined that sulphur is a by-product and that all costs incurred up to and including the sulphur recovery unit of the gas processing facility (the split-off point) are allocable solely to natural gas production. We determined that Husky must incur the costs in the sulphur recovery unit in order to refine natural gas. Only costs incurred after the liquid sulphur exits the sulphur recovery unit of the gas processing facility relate to the production of sulphur. See 1991/92 Final (Comment 3). The production process has not changed since the 1991/92 final, and petitioners have submitted no new information for the Department to reverse this issue. Therefore, consistent with the 1991/92 final we are not assigning any costs of the sulphur recovery unit to sulphur production.

#### Comment 14

Petitioners argue that the Department erred in using the weighted-average calculated cost for liquid and formed sulphur in this review as BIA for Husky's sales of powdered sulphur. Petitioners agree with the Department's determination, in the preliminary results of the 1992/93 review, that Husky failed to report the required cost data for powdered sulphur. Petitioners assert that the Department must presume, as BIA, that the margin on Husky's U.S. sales of powdered sulphur is higher than the margin on its sales for which it provided cost information. Petitioners argue that the Department should apply the highest non-aberrational margin calculated for any of Husky's sales during the period of review (POR) as BIA for each of Husky's U.S. sales of powdered sulphur.

Husky argues that it was unable to provide the sulphur cost data in its original sales response because the company which produced powdered sulphur was sold during the POR. Husky contends that it tried in good faith to gather the requested data and did not refuse to cooperate or significantly impede the proceeding. For this reason, Husky asserts that the Department is under no legal obligation to impose a more severe BIA rate for the powdered sulphur in question.

**Department Position:** We agree with Husky. Husky has cooperated with the Department in this review. The Department stated in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*, 60 FR 10900 (February 28, 1995), that:

In cases where the overall integrity of the questionnaire response warrants a calculated rate, but a firm failed to provide certain FMV information (i.e., corresponding HM sales within the contemporaneous window or CV data for a few U.S. sales), we applied the second-tier BIA rate \* \* \* and limited its application to the particular transactions involved. See *Final Results of Antidumping Administrative Reviews and Revocation in Part of the Antidumping Duty Order, Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, et al.*, 58 FR 39729, 39739 (July 26, 1993).

Accordingly, we applied, as partial BIA for the powdered sulphur transactions where Husky was unable to provide us with the requested information, the highest rate ever applicable to Husky in this or any previous review. Therefore, we have continued to apply Husky's calculated margin on sales of liquid and formed sulphur from this review as BIA.

#### Comment 15

Petitioners argue that Husky failed to provide required information regarding its property, plant and equipment writedowns. Petitioners note that the Department's supplemental cost questionnaire in the 1992/93 review specifically required Husky to state whether changes in expected future cash flows from sulphur reserves were taken into account in property, plant and equipment writedowns, and if so, to report these writedowns. Petitioners argue that Husky did not answer these questions based on the Department's finding in the Final Results of the 1991-1992 Administrative Review that such writedowns were inapplicable to sulphur. Petitioners allege that the Department's finding in the 1991/92 review that writedowns are for property, plant and equipment at the plant were inapplicable to sulphur is erroneous because the writedowns are for property, plant and equipment, at a particular plant, including the sulphur handling plant and equipment located after the point of recovery. Since all costs are incurred after the point of sulphur recovery at one particular plant, petitioners further argue that Husky should report any writedown of property, plant and equipment for the 1992/93 review.

Husky argues that property, plant and equipment writedown information is unnecessary to the Department's analysis. Husky contends that, since petitioners did not appeal the Department's decision to exclude the writedown in the 1991/92 review, when all the costs for the particular facility in question were reported, petitioners have no basis for its complaint in this review.

**Department Position:** We agree with Husky that writedowns are for property, plant and equipment at the plant are not necessary for our analysis. In the 1991/92 review, we excluded Husky's property, plant and equipment writedown from the calculated sulphur costs. In that review, we determined that "since such costs are associated entirely with exploration and development of mineral reserves, we consider this type of writedown to be a cost incurred prior to the sulphur production split-off point. As such we consider these costs to be part of Husky's natural gas operations." 1991/92 Final. There are no facts specific to these reviews that warrant our including a portion of property, plant and equipment writedown in the cost of sulphur. Therefore, we have continued to exclude the property, plant and equipment writedown for the calculation of COM.

#### Comment 16

Mobil argues that it supplied the information requested by the Department and that the Department cannot apply BIA simply because it lacks the information that it believes is necessary to calculate a margin, but which it never requested. Mobil argues that, in this case, it clearly supplied the Department with a complete set of data that fully answers the questions asked. Mobil states that it even went so far as to calculate two separate sets of cost data in an effort to comply with the Department's requirements. Mobil argues that should these complete responses for some reason had not satisfied the Department, then the Department had an obligation to ask subsequent questions or give Mobil notice that its response was deficient before resorting to BIA.

Mobil argues that, to the extent that the Department gave Mobil notice it had concerns about its response to the original questionnaire, Mobil responded by supplying the Department with alternative data. Mobil argues that the Department resorted to BIA without informing Mobil of any deficiencies in this second set of data, and, apparently without even considering it.

Mobil argues that the Department may not properly apply BIA when a respondent has provided all of the information requested. Mobil cites *Olympic Adhesives, Inc. v. United States*, (Olympic Adhesives) 899 F.2d 1565, 1574 (Fed. Cir. 1990), which states that section 1677e(b) "clearly requires noncompliance with an information request before resort to the best information rule is justified \* \* \*." and *Usinor Sacilor, Sollac, and GTS v.*

*United States*, 872 F.Supp. 1000, 1010 (CIT 1994), which Mobil contends stated that the Department erred in applying BIA when respondent reported product codes according to actual yield strength, rather than industry standards, in absence of the explicit Department instructions. Mobil argues that this is true even if the Department discovers that it has not asked the right questions. Mobil cites *Olympic Adhesives*, 899 F.2d at 1574, which states that the Department "may not properly conclude that resort to the best information rule is justified in circumstances where a questionnaire is sent and completely answered, just because the ITA concludes that the answers do not definitely resolve the overall issue presented." Mobil also cites to *Outokumpu Copper Rolled Prods. AB v. United States*, (Outokumpu Copper) 829 F. Supp. 1371, 1386 (CIT 1993).

Mobil argues that in *Outokumpu Copper* (829 F. Supp. At 1387), the Department attempted to resolve an apparent conflict in the record by asking a supplemental question, but did not specifically refer to the conflict nor request the respondent to clarify its responses. Mobil contends that, because the respondent's answer did not resolve the issue, the Department applied BIA. Mobil notes that the CIT reversed this decision based on the fact that the respondent had completely answered the question asked, stating that if Commerce desired an explanation of the alleged conflict, it should have expressly requested one. Mobil also cites to *Hussey Copper, Ltd v. United States*, 852 F. Supp. 1116, 1120 (CIT 1994), which Mobil contends argues that Commerce erred in rejecting respondent's constructed prices because the respondent had no reason to believe that its methodology was impermissible and the Department had never indicated during the review that the method was unacceptable.

Petitioners argue that Mobil failed to make a good faith effort to respond to the Department's cost questionnaires, and did not provide cost data that could possibly be used to calculate the COP and CV of its sulphur. Petitioners contend that in the preliminary results, the Department thoroughly considered the question of whether Mobil cooperated with the Department in this review and for a multitude of very good reasons determined that Mobil failed to provide a significant amount of requested information. Petitioners contend that Mobil's argument that it has been cooperative and has responded to the best of its ability is merely a reflection of the fundamental strategy that Mobil has pursued throughout this

proceeding. Petitioners contend that Mobil's strategy has been to claim that sulphur is a waste product and that, for that reason, Mobil does not maintain separate cost data for sulphur in its normal accounting system, and, therefore cannot report sulphur costs in a manner that would permit its actual sulphur COP and CV to be determined. Petitioners contend that this claim is false, that sulphur is a commercial product that is the source of substantial revenues to Mobil and other Canadian producers. Petitioners argue that Mobil has reported that it does not separately account for any of the joint products of natural gas production, including what it describes as its primary products such as oil, gas, condensates, and NGLs.

