

MEMORANDUM TO: Paul Piquado
Acting Deputy Assistant Secretary
for Import Administration

FROM: Susan H. Kuhbach
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty
Administrative Review of Magnesium Metal from the Russian
Federation for the Period of Review April 1, 2008, through March
31, 2009

Summary

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on magnesium metal from the Russian Federation for the period April 1, 2008, through March 31, 2009. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttal comments by parties:

1. Bill-and-Hold U.S. Sales
2. Constructed Export-Price Offset
3. Affiliation
4. Chlorine Gas Co-Product

Background

On May 13, 2010, the Department of Commerce (the Department) published its preliminary results of the administrative review of the antidumping duty order on magnesium metal from the Russian Federation. See *Magnesium Metal From the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 26922 (May 13, 2010) (*Preliminary Results*). The review covers two manufacturers/exporters, PSC VSMPO-AVISMA Corporation (AVISMA) and Solikamsk Magnesium Works (SMW).

On June 1, 2009, SMW submitted a letter indicating that it made no sales to the United States during the period of review (POR). We confirmed SMW's claim of no shipments by reviewing customs documentation. We received no comments on SMW's submission and we did not receive comments on SMW's submission after issuance of the *Preliminary Results*.

We invited interested parties to comment on the *Preliminary Results*. At the request of the petitioner, we held a public hearing, with a closed session, on July 28, 2010.

Discussion of the Issues

1. **Bill-and-Hold U.S. Sales**

Comment 1: The petitioner argues that, in the *Preliminary Results*, the Department should not have accepted AVISMA's exclusion of certain transactions from its reported U.S. sales based on AVISMA's description of these sales as "bill-and-hold" sales with an invoice date prior to the POR. The petitioner argues that, for the final results, the Department should re-examine the nature of the disputed sales transactions between AVISMA and the U.S. customer for the alleged bill-and-hold sales and determine that these sales are not bill-and-hold sales as AVISMA contends.

The petitioner argues that, in the *Preliminary Results*, the Department implied incorrectly that the petitioner has argued for use of shipment date for establishing date of sale for the disputed sales. The petitioner asserts that its position on this issue is that the invoice date is the proper basis for establishing the date of sale, not shipment date, and that the actual invoice date is the date of the finalized invoices submitted to the customer at the time of shipment. The petitioner alleges that the Department also states incorrectly in the *Preliminary Results* that the petitioner argued for application of adverse facts available (AFA) under section 776(b) of the Tariff Act of 1930, as amended (the Act), to resolve this issue. Rather, according to the petitioner, it stated specifically in its pre-preliminary results comments to the Department that it was reserving judgment as to whether AVISMA's margin calculations should involve application of adverse inferences with respect to the disputed sales. The petitioner argues that it specifically requested that the Department use the constructed U.S. sales file, which the petitioner created using only AVISMA's own data and neutral facts available without any adverse inferences.

The petitioner argues that record evidence shows that AVISMA used the bill-and-hold arrangement for sales that it moved or is attempting to move into the 2007/2008 administrative review where AVISMA was assigned a margin based on total AFA.

The petitioner contends that AVISMA is attempting to associate all of the lower-priced transactions it made during 2007 and 2008 with the completed 2007/2008 administrative review. The petitioner argues that, if successful, AVISMA would isolate its dumping margins and the resulting high cash-deposit rate to a review period in which it received a margin based on total AFA.

The petitioner argues that including these sales in the current administrative review would cause an increase in AVISMA's dumping margin and, consequently, establishing a cash-deposit rate significantly above the *de minimis* rate the Department calculated for the *Preliminary Results* on sales reported by AVISMA.

The petitioner claims that, towards the end of the 2007/2008 POR, AVISMA sent a letter to its bill-and-hold U.S. customer proposing that the parties engage in an entirely new type of

sales arrangement. The petitioner claims further that, prior to AVISMA's offer for a new arrangement, AVISMA's practice was to issue invoices on or within a few days of the date of shipment. The petitioner contends that, under this practice, the date of sale was the invoice date. According to the petitioner, AVISMA sought to alter the longstanding course of conduct with its bill-and-hold U.S. customer when it sent its letter offering a bill-and-hold arrangement. The petitioner contends that AVISMA has not provided any evidence that the proposed new arrangement originated with AVISMA's bill-and-hold U.S. customer. In the petitioner's opinion, the fact that the bill-and-hold U.S. customer did not accept the terms of the new arrangement calls into question AVISMA's assertion that the new agreement originated from AVISMA's bill-and-hold U.S. customer. The petitioner argues that, unlike the other customers with which AVISMA claims to have a bill-and-hold arrangement, the offer AVISMA sent to its bill-and-hold U.S. customer was not accepted. According to the petitioner, AVISMA's bill-and-hold U.S. customer did not sign the proposal but instead sent a counteroffer proposing alternative terms. The petitioner claims that negotiations of material terms between AVISMA and its bill-and-hold U.S. customer were ongoing from the end of the 2007/2008 POR through the point at which AVISMA did not accept its bill-and-hold U.S. customer's counteroffer.

The petitioner contends that record evidence demonstrates that AVISMA offered to change the sales arrangement to a bill-and-hold arrangement and then prematurely generated the invoices during the last month of the 2007/2008 POR. As a result, according to the petitioner, AVISMA sent invoices to its bill-and-hold U.S. customer a second time with dates that are within the current POR. The petitioner contends that, as a result, the disputed sales were made in this POR and should be reviewed in this administrative review.

The petitioner asserts that, in direct contradiction to AVISMA's assertions concerning the authenticity of the original invoices, the invoices issued a second time by AVISMA to its alleged bill-and-hold U.S. customer are the only invoices on this record known to have been received and accepted by AVISMA's bill-and-hold U.S. customer. The petitioner contends that AVISMA's revenue recognition was not based on the issuance of the original invoices and appears to have been tied instead to shipment and issuance of the second invoices.

The petitioner argues that the Department's date-of-sale analysis in the *Preliminary Results* is based on a faulty determination that AVISMA's sales to its bill-and-hold U.S. customer are in fact bill-and-hold transactions. The petitioner states that, despite the Department's finding in the *Preliminary Results* that AVISMA and its U.S. customer entered into a bill-and-hold arrangement, the disputed sales were not, in fact, bill-and-hold sales. The petitioner argues that the Department ignored the fact that AVISMA's bill-and-hold U.S. customer rejected AVISMA's offer for a bill-and-hold arrangement after the original invoices were issued.

The petitioner asserts that the typical purpose of any bill-and-hold arrangement is to allow the seller to invoice and recognize revenue while holding the product for shipment at a later date. According to the petitioner, the buyer bears the risk of loss and such arrangements are known for their potential to be used for manipulation of the timing of sales transactions. The petitioner contends that AVISMA's bill-and-hold customer was wary of the arrangement because it did not accept the revised terms of the arrangement as suggested by AVISMA in its letter to its

bill-and-hold U.S. customer. The petitioner claims that AVISMA appears to have based recognition of revenue on the second issuance of the invoices corresponding to shipment.

The petitioner claims that, pursuant to U.S. General Accepted Accounting Principles (GAAP) which governs AVISMA's accounting, AVISMA did not engage in a bill-and-hold arrangement with its U.S. customer. The petitioner asserts that AVISMA has acknowledged that U.S. GAAP requires a properly executed bill-and-hold agreement to legitimize invoices such as the invoices AVISMA issued a second time to its U.S. customer.