Petitioners argue that, if Mobil's accounting system does not routinely record sulphur cost data separately, that does not mean that Mobil does not have in its possession, or have access to, the information necessary to comply with the Department's information requests. Petitioners contend that, while it may be true that under Mobil's normal accounting system the costs of producing and handling sulphur are labeled as something other than sulphur costs or that sulphur costs are commingled with certain other costs of producing the joint products, Mobil somewhere has a record of, or access to, cost data for sulphur that could be used to provide the costs that the Department has determined are sulphur production costs. Petitioners argue that, despite this, Mobil has made no real effort to derive sulphur costs from the information that it does have or could obtain from the operators of its facilities.

Petitioners maintain that the record conclusively establishes that information sufficient to comply with the Department's requests was readily available to Mobil. Petitioners argue that Husky provided cost information for certain facilities, but that Mobil did not. Petitioners argue that, if sufficient data are available for facilities operated by parties other than Mobil to comply with the Department's requests, then Mobil also possesses sufficient information for facilities it owns and operates. Petitioners argue that Mobil admitted that its records contain full details of all costs incurred at the facility it owned and operated, including sulphur handling cost, yet failed to provide the required information for that facility. Petitioners contend that the record also reflects that where Mobil made even a limited effort to obtain requested data, it was successful. Petitioners cite, as an example, Mobil's ability to obtain estimates of sulphur forming cost for some sulphur-producing facilities it did

not operate merely by making telephone calls to plant operators, and its ability to provide what Mobil described as liquid sulphur handling costs for certain facilities.

Petitioners contend that Mobil attempts to diminish the importance of its failure to report the information requested by the Department by claiming that the Department asked Mobil to report costs using a methodology tailored to Husky's accounting system. Petitioners maintain that, contrary to this claim, the questions asked by the Department were not tailored to Husky's accounting system; rather, during the 1991/92 review, the Department determined what it believed to be the proper methodology for calculating the COP and CV of sulphur. Petitioners argue that, in the final results of review of the 1991/92 review, the Department determined that the sulphur recovery unit must be included in the COM of sulphur, and that this methodology was reflected in the cost deficiency questionnaire sent to Mobil, which required these costs to be included in the reported COM of sulphur. Petitioners also argue that Husky, like Mobil, reported that it does not separately account for sulphur in its accounting system; however, petitioners argue, Husky, for the most part, broke out costs in the manner required by the questionnaire. Petitioners contend that the same data were available to Mobil, and that there is no evidence that Mobil made any attempt to obtain these data.

Petitioners maintain that Mobil is attempting to manipulate the outcome of this review by claiming that the Department can only use the sulphur cost data that it chose to report, which are unrepresentative, grossly understated, and allocated to sulphur using a patently wrong allocation method. Petitioners argue that the Department should reject this approach because, in circumstances such as these, it has been the Department's consistent practice to apply total BIA. Petitioner state that this case is analogous to *Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Reviews*, 60 FR 49569 (September 26, 1995), where the Department found respondents that had submitted multiple questionnaire responses to be uncooperative because answers to the Department's supplemental questionnaires were misleading, and significantly impeded the progress of the review.

Petitioners argue that this case is distinguishable from *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel*

*Plate from Canada: Final Results of Antidumping Duty Administrative Reviews* 61 FR 13815 (March 28, 1996) (*Carbon Steel from Canada*). Petitioners contend that, unlike the respondent in *Carbon Steel from Canada*, Mobil provided costs that were unusable and severely understated, and that in *Carbon Steel from Canada*, the respondent had provided complete information for the mill producing the vast majority of the subject merchandise and supporting documentation for its reported costs. Petitioners contend that Mobil did not provide complete information for any facilities which produce Mobil-owned sulphur for sale, nor did it provide any supporting documentation for the costs that it chose to provide.

Petitioners argue that, contrary to Mobil's assertions that it answered the questions asked and provided usable data (see comments 18-23), Mobil did not provide useable cost data in either Appendix SQ-13 or Appendix SQ-11 of its supplemental response. Instead of complying with the Department's instruction that it report all costs incurred after sulphur recovery, Mobil reported what it described as the total operating costs (less those costs that could be clearly identified as costs incurred prior to the split-off point) incurred in the production of all products at each facility which produces "marketable" sulphur.

Petitioners claim that Mobil used an inappropriate methodology, the barrel of oil equivalent (BOE) methodology, to allocate a portion of the costs to liquid sulphur production. According to petitioners, Mobil's BOE methodology should not be used because the market value of sulphur derives from its value in fertilizer production rather than its thermal heat value. Petitioners state that, in the 1991/92 administrative review, the Department was unable to verify the basis for the BOE Mobil assigned to sulphur, and noted in the verification report that this methodology, "might not be an appropriate basis for the allocation of joint costs." Petitioners cite Mobil's supplemental response where Mobil reported that it employs the BOE methodology to account for the appropriate volume of natural gas and oil reserves on a uniform basis. In the supplemental response, petitioners claim, Mobil specifically noted that sulphur is not usually included in the determination of reserve volumes, and that the only time that BOE is used for sulphur is in conjunction with equalization of sulphur volumes in a planning or performance management study. Petitioners further argue that Mobil's BOE method is not consistent

with Statement of Financial Accounting Standard Board (FAS) No. 19. In summary, petitioners claim that the allocation of costs to sulphur based on a BOE allocation factor is erroneous, understates the cost of producing sulphur, and therefore cannot be used to derive COM. Petitioners claim that Mobil was inconsistent in the application of the BOE methodology because it did not apply the BOE allocation factor to its total plant costs. Instead, Mobil applied the BOE factor to its total plant costs "less those costs that could be clearly identified as costs incurred prior to the split-off point." Thus, petitioners argue, Mobil applied its artificially low BOE allocation factor only to the costs which the Department determined to be sulphur costs, and to certain other costs which Mobil could not identify as non-sulphur costs.

Petitioners further argue that Mobil made significant improper offsets to the costs reported in Appendix SQ-11 of the supplemental response. Petitioners note that, for some facilities, Mobil offset the reported plant costs with net income from "contract services," and for other facilities, Mobil offset the reported costs by an amount for "joint interest recoveries." Petitioners contend that Mobil provided no explanation of why such offsets are necessary and provided no support for the calculation of the cost data contained in Appendix SQ-11.

**Department Position:** We disagree with Mobil. Mobil did not provide the cost data we requested. In the original questionnaires, we specified that, if the subject merchandise were manufactured at more than one facility, the reported COM should be the weighted-average manufacturing cost from all facilities. Mobil responded that it provided the weighted-average COM of sulphur for all facilities which produced marketable sulphur. Mobil did not base the weighted-average COM in the original responses on costs from all its facilities which produced sulphur or even all facilities that produced marketable sulphur.

We further disagree with Mobil's claim that it provided the data requested by the Department in its response to the Department's supplemental cost questionnaire. (Any reference to question 11 of the Department's 1992/93 supplemental cost questionnaire also pertains to question 12 of the Department's 1993/94 supplemental cost questionnaire. Any reference to question 14 of the Department's 1992/93 supplemental cost questionnaire also pertains to question 15 of the Department's 1993/94 supplemental cost questionnaire.) In question 11 of

our February 2, 1996 supplemental cost questionnaire, we requested that Mobil "provide detailed worksheets breaking out costs for 1994 for producing and handling sulphur by cost center or functional cost area," to "clearly describe how, for each facility, the costs in the worksheet were determined and identify the source of your numbers," and to "include in the worksheets the costs before the allocation, explain what those costs represent, and clearly show the allocation factor used." We asked further that Mobil "clearly explain the allocation methodology and the allocation base, and why you chose that methodology for your reported costs." See Mobil 1992/93 and 1993/94 supplemental cost questionnaires both dated February 2, 1996 at 2-3. In Appendix SQ-13 of Mobil's supplemental cost questionnaire responses, Mobil reported a single cost amount for each of the facilities for which it reported costs. The narrative explanation provided in the response states that the costs provided in that appendix were generally obtained from information provided by facility handlers, which indicates that these costs include forming, loading, and general facilities expenses.