The petitioner argues that the vice president of operations for VSMPO-Tirus could not answer the Department's question at verification regarding the issue of not having its U.S. customer agree to the bill-and-hold terms as presented in AVISMA's bill-and-hold contract with its U.S. customer. The petitioner claims that the official avoided the question by diverting the Department's attention and claiming that the purpose of VSMPO-Tirus's bill-and-hold contracts with its customers has more to do with the company's revenue-recognition accounting policy. The petitioner contends that, if the purpose of a bill-and-hold agreement is to recognize revenue early, it follows that the sales to AVISMA's U.S. customer were not made on a bill-and-hold basis because AVISMA's U.S. customer did not agree to the terms of the agreement.

The petitioner argues that AVISMA did not satisfy the criteria established by the U.S. Securities and Exchange Commission (SEC) for recognizing a valid bill-and-hold transaction. The petitioner claims that the SEC has grappled with bill-and-hold transactions because they are often associated with the fraudulent manipulation of the timing of sales. The petitioner contends that the SEC guidelines allow for the recognition of revenue pursuant to a valid bill-and-hold agreement only in cases where seven criteria are met. According to the petitioner, the SEC has issued sanctions in cases where a company or individual claimed to have engaged in a bill-and-hold transaction that did not meet the criteria.

The petitioner claims that the Department's determination that AVISMA and its U.S. customer engaged in bill-and-hold sales appears to be based largely on statements made by company officials during verification. The petitioner argues that the Department cannot rely on statements made during verification because of contradiction in the statements. The petitioner asserts that the statement during verification that the purpose of VSMPO-Tirus's bill-and-hold contracts with its customers has more to do with the company's revenue-recognition accounting policy than with the customer withdrawing its request for a bill-and-hold arrangement is a contradiction of an earlier statement that VSMPO-Tirus enters into the bill-and-hold arrangement only at the request of its customers. The petitioner argues that there is no evidence on the record that AVISMA's U.S. customer ever requested a bill-and-hold agreement.

The petitioner argues that, even if the Department did not rely on the alleged bill-and-hold agreement to establish the validity of the proposed invoices, those invoices cannot be used to establish the date of sale because the material terms of sale were not established. The petitioner contends that the Department explains in *Antidumping Duties; Countervailing Duties, Part II*, 62 FR 27296, 27349 (Dep't of Commerce May 19, 1997) (*Preamble*), that the focus of its date-of-sale analysis is the point at which the material terms are truly established in the minds of the buyer and seller. Thus, according to the petitioner, the date of sale is the date on which the contracting parties reach a "meeting of the minds" on all the material terms of sale.

Citing *Narrow Woven Ribbons with Woven Selvedge from Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 FR 7244, 7251 (February 18, 2010) (*Narrow Woven Ribbons*), the petitioner argues that, although the material terms had generally been understood to mean quantity and price, the Department's definition of material terms has evolved to include other factors, including delivery terms and payment terms. The petitioner asserts that, because AVISMA's U.S. customer did not agree to AVISMA's offer, it did not agree to the material terms of sale reflected in the original invoices. The petitioner argues that, as a result, the material terms of sale were not finalized until the date of shipment.

Citing *Nakornthai Strip Mill Public Co. Ltd. v. United States*, 614 F. Supp. 2d 1323, 1325-28 (CIT 2009) (*Nakornthai*), the petitioner argues that, according to a recent decision by the Court of International Trade (CIT), AVISMA's original invoices cannot establish the date of sale because they do not represent agreement on the material terms of sale.

AVISMA argues that none of the petitioner's allegations are accurate and that the Department should continue to find that the date of sale for AVISMA's bill-and-hold U.S. customer was the date of the issuance of the March 2008 invoices. AVISMA requests that the Department continue to find that sales to this particular U.S. customer were already included in the 2007/2008 review and therefore should not be included in the 2008/2009 review.

AVISMA rebuts the petitioner's assertion that it tried to isolate the low-price sales to the bill-and-hold U.S. customer to the 2007/2008 review. AVISMA argues that the record evidence indicates that many of the sales to its bill-and-hold U.S. customer reported in the 2007/2008 review are at the exact same price as one of the U.S. sales in the current review and others are slightly lower than the highest sale price in the current review.

AVISMA contends that it made sales to the bill-and-hold U.S. customer long before it ever made the sales that it reported in its questionnaire response for the current review. AVISMA claims that the sales it reported in this review were made well after it had made the sales to its bill-and-hold U.S. customer. AVISMA states that it has not attempted to avoid proper review of the disputed U.S. sales.

AVISMA argues that the petitioner's theory that AVISMA tried to associate the low-price sales in the 2007/2008 administrative review is belied by the fact that AVISMA requested a review in the 2007/2008 and 2008/2009 review periods, AVISMA had already reported all of the sales to the bill-and-hold U.S. customer in the 2007/2008 review, and AVISMA reported its U.S. sales in the 2008/2009 review in the exact same fashion it did in the 2007/2008 review. In addition, AVISMA argues, all of the U.S. entries related to the disputed bill-and-hold sales took place in the 2007/2008 period and the Department has assessed antidumping duties against them at a rate of 43.58 percent.

AVISMA rebuts the petitioner's allegation that its U.S. customer did not agree to the bill-and-hold invoices. AVISMA contends that sales to this particular U.S. customer were made pursuant to purchase orders issued by the U.S. customer in late 2007 and early 2008. AVISMA contends further that it then either shipped products contemporaneously with the invoice or, with respect to the invoices under discussion, issued an invoice in advance of the shipment.

According to AVISMA, the invoices were followed by shipments which exactly matched the invoices. AVISMA claims that the Department's U.S. sales verification report confirms this.

AVISMA asserts that the invoices it issued in March 2008 were recorded in the normal course of business in AVISMA's accounting records. AVISMA asserts further that the same invoices were then sent again to its bill-and-hold U.S. customer as a way to help keep track of the metal after it was shipped. According to AVISMA, these invoices have the same number and date as the original invoice date with the same terms of sale. AVISMA argues that, in fact, the invoices are identical, that only a photocopy was made, and the only change on the invoice was a manual change indicating the date of shipment.

AVISMA contends that, after it sold the merchandise to the bill-and-hold U.S. customer in March 2008, it segregated the inventory in its own warehouse and inventory records showed that the material was no longer owned by AVISMA as of late March 2008. AVISMA argues that this was confirmed by the Department when it conducted the verification.

AVISMA argues that, if there had been a dispute as to the material terms of sales on the invoices sent in March 2008, the bill-and-hold U.S. customer would have requested amended invoices with revised terms. According to AVISMA, its U.S. customer did not make such a request and the affidavit from the vice president of VSMPO-Tirus confirms that the bill-and-hold U.S. customer agreed to the terms of the invoices and understood that shipments would be made pursuant to those invoices.

AVISMA rebuts the petitioner's allegation that there is no evidence on the record that the bill-and-hold U.S. customer actually received the invoices and acknowledged the validity of the invoices. AVISMA claims that its bill-and-hold U.S. customer received the invoices at issue in March 2008. AVISMA states that it provided evidence of communication between AVISMA and the bill-and-hold U.S. customer dated March 26, 2008, which includes certain invoices. According to AVISMA, the e-mail message indicates specifically that the metal will be held in VSMPO-Tirus's warehouse, payment for the products will be due according to the terms of payment specified on the invoices, and the invoices will be re-sent on the date of shipment.

AVISMA argues that its U.S. customer treated the March 2008 invoices as binding. AVISMA contends that evidence from the record demonstrates that its U.S. customer received and paid all of the March 2008 invoices in accordance with the terms of sale listed on these invoices. AVISMA argues further that the record shows not only that it sent invoices in March 2008 to the bill-and-hold U.S. customer but also that the bill-and-hold U.S. customer picked up merchandise from AVISMA pursuant to the invoices dated March 28, 2008.

AVISMA argues that, immediately after the invoices were issued in March 2008, its bill-and-hold U.S. customer acted in accordance with the terms of the invoices and began picking up the merchandise from AVISMA's warehouse. Therefore, according to AVISMA, the petitioner cannot credibly argue that its bill-and-hold U.S. customer did not agree to the terms of the March 2008 invoices.

AVISMA rebuts the petitioner's allegation that it appeared not to have treated the disputed transactions as bill-and-hold sales in its accounting records. AVISMA argues that it

billed its U.S. customer on the date of invoice and made corresponding accounting entries. AVISMA asserts that it also treated the inventory as being transferred to the bill-and-hold U.S. customer.

AVISMA argues that evidence on the record establishes that AVISMA and its bill-and-hold U.S. customer both acted in accordance with the terms of the March 2008 invoices.

AVISMA contends that the petitioner mischaracterizes the nature of the bill-and-hold sales. AVISMA questions the petitioner's assertion that, for there to be a bill-and-hold sale at all, it must meet rigorous SEC and U.S. GAAP requirements. AVISMA argues that each bill-and-hold invoice simply states that it is a bill-and-hold sale. That is, according to AVISMA, it issues the U.S. customer the invoices (and bills it) and then holds the merchandise for subsequent shipment and payment according to the terms of the invoice. AVISMA asserts that the invoice made it clear that the bill-and-hold U.S. customer was to instruct as to the date of shipment and the payment was to be made in accordance to the terms of payment.

AVISMA contends that, for internal financial-reporting purposes only, it decided that in order to meet the revenue-recognition test that it has used for magnesium and titanium products it would send a separate letter of agreement to its U.S. customer asking it to agree to accept risk as of the date of invoice. AVISMA asserts that the sole purpose of the letter of agreement was to determine whether it would be able to recognize revenue on the date of issuance of the invoices for purposes of its interim financial statements. AVISMA argues that, because there was an issue regarding acceptance of risk, it decided not to recognize the revenue and, therefore, it booked the revenue at a later date.

AVISMA argues that the March 2008 invoices establish the date of sale and they represent a meeting of the minds. Specifically, AVISMA argues, the facts in this administrative review demonstrate that the bill-and-hold U.S. customer agreed on price, quantity, payment terms, and terms of delivery. AVISMA contends that the fact that the March 2008 invoices represent an agreement by the parties on the material terms of sale was demonstrated by the fact that the quantities and values shown in the invoices and subsequent shipments matched to the penny and to the pound. AVISMA argues that, if there had been a dispute on the material terms of sale, the bill-and-hold U.S. customer would never have purchased the magnesium metal. AVISMA contends also that, if there had been a dispute as to the language on the invoices sent in March 2008, the U.S. customer would have requested amended invoices with revised terms but, according to AVISMA, the U.S. customer did not make such a request.

AVISMA rebuts the petitioner's allegation that AVISMA issued two versions of the same invoice. AVISMA contends that a single invoice was created and entered into its accounting system. AVISMA asserts that, as set forth in the customer ledger, on the date of invoice a single accounting entry was made indicating that an invoice had been issued. AVISMA claims that a separate and second invoice was never created for these transactions. AVISMA claims further that no additional entries were ever made indicating that there was a separate invoice.

AVISMA contends that the recent decision in *Nakornthai* is in fact nothing novel and should not affect the Department's decision in this administrative review. AVISMA argues that

the Department has at times viewed payment and delivery terms as being material, but, with respect to the bill-and-hold sales, there were no changes to payment or delivery terms.

Department's Position: The regulation at 19 CFR 351.401(i) states that, in identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice as recorded in the exporter's or producer's records kept in the ordinary course of business. The Secretary may use a date other than the date of invoice, however, if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale. See 19 CFR 351.401(i).

The *Preamble* to the Department's regulations also discusses the matter of identifying the date of sale of the subject merchandise and foreign like product. Specifically, the *Preamble* states that, "...absent satisfactory evidence that the terms of sale were finally established on a different date, the Department will presume that the date of sale is the date of invoice." The *Preamble* discusses that, in some cases, it may be inappropriate to rely on the date of invoice as the date of sale. For example, the *Preamble* states that the evidence on the record may indicate that, for a particular respondent, the material terms of sale may be established on some date other than the date of invoice. *Id.*

As discussed in the constructed export-price (CEP) sales verification report entitled "Verification of the Sales Response of PSC VSMPO-AVISMA Corporation in the Antidumping Review of Magnesium Metal from the Russian Federation," dated May 7, 2010 (CEP Sales Verification Report), we examined AVISMA's bill-and-hold arrangements with several of its U.S. customers for various products that it sells in the United States. Through our examination of AVISMA's accounting records, we found that, although the subject merchandise may be in AVISMA's warehouse for some time until it ships the subject merchandise to its U.S. customers, AVISMA treats the inventory in its normal books and records as if it left the warehouse for shipment on the date it issues the invoice. See CEP Sales Verification Report. Thus, according to AVISMA's books and records, with regard to AVISMA's disputed bill-and-hold U.S. customer, it issued the invoices to its U.S. customer in March 2008. During verification, we found no evidence to the contrary.

We disagree with the petitioner's argument that March 2008 cannot be used as the date of sale for these sales because the material terms of sale were not established. As part of our verification process, we examined whether the terms of sale for these bill-and-hold transactions ever changed or were subject to change between AVISMA's issuance of its March 2008 invoices and when it shipped the subject merchandise to its U.S. bill-and-hold customers. We found that in all instances there were no changes and there is no record evidence that the terms were subject to change. See CEP Sales Verification Report. As we state above, we verified AVISMA's books and records and found that it recorded in its books and records that it issued the invoices in March 2008. Therefore, we find that the evidentiary information on the record of this review indicates that the material terms of sale were established at the time AVISMA issued the March 2008 invoices because there were no changes in those material terms between AVISMA's issuance of the March 2008 invoices and shipment date or the copied invoices with the hand notation identifying the shipment date.