First, we note that, in response to the questions regarding the supplemental cost questionnaires which Mobil raised at the meeting on February 8, 1996 with Department officials (see Memorandum from Karin Price to the File, dated February 20, 1996, "Meeting and telephone conversation with counsel for Mobil Oil Canada, Ltd. in the 92/93 and 93/94 reviews of elemental sulphur from Canada" (*Mobil Memorandum*)), the Department stated that Mobil should provide cost information as recorded in its records. However, we also requested that Mobil provide a statement received in the normal course of business from each facility which it does not operate, and explain how these statements were used to determine the reported sulphur costs. See *Mobil Memorandum*. Mobil did not provide any such statements, nor did it explain any attempts made to obtain such statements. We also requested, in question four of the supplemental cost questionnaires, that Mobil provide its operating statements for two specific facilities in each review. We requested that, if Mobil were unable to provide those operating statements, it alternatively provide complete expense, revenue, and production data and all internal management reports showing this information for all products manufactured by the facility. Mobil provided only the audited financial statement for one facility. However,

Mobil is not the operator of that facility and did not provide a copy of any statements it received from that facility in the ordinary course of business. The financial statement did not include the detailed information that would normally be included on an operating statement. Furthermore, Mobil did not provide the detailed information we requested as an alternative to an operating statement.

Mobil responded that it did not have operating statements as contemplated by the Department for two owned and operated facilities specifically requested by the Department. Mobil prepared "income statements" for these facilities for the purposes of the supplemental cost questionnaire response. Mobil states on pages 6-7 of its supplemental cost questionnaire responses that the statements were prepared from information in the financial database used to prepare Appendix SQ-11 of the supplemental cost questionnaire responses, as well as from Mobil's audited financial statements. The information in the income statements indicates that Mobil has more detail regarding its costs for the two facilities than is provided in Appendix SQ-13.

We disagree with Mobil that the costs reported in Appendix SQ-13 should not have been broken out to the extent Mobil could do so. Appendix SQ-13 was provided in response to our request in question 14 of the supplemental cost questionnaire for an explanation of how the costs for each facility were weight averaged to determine the COM to provide worksheets showing the calculation. For the facilities for which Mobil reported liquid sulphur costs as well as formed sulphur costs, the total cost amount had to be split between liquid handling costs and forming costs. However, Mobil provided no explanation or detail as to how this was done.

Mobil has claimed in its briefs that the information necessary for the Department's margin calculations is alternatively provided in Appendix SQ-11. The Department requested that Mobil provide costs for its facilities accounting for at least 90 percent of its sulphur production volume. However, Mobil has only reported liquid sulphur costs for a few facilities which represent less than 90% of production. The information provided in Appendix SQ-11 shows that Mobil should also have included costs for several other of its facilities in order to provide costs corresponding to 90% of production, as requested by the Department.

The BOE methodology used to allocate costs to sulphur in Appendix SQ-11 is based on a relative energy

content and is generally used to equate volumes of oil and gas. Gas and oil are energy sources and therefore it is appropriate to use the BOE methodology to uniformly account for volumes of oil and gas reserves. Sulphur is not purchased for its heat or energy content and therefore an allocation based on BOE is not appropriate. Mobil also stated that it excluded certain costs that it determined were related to oil and gas. We cannot determine whether the costs reported in Appendix SQ-11 are representative of Mobil's sulphur production costs and which costs are included. Mobil stated, regarding the information in Appendix SQ-11, in a letter dated April 2, 1996, it was aware that "the Department does not intend to use that information to calculate COP and CV." Therefore, we cannot rely upon the data in Appendix SQ-11 to calculate COP and CV in these reviews.

We further disagree with Mobil's claim that we had an obligation to ask subsequent questions if we were not satisfied with Mobil's responses. When a respondent has been asked for certain information in the questionnaire and sent a supplemental with more specific requests for data, and has not provided it, that response is deficient. Not only did the Department send the supplemental questionnaire to Mobil, Department officials met with Mobil and clarified what we wanted Mobil to report. See *Mobil Memorandum*.

We have found the deficiencies to be so extensive that Mobil's responses cannot be used to calculate a margin. Although Mobil states that it provided the information available to it in its records, it did not provide the operating statements requested to show how its reported costs were obtained. Mobil did not report costs for facilities accounting for 90 percent of production volume as requested. We are not able to determine if the data Mobil provided in Appendix SQ-11 is representative of sulphur handling costs. Mobil did not provide any support for the cost data provided in Appendix SQ-13. Therefore, we are continuing to apply total BIA to Mobil.

We have addressed the specific deficiencies we found with Mobil's cost questionnaire responses in comments 17-22 below.

#### Comment 17

Mobil argues that the Department did not request that it supply the cost of pouring sulphur to block as part of its sulphur handling costs. Mobil adds that, in any event, the plant cost data include block costs. Mobil asserts that the Department states that it had specifically requested that Mobil supply block costs in questions 11 and 14 of the

1992/93 supplemental cost questionnaire and in questions 12 and 15 of the 1993/94 supplemental cost questionnaire and that Mobil failed to do so. Mobil contends that the question 14 did not require Mobil to report its block costs. Furthermore, Mobil argues, the block costs were included in Mobil's response to question 11.

Mobil argues that in its cost response it reported sulphur handling costs as defined by the Department in the preliminary results of the 1991/92 review and the underlying memorandum which, Mobil argues, specifically excluded block costs. Mobil asserts that question 14 of the supplemental cost questionnaire first asked Mobil to explain how the costs from each facility were weight-averaged to determine the reported COM, and then indicated that the reported costs should include costs associated with pouring sulphur to block. Mobil argues that it met with Department officials because the costs it originally reported did not include block costs. Mobil contends that the Department told it not to recalculate its costs in response to the questionnaire, but simply to explain how the reported cost figure was calculated. Mobil states that it acknowledged in its supplemental response, filed a few weeks later, that it was aware that in the recently-released final results of the 1991/92 review, the Department had reversed its position on block costs; the Department decided that they should now be included. Mobil argues that it did not know how to apply this determination because it was made with respect to Husky, and because Mobil did not have time to ascertain block costs before the questionnaire due date. Accordingly, Mobil asserts, it indicated in its supplemental response that it needed guidance from the Department on how to treat block costs.

Furthermore, Mobil argues, in its initial response, omitting block costs was in full accordance with the Department's policy at the time. Mobil contends that the case analyst did not require Mobil to change its previously-submitted costs by adding block costs and that the Department failed to give Mobil any guidance as to how to comply with the Department's recent change regarding inclusion of block costs. Mobil contends that the Department may not apply BIA for failing to provide information that was never requested.

Mobil argues that block costs are included in the second set of cost data supplied by Mobil to the Department in response to question 11 of the supplemental cost questionnaire. Mobil argues that the reported costs under this

alternative methodology include more costs than the Department requested. Mobil contends that the response to question 11 is fully responsive in that it reported the costs associated with producing and handling sulphur incurred after the point at which hydrogen sulphide is split off from the main gas stream. Mobil first explained that it accounts for costs on a facility, rather than a product basis and that, in any event, no costs were attributed to sulphur in its accounting system. Mobil contends that the only way to respond to the Department's request was to report all operating costs incurred at the facilities, including overhead, less those costs that could be clearly identified as costs incurred prior to the split-off point. Mobil asserts that it provided a detailed breakdown of costs, on a plant-by-plant basis, for all of its sulphur-producing plants.

Mobil argues that because its normal accounting system does not break out costs on a product-specific basis, Mobil allocated the costs between the various products produced at each plant by using the allocation basis that it routinely uses for internal purposes. Mobil argues that these costs include all of the costs specifically identified by the Department, including the costs for pouring sulphur straight to block. Mobil notes that these costs included a number of costs incurred before the split-off point. However, Mobil argues that it should not be penalized for supplying the Department with a conservative figure that represents an overstatement of cost.

Petitioners contend that the Department's supplemental cost questionnaire specifically and unambiguously required Mobil to report its block sulphur costs. Petitioners agree with the Department's determination in the preliminary results of these reviews that Mobil could not refuse to respond to a request for information based on a preliminary determination in a previous review. In response to Mobil's argument that the Department did not require the submission of new cost data in the supplemental response, petitioners claim that the language of the supplemental cost questionnaire clearly requires Mobil to report block sulphur costs.

Petitioners argue that the costs provided by Mobil in Appendix SQ-11 are not sufficient because they neither separately break out any of the costs associated with producing and handling sulphur, nor do they break out block sulphur costs.

*Department Position:* We disagree with Mobil. We specifically required in question 11 of the cost supplemental

questionnaire, that "all costs after the split-off point in the joint production process for refining natural gas and elemental sulphur should be reported, such as costs associated with sulphur recovery, pouring sulphur straight to block, \* \* \*." Question 14 of the supplemental cost questionnaire required that "the reported cost of manufacturing should include costs \* \* \* associated with pouring sulphur straight to block \* \* \*." Regardless of Mobil's presumption that the Department excluded block costs in the preliminary results of the 1991/92 review, we required that block costs be included in the reported COM of these reviews. Despite the Department's request, Mobil presumed that the block costs were not necessary in these reviews because the final results of the 1991/92 review were still pending. That such costs were not used in the preliminary results of a previous administrative review does not mean that a respondent can unilaterally decide that such costs need not be reported in another administrative review of the same case, especially when it was specifically requested to report such costs. Mobil was required to be guided by the explicit language of the questionnaire to which it was responding.

While Mobil argues that it provided block costs in response to question 11 in Appendix SQ-11, it stated that the provided costs include a number of costs before the split-off point and it did not segregate any sulphur costs or indicate if and where block costs were reported. We disagree with Mobil that such costs are necessarily conservative and represent an overstatement because these costs were allocated using an inappropriate methodology. See response to comment 16.

#### *Comment 18*

Mobil argues that it provided production costs for at least 90% of its production. Mobil contends that in its original response, it reported the handling costs for as many plants as it could. Because Mobil did not operate the vast majority of facilities which produced sulphur Mobil owned (*i.e.*, owned but not operated facility), Mobil claims, it had to rely on its operators to gather this data. Mobil argues that it reported the handling costs to the best of its ability given the limitations imposed by the failure of each of the operators to cooperate. Mobil argues that the plant cost data provided by it in its supplemental cost response included sulphur handling costs for all of its production. Thus, Mobil argues, it fully responded to the Department's

request for cost data for at least 90 percent of its sulphur production. Mobil argues that the Department ignored the alternative data in Appendix SQ-11.

Petitioners argue that Mobil failed to provide cost data for facilities that account for 90 percent of its production. Petitioners claim that, in reporting costs used to calculate COP and CV, Mobil based the COM of liquid sulphur on data from only a small number of self-selected facilities as contained in Appendix SQ-13. Petitioners assert that these plants account for much less than 90% of Mobil's production of liquid sulphur. While petitioners acknowledge that Appendix SQ-11 contains selected cost data for all of Mobil's facilities, they assert that this cost data is not sulphur production costs, but improperly allocated costs that understate the COM of Mobil's sulphur. Petitioners further note that Mobil was aware that the Department did not intend to use the data in Appendix SQ-11 to calculate the COP and CV of sulphur.

*Department Position:* We disagree with Mobil. Mobil did not report costs for its facilities accounting for 90% of its sulphur production in Appendix SQ-13. Appendix SQ-13 contains Mobil's reported weighted-average COM. Mobil provided only a single cost figure for each facility reported and did not breakdown or explain the figure or provide support documentation. While Mobil did report alternative information on all of its facilities in Appendix SQ-11, the data provided was not based on sulphur production costs. Mobil provided total facility costs and stated that it excluded certain costs that it determined were solely related to oil and gas. Mobil did not provide any support documentation or an explanation of what costs were provided. Therefore, we cannot determine whether the costs reported in Appendix SQ-11 are representative of Mobil's sulphur production costs and which costs are included. As noted in our response to comment 16, the submitted information in Appendix SQ-11 is not sufficient to calculate COP and CV.

#### *Comment 19*

Mobil argues that it provided a detailed breakdown of costs. Mobil argues that the Memorandum from Holly Kuga to Joseph Spetrini, "Whether to Use Best Information Available for Husky Oil Ltd. and Mobil Oil Canada, Ltd. in the 1992/93 Administrative Review of Elemental Sulphur for Canada," dated June 4, 1996, and also Memorandum from Holly Kuga to Joseph Spetrini, "Whether to

Use Best Information Available for Husky Oil Ltd. and Mobil Oil Canada, Ltd. in the 1993/94 Administrative Review of Elemental Sulphur for Canada," dated June 4, 1996, (collectively, Decision memorandum) states that Mobil failed to provide a detailed breakdown of costs as requested in question 11 of the supplemental cost questionnaire, and notes that Appendix SQ-13 of Mobil's supplemental cost questionnaire listed a single cost amount for each plant. Mobil argues that the Department's reasoning is faulty for two reasons. First, Mobil argues, Appendix SQ-13 responded not to question 11, but to question 14, which simply required Mobil to explain how it had weight-averaged the costs from the different plants to arrive at the cost of production reported in the original response. Mobil contends that question did not ask for a detailed breakdown of costs.

Secondly, Mobil argues that it provided in Appendix SQ-11 a detailed, plant-by-plant breakdown of costs as the Department requested in question 11. In this question, the Department asked Mobil to provide all costs of sulphur incurred after the gas split-off point, including the cost of the sulphur recovery unit.

Mobil asserts that in its Decision Memorandum, the Department stated that it would not even consider Appendix SQ-11 on the grounds that it included costs in the sulphur recovery unit which the Department had decided should not be included in the cost of production. Mobil states that the Department accused Mobil of failing to provide a detailed breakdown of costs as requested in Question 11, and yet refused to consider Mobil's completely responsive answer on the grounds that it contained "irrelevant" costs.

Petitioners argue that Mobil failed to provide a detailed breakdown of costs as required in question 11 of the supplemental questionnaire. Petitioners assert that, although Mobil claims that the requested breakdown of costs was contained in Appendix SQ-11, this data does not satisfy the requirements of question 11 because it fails to identify any of the cost incurred in producing sulphur and it does not clearly describe how the costs were determined. Petitioner maintains that Mobil failed to provide any support for the cost data contained in Appendix SQ-11.

*Department Position:* We disagree with Mobil. Question 11 required Mobil to provide worksheets which were to include a "description of each cost center or functional unit, and identify the costs included in each." As noted above in Comment 16, Appendix SQ-



11, which was provided in response to question 11, does not contain a breakdown of costs sufficient to determine where and how sulphur handling costs are included in the reported costs. We required Mobil to provide detailed worksheets breaking out costs for producing and handling sulphur by cost center and functional cost area. We also required Mobil to clearly describe how, for each facility, the costs in the worksheets were determined, and identify the source of the numbers and to clearly explain the allocation methodology and the allocation base, and why Mobil chose this methodology for reporting its cost. The data in SQ-11 does not satisfy the requirements of question 11. Appendix SQ-11 does not identify any of the costs incurred in producing sulphur nor does it describe how the costs were determined. Mobil also failed to provide any support for the cost data contained in Appendix SQ-11.