With regard to the petitioner's argument that AVISMA did not enter into a bill-and-hold arrangement with its U.S. customer, we find that, although AVISMA's U.S. customer may have not agreed fully to all of the terms outlined by AVISMA in its letter of agreement, evidence on the record indicates that AVISMA's U.S. customer did purchase the magnesium metal in accordance with the essential terms of the March 2008 invoices. Further, as discussed above, there is no evidence that the essential terms outlined in the March 2008 invoices were subject to change. Thus, we find that both parties treated the March 2008 invoices as binding; we found no evidence during the verification to the contrary. For example, we did not find any evidence during verification that AVISMA or its U.S. customer requested that the material terms of sale, *i.e.*, price and quantity, be revised or amended. See CEP Sales Verification Report. Therefore, we are not persuaded by the petitioner's argument that AVISMA's U.S. customer did not agree to the terms set forth in the bill-and-hold invoices issued by AVISMA in March 2008. Thus, we are satisfied that AVISMA's March 2008 invoice date is the appropriate date of sale for these sales. As such, they occurred prior to the period covered by this review.

In addition, with regard to the petitioner's reliance on U.S. GAAP and the guidelines issued by the SEC, we find that the guidelines under U.S. GAAP and the SEC do not alter our position on whether we identified the correct date of sale in this review because our focus here is whether the material terms of sale were established when AVISMA issued its March 2008 invoice. As we indicate above, the evidentiary information on the record of this review indicates that the material terms of sale were established at the time AVISMA issued the invoices in March 2008 and were not subject to change. We find the issue of revenue recognition and transfer of ownership of risk to be separate issues that do not affect our date-of-sale analysis. For example, the Department has on several occasions used contract date, order-confirmation date, or order-acknowledgment date as the date of sale because those dates corresponded to when the material terms of the sales in question were set. See, *e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Sulfanilic Acid from Portugal*, 67 FR 60219 (September 25, 2002), and accompanying Issues and Decision Memorandum at Comment 1.

With regard to the petitioner's reliance on *Narrow Woven Ribbons*, we agree that on occasion we have also viewed payment and delivery terms as being material to the terms of sale. In this review, we verified that the payment and delivery terms were honored by AVISMA in accordance with the language in the March 2008 invoices. Thus, we find that the material terms of sale as outlined in the March 2008 invoices conforms with our determination in *Narrow Woven Ribbons*.

2. Constructed Export-Price Offset

Comment 2: The petitioner contends that the Department erred in granting a CEP offset to normal value when calculating an antidumping margin for AVISMA for the *Preliminary Results*. The petitioner argues that AVISMA is not entitled to a CEP offset because it did not meet its burden of demonstrating eligibility. The petitioner asserts that the Department denied AVISMA a CEP offset in the original less-than-fair-value (LTFV) investigation and the 2005/2006 and 2006/2007 administrative reviews of this proceeding based on virtually identical facts. The petitioner points out that the CIT has affirmed the Department's decision not to grant AVISMA a CEP offset in the 2006/2007 administrative review.

The petitioner argues that the Department did not explain why it changed course in the *Preliminary Results* from prior segments of the proceeding and, as a result, it should reverse its preliminary decision and deny AVISMA the CEP offset in the final results.

According to the petitioner, the CEP offset is available to respondents under particular circumstances. First, the petitioner asserts, there must be a decision that sales to the United States are in fact CEP sales. Second, the petitioner contends, there must be a determination that there are different levels of trade between the home market and the U.S. market and that the home-market level of trade is more advanced than the U.S. level of trade. The petitioner states that, when it is not possible to quantify the price differences related to those sales to make a level-of-trade adjustment, a CEP offset is made. The petitioner argues that, only after these conditions are met, can a CEP offset be made, citing section 773(a)(7)(B) of the Act.

The petitioner argues that, in the current administrative review, the Department established that AVISMA made CEP sales to U.S. customers during the POR but AVISMA has not met its burden of showing that the home-market level of trade is more advanced than the U.S. CEP level of trade based on a difference between the actual functions performed by the sellers at the different levels in the two markets.

According to the petitioner, simple differences in selling activities, such as those claimed by AVISMA in the limited information in its response, are not sufficient for determining that there is a difference in the stage of marketing. The petitioner argues that AVISMA made only cursory statements about differences in the services provided in the two markets and that AVISMA did not provide any explanation for the classifications in its selling-functions chart which, according to the petitioner, is identical in relevant sections to the chart AVISMA provided in the 2006/2007 review. The petitioner claims that AVISMA provided even less information in the current administrative review than it provided in the 2006/2007 review.

Citing *PSC VSMPO - AVISMA Corp. v. United States*, Court No. 08-00321, Slip Op. 2009-120 (CIT October 20, 2009) the petitioner contends that the court stated in particular that AVISMA's selling-functions chart for the 2006/2007 review does not indicate the measure by which AVISMA made its evaluations. The petitioner argues that, as the CIT indicated, AVISMA must provide more information, including detailed discussions of the different types of selling functions, in order to demonstrate its eligibility for a CEP offset. Citing *Corus Engineering Steel Ltd. v. United States*, 27 CIT 1286, 1292 (2003), the petitioner argues that there may be circumstances where the significance of one or two indirect selling functions outweigh the significance of the rest.

The petitioner contends that AVISMA has again claimed that its larger number of home-market customers requires more personnel than its sales to its U.S. affiliate. The petitioner asserts that, as the Department found in the 2005/2006 and 2006/2007 reviews, AVISMA provided no discussion or supporting documentation as to how it arrived at this estimate or how this estimate took into account the differences between the two markets in the number of sales, in the terms of sales and payment, in quantities, and in the sales documentation involved. The petitioner argues that AVISMA claims that the home-market sales require more logistical support because transportation is by individual truck loads as opposed to train and ocean freight for U.S. sales. The petitioner asserts that in the 2006/2007 review the Department found that

AVISMA provided no discussion addressing logistics support pertaining to its U.S. shipments and that the personnel time dedicated to one market does not necessarily translate into a greater effort in servicing that market to the extent that it results in significant differences in a selling activity between the two markets. According to the petitioner, these same deficiencies apply in this administrative review as well.

The petitioner rebuts AVISMA's contention that this review is different from the previous administrative reviews because there were no sales from AVISMA to VSMPO-Tirus during the POR. The petitioner argues that the sales to the U.S. affiliate of merchandise sold to unaffiliated customers during the POR and the timing of the earlier sales to VSMPO-Tirus are irrelevant to the Department's analysis of the associated sales activities within the context of the CEP offset. According to the petitioner, this is because there is no requirement in the statute or regulation that sales to U.S. affiliates must occur within the POR. The petitioner argues further that the Department frequently recognizes that CEP sales involve a lag in time between the sale of subject merchandise to the U.S. affiliate and to the first unrelated customer. The petitioner argues that, as a result, AVISMA's assertion regarding the lack of sales to its U.S. affiliate during the POR is without merit.

Citing *Schucker v. F.D.I.C.*, 401 F. 3d 1347, 1354 (CAFC 2005) (citing *M.M. & P. Mar. Advancement, Training, Educ. & Safety Program (MATES) v. Department of Commerce*, 729 F. 2d 748, 754-55 (CAFC 1984)), the petitioner argues that the Department may not simply change its practice or depart from precedent without proper justification. According to the petitioner, this rule allows the reviewing court to understand the basis of the agency's action and judge the consistency of that action with the agency's general mandate. The petitioner contends that the focus on transparency and consistency is particularly relevant in situations where the Department has examined the same set of facts in earlier segments of a proceeding and changes its determination regarding those facts. To support its argument, petitioner cites *Pohang Iron and Steel Co., Ltd. v. United States*, 23 CIT 778, 788-89 (1999), in which the CIT found that the Department's decision to change its classification of sales from export-price (EP) sales to CEP sales was inappropriate because the facts were the same as in the first two reviews, when the Department classified them as EP sales, and the Department did not offer sufficient justification for the change.