Our discussion of Appendix SQ-13 in the Decision Memorandum does not indicate that Appendix SQ-13 was provided in response to question 11. Mobil provided cost information in both Appendix SQ-11 and Appendix SQ-13. In question 14, we required Mobil to show how the worksheets provided in response to question 11 tie to the worksheets provided in response to question 14. Appendix SQ-13 was provided in response to question 14. Therefore, the response to question 14 should have tied to the worksheet provided in response to question 11. Based upon all of the above, the Department concluded that Mobil's response with respect to the requested cost breakout was seriously deficient.

#### Comment 20

Mobil points out that the Department stated in its Decision Memorandum that Mobil failed to provide statements from operators of the plants operated by parties other than Mobil and to explain how these were used to calculate the sulphur handling costs. Mobil argues that the statements from the operators used to determine the reported sulphur handling costs are in the record and that the underlying data was available for verification.

Mobil argues that in question 4 of the supplemental cost questionnaire, the Department asked Mobil to provide operating statements for two plants in each review, or, "if no operating statements are prepared for the facilities \* \* \* provide complete expense, revenue, and production data \* \* \*." Mobil argues that it provided a copy of the audited financial statement for one of the plants, which Mobil believed to

be responsive to the request for an operating statement. Mobil also asserts that it explained that since it did not prepare an operating statement for the other plant in the ordinary course of business, it had followed the alternative method specified in the question and prepared an income statement from the financial database used to generate Mobil's financial statements. Mobil argues that since the statement included complete expense, revenue, and production data, Mobil fully complied with the alternative specified in the questionnaire. The Decision Memorandum, Mobil asserts, merely states that Mobil had been requested to supply an operating statement, but ignored the fact that the Department had directed Mobil to provide expense, revenue, and production data in the event the operating statement did not exist. Mobil claims that the Department concluded that it could not rely on the income statement because it was not kept in the ordinary course of business.

Petitioners argue that Mobil failed to provide operating statements of its plants which were operated by parties other than Mobil, and failed to explain how costs of those plants were used to calculate its sulphur handling costs as required by the supplemental cost questionnaires. Petitioners contend that the Department clearly required Mobil to provide these operating statements, and Mobil offered no explanation for its failure to comply with the Department's requests.

Petitioners argue that Mobil failed to provide the operating statements for two of Mobil's plants in each review which were requested in question four of the Department's supplemental cost questionnaires. Petitioners argue question 4 stated that, if no operating statements were prepared, or such statements did not exist, Mobil was to provide complete expense, revenue, and production data, as well as internal management reports. Petitioners assert that the Department clarified this request by asking Mobil to provide statements received in the normal course of business. Petitioners contend that Mobil's submission of financial statements in lieu of operating statements for one of the two plants was unresponsive to the Department's request. Petitioners claim that the financial statements do not contain the majority of the requested information and Mobil offered no reason for the appropriateness of substituting financial statements for operating statements. Petitioners note that Mobil also did not submit revenue and production volume statements received in the normal course of business. For the second plant

in both reviews, petitioners contend, Mobil did claim that operating statements were unavailable but submitted income statements which do not detail revenues and production volumes for the products produced at that plant. According to petitioners, these statements should not be relied upon because they were prepared solely for the purposes of this review rather than in the normal course of business.

*Department Position:* As noted in the *Mobil Memorandum*, we spoke with counsel for Mobil and clarified some specific questions about the cost supplemental questionnaire. We stated that:

With regard to question 11 in the 92/93 review and 12 in the 93/94 review, \* \* \* Mobil should include an explanation as to how the statements received from facilities where Mobil is not the operator were used to determine the reported sulphur costs, that the costs included in the reported sulphur costs should be identified, and that a sample statement from each facility should be submitted."

#### *Mobil Memorandum*

Mobil did not provide the statements from each facility as requested or any other source documents in response to question 11. Mobil did not explain any attempts made to obtain such statements from each operator. While Mobil maintains that the alternative data to operating statements provided in response to question four is fully responsive, we do not agree that the financial statement and the "income statements" prepared for the supplemental cost responses sufficiently answered the Department's request for complete revenue, expense and production data for all products manufactured by the facilities.

#### Comment 21

Mobil claims that, by submitting the information provided in Appendix SQ-13 of its supplemental questionnaire response, it was fully responsive to question 14 of the Department's supplemental cost questionnaire. Question 14 also requested Mobil to "separately identify the variable and fixed costs, as requested in questions 3.B.2 and 3.B.3 of the questionnaire." Mobil points out that it responded to this question by stating that it had weight-averaged the handling costs from the individual plants based on the quantity of sulphur produced and sold, and included a worksheet demonstrating the calculation. Further, Mobil states, it noted in its response that it was unable to segregate these costs into fixed and variable components as this information was unavailable to it.

Mobil claims that it then noted in its supplemental response that, because sulphur handling occurs when the sulphur is destined for sale, the cost of the entire operation should be considered to be variable.

Mobil argues that it answered the question as asked, yet the Department states that Mobil should have broken out its costs in more detail to the extent it could do so in the Decision Memorandum. Mobil argues that it cannot be given BIA for failing to provide information that was never requested. Mobil challenges the Department's claim in the Decision Memorandum that Mobil could have provided a more detailed response than that provided in Appendix SQ-13 based on the fact that Mobil prepared a detailed income statement for a particular plant in response to Question 4 of the supplemental cost questionnaire. Mobil argues that the income statement shows that it contains no detail of sulphur handling, because Mobil does not break out these costs in its accounting system.

Mobil argues that the Department was incorrect in stating in the Decision Memorandum that the forming costs reported in Appendix SQ-11 for each plant with forming facilities had been used to calculate the cost of formed sulphur in Appendix SQ-13. Thus, Mobil asserts, the Department was also incorrect in concluding that it was able to break out its sulphur costs to some extent. In fact, states Mobil, it used the information in Appendix 13 to include the forming costs separately in Appendix SQ-11. Mobil argues that, in the 1992/93 review, the reverse is true. Mobil added the forming costs from Appendix SQ-13 to Appendix SQ-11 to avoid double counting. Mobil argues that, in the 1993/94 review, the forming costs were not added.

Petitioners argue in support of the Department's use of BIA because Mobil's cost data contained in Appendix SQ-13 did not adequately respond to question 14 of the supplemental questionnaire. Petitioners note that questions 11 and 14 specifically required Mobil to report detailed information for the costs used to calculate the COP and CV of its sulphur. As a result of Mobil's failure to report its sulfur costs in the manner requested by the Department, petitioners claim that it is unclear what costs were included in the COMs reported in Appendix SQ-13. Petitioners argue that Mobil's response failed to include such major cost elements as block storage, liquid sulphur transfer, remelting, and depreciation. Petitioners contend that

neither appendix provided an explanation for the calculation of per-unit costs reported in Appendix SQ-13.

*Department Position:* We agree with petitioners. Mobil reported a single cost for each of the facilities for which it reported costs in Appendix SQ-13. It is unclear what costs were included in the COMs reported in Appendix SQ-13. Also, for the facilities for which Mobil reported liquid sulphur costs as well as formed sulphur costs, the total costs amount had to be split between liquid handling costs and forming costs. Mobil provided no explanation or detail as to how this was done. Mobil stated in its response that it generally relied on information provided by facility operators, but did not explain what this information contained or provide any support. Therefore, we have no explanation for the calculation of per-unit costs reported in Appendix SQ-13 and cannot rely on this data.

#### Comment 22

Mobil argues that the Department may not penalize it for reporting its data in a manner that differs from typical cost accounting methods. Mobil argues that the decision to apply BIA appears to be a decision to penalize Mobil for failing to report sulphur handling costs in a manner that the Department would prefer. Mobil argues that, if the Department persists in applying BIA to a company that has reported its costs to the best of its ability, it is informing that company that it can never satisfy the Department and will always be subject to a BIA rate. Mobil argues that this conflicts with the Department's own stated policy, as well as judicial authority.