The petitioner argues that the facts are essentially unchanged and the explanations given by AVISMA in this review are sparse when compared to the 2005/2006 and 2006/2007 administrative reviews in which the Department denied AVISMA a CEP offset. The petitioner argues that the Department did not provide any explanation for why its evaluation of the same facts led to a different result in this administrative review. The petitioner argues that, because granting a CEP offset in the final results would be a clear deviation from the Department's precedent in analyzing this factual situation, the Department should reverse its preliminary decision and deny AVISMA the CEP offset in the final results.

AVISMA rebuts the petitioner's assertion that the facts on the record of this case do not support granting AVISMA a CEP offset. AVISMA argues that it provided evidence on the record to support granting a CEP offset in this segment of the proceeding.

Citing *Micron Technology, Inc. v. United States*, 243 F.3d 1301, 1315 (CAFC 2001), AVISMA argues that, when making a level-of-trade comparison for CEP sales, the Department is to use the constructed price, *i.e.*, the price which reflects the deductions made pursuant to section 772(d) of the Act.

AVISMA contends that it is entitled to a CEP offset with respect to its sales in the United States because the level of trade of its sales in the home market is at a different level of trade (and more advanced down the chain of distribution) than the level of trade of any of the sales in the U.S. market. In addition, according to AVISMA, it is not possible to calculate a level-of-trade adjustment to compensate for this difference in the level of trade because there is no comparable level of trade in the home market.

AVISMA contends that, in determining the level of trade for CEP sales, it is the Department's longstanding practice, pursuant to 19 CFR 351.412, to adjust the CEP starting price for all deductions made under section 772(d) of the Act prior to starting a level-of-trade analysis. AVISMA states that the constructed level of trade is intended to represent the level of trade of the transaction between the foreign producer and its affiliated importer. AVISMA asserts that it is the selling activities associated with the transaction between the foreign producer and a hypothetical "super-distributor" at the U.S. border that are at issue in determining the CEP level of trade.

AVISMA contends that its affiliated U.S. importer, VSMPO-Tirus, conducts virtually all the selling functions with respect to the end-user customer in the U.S. market while AVISMA conducts all the selling functions in the home market. Citing its supplemental questionnaire response, AVISMA argues that, once the indirect selling expenses and allocated profit associated with these functions are removed (*i.e.*, at the CEP level), virtually none of the selling functions performed by AVISMA for its home-market customers remain in the adjusted U.S. sales.

AVISMA asserts that the only activities arguably related to sales to the U.S. end-user customer remaining at the CEP level of trade are order-processing and freight and delivery services to send the materials to the United States. According to AVISMA, these services constitute little more than logistical inter-company transfer services, not the advanced selling services performed by AVISMA in the home market. Thus, according to AVISMA, the sales in the home market are made at an advanced stage, are closer to the end of the chain of distribution, and involve a substantial number of additional selling functions than those of the CEP sales level.

AVISMA argues that it has met its burden of demonstrating that it is entitled to a CEP offset.

AVISMA claims that there are clear and substantial differences in the selling activities between the home market and the U.S. market. Moreover, according to AVISMA, it was able to quantify the differences in selling functions in a manner that it has not been able to do in previous administrative reviews. AVISMA argues that sales to the United States are relatively simple, where all sales went to a single customer, VSMPO-Tirus, and it made a single ocean-freight shipment to VSMPO-Tirus during the POR.

In contrast, AVISMA argues, the home market involves substantially more customers, invoices, and quantities of sale. Thus, according to AVISMA, it is axiomatic that, if a company sells to one customer versus numerous customers and has numerous invoices compared to one shipment, selling expenses in the U.S. market will be of a lesser amount than the selling expenses incurred in the home market.

AVISMA claims that it was able to quantify further differences that exist during a period of normal selling activity by providing the number of people who conduct the various functions. AVISMA states that, for example, for sales in the home market, two full-time staff members are required by the company and, for sales to the United States, the sales require only half of one staff member's time. AVISMA states further that, for home-market sales, it employs numerous people to provide technical support whereas it does not provide any technical support for its sales to VSMPO-Tirus.

AVISMA claims that the Department reviewed this issue carefully at the both the U.S. sales and home-market verifications. According to AVISMA, in both cases, the Department found no discrepancies. AVISMA contends that the revised sales-function chart provided at the U.S. sales verification highlights the differences between the sales in the home market and AVISMA's sales to VSMPO-Tirus. According to AVISMA, of the 14 sales functions performed by AVISMA in the home market, five are considered high, five medium, and four low. AVISMA contends that only two of these functions are performed for sales to the United States, which include packing and order-processing. AVISMA contends that the record indicates that the company performs significantly more services for its home-market sales than it does for its sales to the United States. AVISMA argues that this level of detail goes well beyond "cursory statements" as alleged by the petitioner and provides sufficient evidence that there is a difference in the marketing stages.

AVISMA argues that the detail provided in terms of numbers of employees, which the Department verified, goes well beyond the standard selling chart which the petitioner claims is the same as for the 2006/2007 review. According to AVISMA, the detail provided by AVISMA demonstrates the weight and intensity that the petitioner claims is necessary.

AVISMA claims that it is entitled to a CEP offset because it has met the criteria as discussed by the petitioner in its argument. AVISMA contends that the first criterion states that the sales to the United States must be of a CEP type. AVISMA states that the petitioner concedes that the sales in question are CEP in nature. AVISMA asserts that the second criterion states that there must be a determination that there are different levels of trade between the home market and the United States. AVISMA argues that VSMPO-Tirus handles all selling functions to U.S. sales whereas AVISMA in the home market sells almost exclusively to end-users and provides a wide range of services. Consequently, AVISMA asserts, there are two distinct levels of trade. AVISMA states that the third criterion indicates that the home-market level of trade must be more advanced than the CEP level of trade and that it is impossible to quantify the price difference related to those sales and different levels of trade to make a level-of-trade adjustment. According to AVISMA, the sales in the home market are to end-users which is a more advanced level of trade than the sales to a U.S. affiliated distributor. AVISMA contends that, using the

petitioner's own test, AVISMA has met its burden and therefore the Department should grant the CEP offset.

AVISMA argues that the fact that the Department did not grant a CEP offset in the previous administrative reviews is not dispositive of the issue for the current administrative review. Citing *E.I. DuPont de Nemours & Co. v. United States*, 22 CIT 19 (1998), AVISMA argues that each antidumping review is a separate proceeding covering merchandise entering the United States during a specific time period and the facts of each review are considered separately based on information submitted for that segment of the proceeding.

Citing *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 47551 (September 16, 2009), and accompanying Issues and Decision Memorandum at Comment 8, AVISMA rebuts the petitioner's assertion that the Department cannot make a different decision in this administrative review than it has in the previous administrative reviews. Specifically, AVISMA argues, the Department's longstanding practice, which has been upheld by the court, is to treat each segment of an antidumping proceeding, including the antidumping investigation and the administrative reviews that may follow, as independent proceedings with separate records and which lead to independent determinations.