Mobil cites *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556 (Fed. Cir. 1984), which involved an International Trade Commission (ITC) injury determination, where the Federal Circuit rejected an interpretation that would authorize agencies to impose particular accounting methods on companies according to agency needs. Mobil notes that the court stated:

[I]t is inflating out of all proportion the importance of the laws with which the lower court deals to expect that business people and corporate accountants would keep their books with an eye to an obscure and wholly arbitrary statutory geographic region, which a relatively small Government agency might declare for the purposes of one antidumping injury investigation.

*Id.* At 1561. Mobil argues that the CIT similarly cautioned the Department against overextending its authority during investigations: "Commerce's desire to obtain documentation should not fly in the face of established

business practice, and should not be transformed into a do-or-die requirement," citing *Industrial Quimica del Nalon, S.A. v. United States*, 15 CIT 240, 244 (CIT 1991).

Mobil argues that the Department itself has acknowledged that it cannot penalize a respondent for failing to maintain business records in a particular manner or for using an allocation method that the Department subsequently rejects. Mobil argues that in a case closely analogous to this one, *Carbon Steel Plate from Canada* (61 FR at 13815), at comment 7, the Department accepted the respondent's reported costs for one production location as a proxy for costs at another production location. Mobil argues that the respondent, like Mobil, did not maintain records that would enable it to calculate the actual cost of producing the subject merchandise at each of its plants. Mobil argues that the Department accepted costs from one plant as a surrogate for total costs based on three factors that are also present in this case: (1) the nature of the respondent's accounting system prevented more detailed reporting; (2) the Department verified the respondent's inability to provide more specific costs; and (3) the respondent's alternative methodology was a conservative estimate of costs. In addition, Mobil argues that the Department accepted respondent's allocation of indirect selling expenses because the respondent did not maintain records of the actual indirect selling expenses of each of its markets as a matter of normal business procedure. Mobil also cites *Smith-Corona Group v. United States* 713 F.2d 1568, 1580 (Fed. Cir. 1983), in which, it argues, the Department properly accepted respondent's allocation of rebates based on actual figures when the company did not maintain records directly tying each rebate to a particular sale; *Zenith Elecs. Corp. v. United States*, No. 90-07-00339, slip-op. 94-148 (CIT 1994), in which, it argues, the Department properly declined to adopt petitioners adverse allocation methodology for discounts given that the respondent reported the information in the best manner it could, given its accounting system; *Final Results of Antidumping Duty Administrative Review; Certain Cold-Rolled Carbon Steel Flat Products from Germany*, 60 FR 65264 (December 19, 1995), in which, it argues, the Department accepted respondent's data because the necessary records were not maintained; *Final Determination of Sales at Less than Fair Value: High Capacity Pagers from Japan*, 48 FR 28682 (June 23,

1983), in which, it argues, the Department allowed an adjustment for technical services, including certain allocated costs, because they were reasonably calculated and actual data were not kept as ordinary business records.

Mobil argues that a decision to resort to BIA is even less justifiable when the respondent, recognizing the limitations of its accounting system, provides the Department with alternative data or methodologies. Mobil cites *Federal-Mogul Corp. v. United States*, 918 F. Supp. 386, 410 (CIT 1996) (citing *Allied-Signal Aerospace Co. v. United States* 996 F. 2d 1185, 1193 (Fed. Cir. 1993)), and notes that the CIT stated that the Department may not resort to BIA by ignoring certain data, which the respondent had provided as an alternative reporting method, simply because it does not like it.

Petitioners argue that, in light of the fundamental deficiencies in the data provided by Mobil, the Department properly relied on total BIA to establish Mobil's margin in the preliminary results. Petitioners argue that, in addition, the Department properly recognized that Mobil had in its possession or had access to information sufficient to comply with the Department's requests for information and to calculate COM of its sulphur in accordance with the methodology adopted by the Department in the 1991/92 review. Petitioners conclude that the Department should assign to Mobil, as BIA, the highest rate ever assigned to Mobil in this proceeding.

**Department's Position:** We disagree with Mobil that we have penalized it for not keeping its books in the manner we would prefer. As detailed in the Decision Memorandum and discussed in comment 16, Mobil did not provide operating statements, block storage sulphur costs, any support or explanation of the costs included in the reported COM and did not report the costs for the percentage of production volume requested. These were items (1) that Mobil could have provided to the Department or (2) if they were unable to provide them, for which Mobil should have explained why it could not respond sufficiently to the Department's requests. Mobil did not explain or document what steps were taken to obtain sulphur production costs and support documents from each facility. Mobil did not explain or detail the costs included nor provide support for the reported COM. In light of these deficiencies, it is appropriate to apply BIA to Mobil.

#### Comment 23

Mobil argues that the Department should not reject Mobil's responses and resort to BIA without conducting verification. Mobil argues that if the Department's decision is not an effort to penalize Mobil for not maintaining more detailed cost records, then it must be based on a belief that Mobil's accounting system contains more detail than it has supplied. Mobil argues that it has clearly and repeatedly explained that its cost system does not allow it to respond to the Department's standard questionnaire in the detail required. Mobil argues that the Department verified during the 1991/92 review that Mobil's cost accounting system differs significantly from the systems the Department normally encounters. Mobil argues that as a result of the cost verification by the Office of Accounting, the Department concluded that "[t]he cost accounting details included in both of the company's submissions were limited primarily by the constraints of Mobil's accounting system," and that the system "does not allow for the level of detail contemplated by the Department's suggested format." (Cost of Production and Constructed Value Verification Report, 1991/92 Administrative Review (September 27, 1994) at 6.) Mobil argues that in this review the Department appears to have ignored the findings of its own cost analysts and concluded that Mobil's accounting system has more detail than Mobil has divulged. Mobil argues that the Department has no basis for this assumption. Mobil argues that each of its submissions is accompanied by sworn statements that attest to the completeness and accuracy of the information. Mobil argues that the Department's own verifications support its statements. Mobil argues that, if the Department were somehow convinced that Mobil's assertions were false or that the facts had changed substantially, the Department could have verified the information. Mobil asserts that the Department declined its suggestion that the Department verify Mobil 1993/94 response concurrently with the verification of the 1994/95 response.

Mobil argues that it was informed that the Department would prefer to address Mobil's unique cost situation in the 1994/95 review. Mobil argues that the verification of its cost system in the 1994/95 review will come too late to rectify the results of this review. Mobil contends that, if the Department persists in applying BIA in the final results of the 1993/94 review, it will be subjected to unjustifiably high antidumping duty cash deposit rates. Mobil also argues,

that improperly applying BIA to Mobil may unfairly delay Mobil's ability to qualify for revocation of the order. Mobil argues that, by declining to conduct verification, the Department failed to follow its regular practice of first providing a respondent with an opportunity to satisfy the Department that it has provided complete responses before resorting to BIA. Mobil cites *Rautaruukki Oy v. United States*, No. 93-09-00560, slip-op. 95-56 (CIT 1995) (quoting International Trade Administration Revisions to 19 CFR Part 353, 54 FR 12742, 12766 (March 28, 1989)), in which the CIT stated "prior to resorting to best information available, the Department as a matter of practice often \* \* \* permits a respondent to correct a deficiency during the verification process \* \* \*." Mobil argues that because the Department did not verify Mobil's responses, Mobil was never given the opportunity to demonstrate that its responses were complete even though it was available at all times during the course of this review for verification.

Petitioners argue that the Department should not verify Mobil's cost responses. Petitioners argue that, as set forth in detail in Section II.A., the record conclusively establishes that information sufficient to comply with the Department's information requests was available to Mobil. Petitioners argue that the record also establishes that Mobil made no real effort to supply this information, and that there is no need to verify what the record already establishes. Petitioners contend that, as a matter of law, the Department has no obligation to verify the unrepresentative and understated sulphur cost data that Mobil chose to report, because those cost data cannot be used to calculate the COP and CV of Mobil's sulphur. Petitioners argue that the Department has routinely canceled verification in instances where a respondent has not provided usable cost data in its questionnaire responses, and that the Department has already verified that Mobil misreported its forming costs at one of its sulphur producing facilities.