For the reasons outlined above, AVISMA requests that the Department continue to grant it a CEP offset for the final results.

Department's Position: The respondent bears the burden of demonstrating its entitlement to a favorable adjustment such as a CEP offset. Before granting a CEP offset, the regulations at 19 CFR 351.412(f)(1)(ii) require the Department to find that normal value is at a more advanced level of trade than the CEP level of trade. In order to determine whether the U.S. and home-market sales were made at different levels of trade, the regulations at 19 CFR 351.412(c)(2) require the Department to make the following findings: sales were made at different marketing stages (or their equivalent); there must be substantial differences in selling activities to conclude that sales were made at different marketing stages; some overlap in selling activities will not preclude a determination that two sales are at different stages of marketing. Thus, in line with legal precedent and the regulatory framework, AVISMA has the burden of demonstrating to us that there are substantial differences in selling activities between its sales in the home market and to the United States, that home-market sales involve an advanced marketing stage, and that the overlap in selling activities in both markets is not significant. As supported by the discussion that follows, we find that AVISMA has met this evidentiary burden for this segment of the proceeding.

In analyzing the respective levels of trade for the comparison-market and U.S. CEP sales, it is our practice to "examine stages in the marketing process and selling functions along the chain of distribution between the producer and unaffiliated customer." See, e.g., *Certain Hot-Rolled Carbon Steel Flat Products from Romania: Preliminary Results of the Antidumping Duty Administrative Review*, 72 FR 44821, 44824 (August 9, 2007) (unchanged in *Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review*, 72 FR 71357 (December 17, 2007)). If the comparison-market sales are at a different level of trade than the CEP level of trade and the difference affects price comparability, as

manifested in a pattern of consistent price differences between sales on which normal value is based and comparison-market sales at the level of trade of the export transaction, we make a level-of-trade adjustment pursuant to section 773(a)(7)(A) of the Act. For CEP sales, if the normal-value level of trade is more remote from the factory than the CEP level of trade and there is no basis for determining whether the difference in level of trade between normal value and CEP affects price comparability, we adjust normal value under section 773(a)(7)(B) of the Act (the CEP offset). See *Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review*, 74 FR 1174 (January 12, 2009).

In order to determine whether the comparison-market sales and CEP sales were made at different marketing stages, we compared the various selling activities performed by AVISMA for sales to unaffiliated customers in Russia to the selling activities performed for AVISMA's sales to its U.S. affiliate, VSMPO-Tirus. In contrast to the many selling activities performed by AVISMA for sales in Russia, we confirmed at verification the limited selling functions that AVISMA performs for sales to VSMPO-Tirus. See the verification report entitled "Verification of the Sales Response of the PSC VSMPO-AVISMA Corporation in the Antidumping Duty Review of Magnesium Metal from the Russian Federation," dated June 21, 2010 (Home-Market Verification Report), where we found no discrepancies with regard to AVISMA's reported selling activities and the level of reported intensity for each reported selling activity in the home market. See also the CEP Sales Verification Report, where we also found no discrepancies with regard to the reported selling activities for sales by VSMPO-Tirus to unaffiliated U.S. customers.

We find that AVISMA's limited activities for sales to VSMPO-Tirus are in line with VSMPO-Tirus's business structure. VSMPO-Tirus is a company that was established to market and distribute AVISMA's magnesium metal and titanium products in the United States. See CEP Sales Verification Report at Exhibit 2, page 5. Accordingly, it is not necessary for AVISMA to provide many of the selling functions to VSMPO-Tirus because VSMPO-Tirus is already performing many of these functions from its own offices in the United States. For example, during the CEP verification, company officials of VSMPO-Tirus explained, and we confirmed, that they conduct sales-forecasting and economic-planning functions in order to determine how much magnesium metal is needed to meet the demand of its unaffiliated U.S. customers. See CEP Sales Verification Report at page 5. During our verification in Berezniki, Russia, we found that these selling functions were not performed by AVISMA during the POR with respect to sales from AVISMA to VSMPO-Tirus. See Home-Market Verification Report at 5. Overall, we found at verification that AVISMA performed minimal selling activities for sales to VSMPO-Tirus limited to administrative and logistical functions, such as order input/processing, freight and delivery/logistics, and packing. With respect to sales from AVISMA to its unaffiliated customers in Russia, we verified that AVISMA's personnel met and communicated frequently with its customers regarding sales forecasts for the year and market opportunities, directly negotiated sales opportunities with its unaffiliated home-market customers, and promoted sales of new and existing products (and provided technical support as well) for products such as magnesium cylinders. See Home-Market Verification Report at 5.

We also considered the role played by AVISMA's U.S. affiliate to be relevant in our decision to grant a CEP offset to AVISMA. See, e.g., *Stainless Steel Sheet and Strip in Coils from Germany; Notice of Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 45024, 45029 (August 6, 2006) (finding that in the home market the respondent made sales "further down the chain of distribution by providing certain downstream selling functions that are normally performed by the affiliated resellers in the U.S. market) (unchanged in *Stainless Steel Sheet and Strip in Coils from Germany; Notice of Final Results of Antidumping Duty Administrative Review*, 71 FR 74897 (December 13, 2006). In such cases, we have found that evidence demonstrating that the U.S. affiliated customer performs significant selling activities in the U.S. market supports the conclusion that the foreign producer's sales in the comparison market are made at a more advanced level of trade than the CEP level of trade. Our basis for this reasoning is that, if the U.S. affiliate performs significant selling activities in the U.S. market that are also handled by the foreign producer in the comparison market, the comparison-market level of trade is necessarily more advanced than the CEP level of trade, where activities performed by the U.S. affiliate are excluded from price pursuant to section 772(d) of the Act. See *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 47551 (September 16, 2009), and accompanying Issues and Decision Memorandum at Comment 8. Thus, we find that AVISMA's CEP level of trade is different from its home-market level of trade and at a less advanced stage of distribution than the home-market level of trade. Furthermore, because we have no information that provides an appropriate basis for determining a level-of-trade adjustment, we continue to find that a CEP-offset adjustment is warranted in this segment of the proceeding in accordance with sections 773(a)(7)(B) and 773(a)(8) of the Act.

The petitioner's argument that the record evidence in the current review does not support the granting of a CEP offset because the information on the record of the instant review does not differ significantly from the information on the record of the previous administrative review is not valid. As the CIT has established in *E.I. DuPont de Nemours & Co. v. United States*, 22 CIT 19, 32 (1998), "Commerce's longstanding practice, upheld by this court, is to treat each segment of an antidumping proceeding, including the antidumping investigation and the administrative reviews that may follow, as independent proceedings with separate records and which lead to independent determinations." The current administrative review is an independent segment of the proceeding with a separate record and includes a different set of circumstances.

Because we were able to conduct both the U.S. and home-market sales verifications for this review, the facts in this review are different from the facts in the 2006/2007 review concerning this issue. First, because we verified both AVISMA and its U.S. affiliate, VSMPO-Tirus, we were able to examine in detail AVISMA's reported selling activities and the level of intensity it reported. Contrary to the current review, we did not verify AVISMA in either the 2005/2006 or 2006/2007 review.