**Department's Position:** We agree with petitioners, in part. We do not necessarily verify respondents' information in each administrative review. Furthermore, the purpose of verification is to verify the information submitted to the Department in questionnaire responses. It is not an opportunity for respondents to submit additional information. While we often will permit, at the beginning of verification, minor corrections to the response that were found in preparing for verification, verification is not an

opportunity to correct for deficiencies in the questionnaire responses. If, as in the present case, we find prior to verification that the information is so deficient that we would not be able to use it, then we do not proceed with verification. To do otherwise would be a waste of resources. See for example, *Chrome-plated Lug Nuts From Taiwan; Preliminary Results of Antidumping Duty Administrative Review and Termination in Part*, July 8, 1996 (61 FR 35725), where two companies informed us prior to verification that we would not be able to reconcile data. Because we found prior to verification that Mobil had not adequately responded to our requests for information, it was not appropriate to verify the deficient information. Regarding Mobil's comments about the 1994/95 review, we treat each segment of the proceeding separately. Our decision not to verify in the 1993/94 review was based on the information on the record for that review. Issues arising in the 1994/95 review will be considered based on what is on the record of that review.

#### Comment 24

Mobil argues that the Department improperly applied total, rather than partial, BIA. Mobil argues that it is the Department's practice to apply partial BIA when a respondent's submitted information is deficient in only limited respects, and cites as an example, *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland cement v. United States*, 865 F. Supp. 857, 863 (CIT 1994), aff'd on other grounds, 68 F.3d 487 (Fed. Cir. 1995). Mobil contends that the Department generally accepts a respondent's U.S. sales data, even if the cost data is found to be deficient, and cites as examples, *Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Dynamic Random Memory Semiconductors of One Megabit and Above from the Republic of Korea*, 57 FR 49066 (October 29, 1992); *Final Results of Antidumping Duty Administrative Review and Revocation, in part of the Antidumping Duty Order: Certain Cut Flowers from Colombia* 56 FR 50554 (October 7, 1991), in which the Department stated, "While continuing to use the verified sales portion of their response, BIA was only used for that portion of the response which was unverifiable."; and *Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review*, 59 FR 42806, (August 19, 1994) (comment 1), in which, Mobil argues, the Department accepted portions of respondent's cost response that were not deficient, and noted that some of the

areas of concern were related to the methodology used, rather than the accuracy of the submitted data. Thus, Mobil argues, the Department's decision to reject Mobil's sales data is inexplicable given that it apparently found no deficiencies in Mobil's sales response. Mobil further argues that the Department found Mobil to be cooperative and yet still applied total BIA. Mobil argues that, if the Department finds Mobil's cost data to be deficient, despite the fact that it is complete, it should at least use Mobil's U.S. sales data in calculating a margin.

Mobil notes that the Department issued a preliminary determination in *Certain Cut-to-Length Carbon Steel Plate from Sweden; Preliminary Results of Antidumping Duty Administrative Review*, 61 FR 51898 (October 4, 1996) (*Steel from Sweden*), in which Mobil argues the Department decided to apply total BIA because of deficiencies in the cost data, even though the sales data was verified. Mobil contends that the Department noted that there were no alternative sets of cost data for the Department to use. Mobil argues that, in this case, the Department has several alternatives, including petitioners' data as adjusted by the Department to initiate the sales-below-cost allegation; Mobil's verified 1991/92 cost data (adjusted for inflation), which the Department verified; and Husky's reported liquid sulphur cost. Thus, Mobil argues, the factors that necessitated total BIA in *Steel from Sweden* are not present in Mobil's case.

Petitioners disagree with Mobil. Petitioners argue that, as set forth in Section II.A., Mobil deliberately withheld a substantial amount of requested information from the Department and has attempted to manipulate the outcome of this review by arguing that the Department must use the cost data it chose to report which, as set forth in Section II.B., are unrepresentative, understated, and allocated to sulphur using a patently wrong allocation method. Petitioners argue that it is consistent with the statute and Department practice to apply total BIA to Mobil in these circumstances. Furthermore, petitioners argue, it is Department practice to reject a respondent's submitted information *in toto* where a respondent fails to provide reliable cost data. Petitioners contend that the Department has recognized that if it were to utilize a respondent's sales information when a respondent fails to provide usable cost information, respondents would be in a position to manipulate the outcome of reviews by supplying only that information which

the respondent wants the Department to use in its margin calculations.

*Department's Position:* We disagree with Mobil. Our determination to apply total BIA in this case, rather than partial BIA, is proper and in accordance with both the Department's stated practice in this area, and the law effective for these reviews. See *Final Determination of Sales at Less Than Fair Value: Grain-Oriented Electrical Steel From Italy*, 59 FR 33952 (July 1, 1994) ("The rejection of a respondent's questionnaire responses *in toto* and use of BIA is appropriate and consistent with past practice in instances where a respondent has failed to provide verifiable COP information." (Citing as examples of past practice *Final Determination of Sales at Less Than Fair Value: Certain Forged Stainless Steel Flanges From Taiwan*, 58 FR 68859 (December 29, 1993) and *Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Lead & Bismuth Carbon Steel Products From France*, 58 FR 6203 (January 27, 1993).))

Where the Department determines that parts of a respondent's submitted cost data are reliable, BIA "plugs" may be used to fill in gaps created by missing or unreliable data. In the present case, however, Mobil's cost response was found to have extensive deficiencies rendering the entire cost response unusable. See comments 16 and 18 above. Therefore, in accordance with the Department's practice, we have applied cooperative total BIA to Mobil in these reviews.

Contrary to Mobil's contention, *Silicon Metal From Brazil* is consistent with the above practice. In that case, the Department stated that, while there were areas in which the costs were not appropriately quantified, "we have not found these deficiencies to be so significant or pervasive as to call into question the accuracy of the entire [cost] response." (59 FR 42806, 42807; August 19, 1994). Accordingly, in that case the Department relied on BIA only "in the instances where [it] found insufficient verification support." *Id.* at 42807. For the cost in general, the Department used the respondent's data in reaching the final results in that review. *Id.* Similarly, in *DRAMs From Korea*, cited by Mobil, the Department once again relied on BIA only for those portions of the cost response found to have "insufficient verification support". *DRAMs From Korea*, 54 FR 15467, 15471 (March 23, 1993). For the methodological issues, where appropriate, "the costs were recalculated to quantify or value that particular cost element." *Id.* By contrast, in the present case, we do not have

usable cost data for Mobil. Without such data, the Department cannot calculate an appropriate foreign market value (FMV), and thus cannot perform sales comparisons. *See also, Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Turkey*, 61 FR 30309, 30312 (June 14, 1996).

Furthermore, even if the Department were to contemplate use of an alternative to total BIA in this situation, we note that no appropriate alternative data is available to use as BIA for FMV in this case. Mobil suggests that the Department use as BIA the company's reported costs for the previous period,—i.e., the 1991/92 review. However, in past cases, the Department has specifically rejected this type of application even under both the new statutory provisions concerning the basis for the use of facts available enacted through the URAA, and the pre-URAA provisions. For example, in *Steel From Sweden*, the case cited by Mobil, the Department not only rejected the respondent's entire cost database, but further rejected application of any alternative to total facts available. In applying total facts available, the Department specifically rejected use of actual costs from a previous review because "[i]f the Department were to rely on such data, a respondent would have no incentive to report its costs once it was satisfied with the verified costs from a particular review period." *Steel From Sweden*, 62 FR 18396 (April 15, 1997). The same concern is also present in the instant case. In this type of application, manipulation of either the U.S. price or the FMV component of the margin calculation has the potential to have a dramatic impact on the dumping margin.