In addition, we were able to discuss the types of the selling activities reported with company officials and examined documentation supporting their assertion of the level of intensity reported in the selling-functions chart. Because we did not verify AVISMA in either the 2005/2006 or 2006/2007 review, we were unable to conduct such exercises in those reviews

to confirm AVISMA's reported information concerning its selling activities. In the 2006/2007 review where we denied AVISMA the CEP offset, we expressed concerns about the validity and consistency of the information presented by AVISMA in that particular review. For example, in the 2006/2007 review we found that AVISMA's discussion on which we relied in making our preliminary decision to grant a CEP offset reflected unsupported conclusory or contradictory statements. See *Magnesium Metal from the Russian Federation: Final Results of Administrative Review*, 73 FR 52642 (September 10, 2008), and accompanying Issues and Decision Memorandum at Comment 7 (*2006/2007 Magnesium Metal*). In this review, through the process of verification we were able to confirm AVISMA's assertion with regard to information presented in the selling-function chart. In addition, in *2006/2007 Magnesium Metal*, we found that AVISMA did not establish that it provides substantially more sales-support effort in the home market than for its affiliated U.S. customer. Again, in this review, through the process of verification, we found that AVISMA was able to establish that it provided substantially more sales-support effort in the home market than for its affiliated U.S. customer. See Home-Market Verification Report at 5. Thus, we find that our analysis in our preliminary analysis memo dated May 7, 2010, with regard to granting a CEP offset for this review continues to be accurate where we state:

AVISMA reported one channel of distribution in the home market, sales to end- users. We found that the home-market channel of distribution constitutes a single level of trade.

In the U.S. market, AVISMA made only CEP sales. In the case of CEP, we identified the level of trade based on the price after the deduction of expenses and profit under section 772(d) of the Act. Based on our overall analysis, we considered the CEP to constitute only one level of trade.

We found that there were significant differences between the selling activities associated with the CEP and those associated with the home-market level of trade. For example, in contrast to the home-market level of trade, the CEP level of trade involved no sales forecasting, strategic and economic planning, technical advice, market research, advertising and sales promotion, and inventory maintenance. Furthermore, the intensity associated with the processing of sales-related documents, the involvement of direct sales personnel, and the provision of freight and delivery arrangements was substantially higher at the home-market level of trade than at the CEP level of trade. Therefore, we considered the CEP level of trade to be different from the home-market level of trade and at a less advanced stage of distribution than the home-market level of trade. Consequently, we could not match to sales at the same level of trade in the home market nor could we determine a level-of-trade adjustment based on AVISMA's home-market sales of the foreign like product. Furthermore, we have no other information that provides an appropriate basis for determining a level-of-trade adjustment. For AVISMA's CEP sales, we made a CEP-offset adjustment in accordance with sections 773(a)(7)(B) and 773(a)(8) of the Act.

It is the Department's practice to examine not only the number of indirect selling functions undertaken outside the United States for the U.S. and comparison markets but also their weight and intensity. We examined AVISMA's selling functions, weight, and intensity when we conducted verifications in AVISMA's headquarters in Berezniki, Russia, and VSMPO-Tirus's operations in Pittsburgh, Pennsylvania. As we stated in our verification reports, we

found no discrepancies with the information reported by AVISMA regarding its selling activities. See Home-Market Verification Report at page 5 and CEP Sales Verification Report at page 5.

We find the petitioner's assertion that we may not simply change our practice or depart from precedent without proper justification to be misplaced. We did not establish a practice of denying AVISMA a CEP offset or establish a precedent without proper justification. As we indicate above, contrary to the events of the 2005/2006 and 2006/2007 reviews, we were able to verify the accuracy of AVISMA's selling-functions chart by discussing the selling activities with company personnel, reviewing documentation supporting the level of intensity reported, and examining empirical evidence by verifying the company's books and records.

3. Affiliation

Comment 3: The petitioner contends that the Department did not address the issue of affiliation between AVISMA and certain home-market customers in the *Preliminary Results*. The petitioner argues that the statute and administrative precedent establish that AVISMA is affiliated with certain home-market customers through their respective parents' joint venture, Rusinvestpartner. The petitioner asserts that, although AVISMA has denied that an affiliation exists, it has not provided the joint-venture agreement which would resolve the issue. The petitioner argues that, despite the Department's specific instruction to provide a complete, translated copy of the Rusinvestpartner joint-venture agreement and all amendments, AVISMA refused to provide the agreement, claiming that it did not have access to the joint-venture agreement.

The petitioner argues that AVISMA's refusal to provide information specifically requested by the Department warrants the application of partial AFA under section 776(b) of the Act. The petitioner argues further that, as partial AFA, the Department should determine that the requested information would have established affiliation between AVISMA and certain of its home-market customers.

The petitioner contends that affiliation between AVISMA and certain home-market customers is established by the control that AVISMA's parent company and Renova have over the joint venture, Rusinvestpartner. According to the petitioner, section 771(33)(F) of the Act states that persons are affiliated where two or more persons are direct or indirectly controlling, controlled by, or under common control with, any person. The petitioner concludes that affiliation between two parties exists where each party exerts control over a third party. The petitioner asserts that the Department has determined that two parties are affiliated where both are able to exert control over a commonly owned and controlled joint venture. Citing 19 CFR 351.102(b)(3), the petitioner argues that control is found where the relationship has the potential to affect decisions concerning the production or cost of the subject merchandise or foreign like product.

The petitioner claims that, in this case, the home-market customers in question are subsidiaries of Renova and administrative precedent makes clear that parent companies and their subsidiaries should be treated as a single entity. The petitioner argues that the parent companies

of AVISMA and the home-market customers in question exert the requisite control over the joint venture. Therefore, according to the petitioner, pursuant to section 771(33)(F) of the Act, they are affiliated.

The petitioner argues that the Department's recent determination in *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010), and accompanying Issues and Decision Memorandum at Comment 10 (*Oil Country Tubular Goods*), is directly applicable to this case. There, the petitioner states, the Department determined that two parties were affiliated through a joint venture. The petitioner contends that, in making this determination, the Department stated that affiliation does not require that control must apply specifically to day-to-day business decisions.

The petitioner argues that, consistent with the Department's analysis in *Oil Country Tubular Goods*, AVISMA and certain home-market customers are affiliated. The petitioner argues further that record evidence demonstrates that both AVISMA's parent company and the home-market customers' parent company control the joint venture, Rusinvestpartner, through equity ownership and the fact that each entity is controlled by the founders of Rusinvestpartner demonstrates the same type of control as in *Oil Country Tubular Goods*. Citing *Electrolytic Manganese Dioxide from Japan: Final Results of Antidumping Duty Administrative Review*, 65 FR 55939 (September 15, 2000), and accompanying Issues and Decision Memorandum at Comment 2 (*EMD from Japan*), the petitioner argues that the Department has determined that two parties are affiliated where both are able to exert control over a commonly owned and controlled joint venture.

The petitioner argues that, because AVISMA refused to provide information specifically requested by the Department in this review, the Department should apply partial AFA. The petitioner suggests that the Department find that the joint-venture agreement would have established affiliation if it had been submitted by AVISMA. The petitioner argues that, if the Department determines that partial AFA is not warranted, the Department should find nonetheless that AVISMA and the home-market customers in question are affiliated.