Mobil's other suggested alternatives—i.e., petitioners' data used in its below-cost allegation, or, alternatively, another respondent's CV data reported in the present reviews, would also be inappropriate. The cost data submitted by petitioners in these reviews is not public data and is therefore not available for consideration as BIA. With respect to applying another respondent's CV data, it would not be appropriate to use the ranged public CV data submitted by Husky as BIA in this case. First, for that part of Husky's cost data that was applied and adjusted by the Department in calculating COM and CV in these reviews, no ranged public data were reported. Second, the reported public CV is an unadjusted figure which cannot properly reflect CV without further adjustment. Husky's public cost and production data lacks the proper detail to make appropriate adjustments to the public CV figure.

Accordingly, no appropriate public data would be available for consideration as BIA in this case.

#### Comment 25

Mobil argues that, even if the Department's decision to apply BIA is correct, its decision to apply a BIA rate that is itself based on partial BIA cannot be supported. Mobil argues that, although the Department has discretion in its choice of BIA, the CIT cautioned in *National Steel Corp. v. United States*, 913 F. Supp. 593, 597 (CIT 1996) (*National Steel*) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)) that it must exercise that discretion in light of the "Basic requirement of the BIA rule \* \* \* to determine margins as accurately as possible." Mobil also cites to *National Steel* 870 F. Supp. 1130, 1136 (CIT 1994) (quoting *Manifattura Emmepe S.p.A. v. United States* 799 F. Supp. 110, 115 (CIT 1992)), in which the CIT stated that there must be a "rational relationship \* \* \* between the 'data chosen and the matter to which they are to apply.'" Mobil contends that in *National Steel*, the court found that the Department's choice of BIA might have been aberrant based on the fact that a significant portion of the respondent's sales had margins well below the selected rate.

Mobil argues that, in this case, the Department's decision to base Mobil's BIA rate on Husky's rate, which, it argues, is itself based, to a significant extent, on BIA, violates the Department's own consistent policy of using another respondent's rate only if that rate is a non-BIA rate. Mobil argues that, in the 1991/92 review in this case, the Department rejected the petitioners' suggestion that the Department apply to Mobil, as a BIA rate, the rate applied to Petrosul, since the latter was itself a BIA rate. Mobil also cites *Roller Chain, Other Than Bicycle, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews* 57 FR 3745 (January 31, 1992) in which it argues the Department selected, as BIA, the highest non-BIA rate of any firm in a prior review; *Roller Chain Other Than Bicycle, from Japan: Final Results of Antidumping Duty Administrative Review*, 57 FR 43697 (September 22, 1992), in which it notes that the BIA rate remained unchanged in the final results; *Drycleaning Machinery from Germany; Final Results of Antidumping Duty Administrative Review*, 56 FR 66838 (December 26, 1991), in which it argues, as BIA, the Department chose another respondent's non-BIA rate; *Final Results of Antidumping Duty Administrative Review and Revocation*,

*in part of the Antidumping Duty Order: Certain Cut Flowers from Colombia*, 56 FR 50554 (Comment 6) (October 7, 1991), in which it argues, as BIA for non-responding firms, the Department chose the highest non-BIA rate from any review; and *Saha Thai Steel Pipe Co. v. United States*, 828 F. Supp. 57, 63 (CIT 1993), in which the CIT stated, "In selecting the BIA rate for a given subsidy program, Commerce asserts its practice is to select the highest published non-BIA rate for the identical program in the same country."

Mobil argues that, contrary to the Department's own stated practice, as upheld by the CIT, the Department has simply applied the rate chosen for Husky which itself is partially based on BIA. Mobil argues that this is clearly improper.

Mobil argues that the standards that govern the Department's choice of BIA are now more stringent as a result of the dictates of the 1994 Antidumping Code (Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994), and argues that the code makes it clear that the Department must have some rational basis in its choice of BIA. Mobil notes that paragraph 7 in Annex II of the Code establishes the standards that govern the choice of BIA, and, Mobil argues, cautions the administering authority to exercise its discretion to use BIA with "special circumspection." Mobil argues, that to ensure that some rational basis exists between the choice of BIA and the respondent's actual antidumping margin, the Code directs the authority to check the information used to support its choice of BIA with information from other independent sources, "such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation." Mobil argues that, based on these criteria, the Department would not be able to support its choice of BIA in Mobil's case because it has not even attempted to choose a BIA based on information that the Department perceives to be the best alternative to Mobil's own reported costs.

Petitioners argue that the application of Husky's rate to Mobil, as BIA, is fully consistent with Department practice. Petitioners argue that Husky's rate is a calculated rate in this review, and that the fact that certain elements of Husky's costs were based on BIA does not alter this fact. Petitioners argue that there have been numerous instances where the Department has used rates that were, in part, based on BIA to establish a total BIA rate for another company, and that indeed, a significant percentage of the

rates calculated by the Department have an element of BIA in them. Petitioners maintain that Mobil's argument that it would be inconsistent with Department practice to apply Husky's rate to Mobil, as BIA, should be rejected.

*Department's Position:* We disagree with Mobil. It is the Department's long-standing practice to use partial BIA with respect to a respondent and apply that rate, as BIA, to other firms who have failed to provide adequate responses. In this case, Husky's rate is a calculated rate, and, therefore, is appropriate as BIA for Mobil. We also disagree with Mobil that we have not exercised caution in choosing the rate. We have followed the law and have chosen a rate that is consistent with Department practice. As we stated in the preliminary results notice for these reviews, the applicable statute and regulations are as they existed on December 31, 1994. These reviews are not subject to the 1994 Antidumping Code and therefore it does not apply. Accordingly, the Department's established second-tier BIA practice in this case is required by the law applicable in these reviews. Therefore, for these final results, as BIA, we have continued to apply Husky's rate to Mobil.

#### Final Results of the Reviews

As a result of our reviews, we finally determine that the following margins exist for the periods December 1, 1992 through November 30, 1993, and December 1, 1993 through November 30, 1994:

Manufacturer/exporter	Time period	Margin <sup>5</sup> (percent)
Alberta Energy Co., Ltd .....	12/1/92–11/30/93	15.56
	12/1/93–11/30/94	15.56
Allied-Signal Inc ....	12/1/92–11/30/93	240.38
Brimstone Export ....	12/1/92–11/30/93	240.38

Manufacturer/exporter	Time period	Margin <sup>5</sup> (percent)
Burza Resources ..	12/1/92–11/30/93	240.38
Fanchem ...	12/1/92–11/30/93	240.38
Husky Oil Ltd .....	12/1/92–11/30/93	40.38
	12/1/93–11/30/94	3.38
Mobil Oil Canada, Ltd .....	12/1/92–11/30/93	340.38
	12/1/93–11/30/94	340.38
Norcen Energy Resources ..	12/1/92–11/30/93	240.38
	12/1/93–11/30/94	440.38
Petrosul International ..	12/1/92–11/30/93	240.38
	12/1/93–11/30/94	240.38
Saratoga Processing Co., Ltd .....	12/1/92–11/30/93	428.90
Sulbow Minerals	12/1/92–11/30/93	240.38

<sup>1</sup> No shipments or sales subject to this review. The firm has no individual rate from any segment of this proceeding. As a result, the firm will be subject to the "all others" rate.

<sup>2</sup> Non-cooperative total BIA rate.

<sup>3</sup> Cooperative total BIA rate.

<sup>4</sup> No shipments to the United States during the period of review. Rate is the rate established during the immediately preceding administrative review.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between U.S. price and FMV may vary from the percentage stated above. The Department will issue appraisal instructions directly to the Customs Service.

Furthermore, the following deposit rates will be effective upon publication of these final results of administrative review for all shipments of elemental sulphur from Canada entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Tariff Act: (1) the cash deposit rates for the reviewed

companies will be those rates established in the final results of the most recent review in which the company was involved; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in either of these reviews, a prior review, or the original less than fair value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in these or any previous review, or the LTFV investigation, the cash deposit rate will be the "new shipper" rate of 5.56 percent established in the first review conducted by the Department in which a "new shipper" rate was established. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CR 353.34(d)(1). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: July 7, 1997.

**Joseph A. Spetrini,**  
Acting Assistant Secretary for Import Administration.

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