AVISMA disputes the petitioner's assertion that it failed to cooperate with the Department's requests for information. AVISMA argues that, in light of other information on the record, there is no basis to believe that the joint-venture agreement would be sufficient to establish the alleged affiliation with Renova based on the Department's affiliation test. AVISMA contends that the joint-venture agreement between a subsidiary of its parent company and Renova is irrelevant to the petitioner's claim that AVISMA is affiliated with certain home-market customers because there is no evidence on the record establishing the affiliation, if any, between Renova and the home-market customers in question.

AVISMA argues that, contrary to the petitioner's mischaracterizations, AVISMA did not refuse to provide the joint-venture agreement. According to AVISMA, it clarified that it was not a party to the joint-venture agreement which was entered into between two separate legal entities

that it does not control. AVISMA states that it explained to the Department that it requested a copy of the joint-venture agreement from its parent company and it was unable to obtain the joint-venture agreement with Renova because of confidentiality concerns. AVISMA claims that it made every effort to obtain the information requested, but it was unable to obtain a copy of the agreement. AVISMA asserts that it notified the Department of this situation and provided an explanation. Therefore, AVISMA contends, the application of facts available is not warranted.

AVISMA states that, even assuming that an affiliation exists between its parent's subsidiary and Renova based on the joint venture, nothing on the record supports the unfounded assertion that Renova is the parent company of certain of AVISMA's home-market customers. AVISMA contends that the record reflects no such relationship between Renova and certain home-market customers. According to AVISMA, the sole support for the petitioner's claim that certain home-market customers are affiliated with Renova is an undated chart attached at Exhibit 5 of the petitioner's September 1, 2009, submission purporting to represent the corporate structure of Renova. AVISMA argues that none of the home-market customers are listed as subsidiaries on the chart and, based on information included on the chart, the home-market customers appear outside the Renova corporate tree. AVISMA argues further that there is no information on the record explaining the relationship between Renova and certain of AVISMA's home-market customers. AVISMA contends that there is no information on the record showing that Renova owns, controls, or holds five percent or more directly or indirectly of the outstanding voting stock of the home-market customers in question, as needed pursuant section 771(33)(E) of the Act. AVISMA argues that, despite the petitioner's attempts to create the appearances of relationships among these parties, the relevant statutory test has not been met.

AVISMA contends that the Department often treats affiliated entities as a single entity where the parent company owns or controls directly or indirectly its subsidiary company or its subsidiary's subsidiary. AVISMA asserts that there is no basis to treat Renova and its home-market customers as a single entity because there is no showing that they are affiliated.

Citing *Oil Country Tubular Goods and Mitsubishi Heavy Industries Ltd. v. United States*, 15 F. Supp. 2d 807 (CIT 1998), AVISMA argues that the Department has normally considered affiliated parties as a single entity only where the ownership interest has been at least a majority ownership, if not 100 percent. AVISMA argues that the record does not support a finding that Renova and certain home-market customers should be treated as a single entity.

AVISMA argues that, because the petitioner did not establish any affiliation between Renova and certain home-market customers in the first instance, there is no question of a further affiliation between AVISMA and its home-market customers *via* Renova.

Citing *TIJD Inc. v. United States*, 29 CIT 307, 314-315, 366 F. Supp. 2d 1286, 1293 (2005), AVISMA argues that the court held that two elements must be satisfied for affiliation to exist. According to AVISMA, two parties must be legally or operationally in a position to exercise restraint or direction over a third party and the relationship with the third party must have the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise. AVISMA argues that the party alleging affiliation must successfully demonstrate

that both elements have been fulfilled. AVISMA argues that the petitioner's analysis for the most part omits the second element of the affiliation test, as applied by the court and by the Department. AVISMA contends that, under the petitioner's analysis, any joint venture between two companies makes all the companies affiliated with each of the joint-venture companies.

AVISMA argues that of all the cases cited by the petitioner do not support a finding of affiliation with respect to AVISMA and certain home-market customers. AVISMA contends that, in the case of *EMD from Japan*, the Department explained that affiliation could theoretically arise out of a joint-venture arrangement but, consistent with the Department's regulations, control will not be found unless the relationship has the potential to impact decisions concerning the production, pricing, or costs of the subject merchandise or like product. AVISMA argues that two separate and distinct determinations had to be made in that case: that two partners jointly control a joint venture and that the relationship has the potential to impact the production or pricing of the subject merchandise. AVISMA argues that the petitioner has never provided any evidence that this could be the case.

AVISMA argues that, in the case of the Rusinvestpartners joint venture, there is no evidence on the record to suggest that the joint venture is in any way involved with subject merchandise. AVISMA claims that the petitioner's own information indicates that Rusinvestpartners is interested in acquisition of lead and zinc deposit. AVISMA argues that it does not use any lead or zinc in its production process.

In conclusion, AVISMA argues that there is no evidence of affiliation between AVISMA and certain home-market customers despite the petitioner's attempts to suggest otherwise.

Department's Position: Because we do not have sufficient information on the record on this review to support a finding that AVISMA is affiliated with certain home-market customers *via* the Rusinvestpartners joint venture, we cannot make an appropriate determination on whether AVISMA is affiliated with certain home-market customers *via* the joint venture. Specifically, we do not have information on the record indicating that Renova owns, controls, or holds five percent or more, directly or indirectly, of the outstanding voting stock of the home-market customers in question. Accordingly, record evidence does not support a finding of affiliation between AVISMA and certain home-market customers under section 771(33)(F) of the Act. Nonetheless, we believe that there is enough information on the record that warrants further examination of this issue in the subsequent administrative review. Therefore, we intend to explore this issue in further detail in the 2009/2010 review which has been initiated.

We also determine the application of partial AFA is not warranted with respect to AVISMA's inability to provide a copy of the joint-venture agreement. Section 776(a) of the Act provides that the Department shall apply "facts otherwise available" if (1) necessary information is not on the record, or (2) an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Section 776(b) of the Act provides further that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. We do not find, however, that AVISMA has failed to cooperate to the best of its ability. Rather, in order to make a determination regarding affiliation, we require additional information with respect to Renova and its affiliates that we did not specifically request from AVISMA in the context of this review. Thus, we do not believe an adverse inference is warranted.

Finally, the record indicates that none of the home-market sales that were compared to AVISMA's U.S. sales during the POR were sold to the home-market customers in question. Therefore, none of the sales in question were used in our calculation of the margin for AVISMA. As we indicate above, however, we intend to examine this issue more closely in the subsequent review of the order.

4. Chlorine Gas Co-product

Comment 4: The petitioner contends that, in the current administrative review, the Department calculated the value of chlorine gas inappropriately for the *Preliminary Results* by adding the estimated gasification costs to the market value of liquid chlorine (*i.e.*, the replacement-cost approach) instead of deducting the verified liquefaction costs from the market value of liquid chlorine (*i.e.*, the net realizable value (NRV) approach). The petitioner points out that, for the final results in the 2006/2007 review, the Department also valued chlorine gas in the same manner and amount as valued for the *Preliminary Results*. The petitioner argues that, for the final results, the Department should value chlorine gas in the same manner and amount as valued in the LTFV investigation of this case because the Department verified the market value of liquid chlorine and the liquefaction costs to convert chlorine gas into saleable liquid chlorine.

According to the petitioner, the Department's rationale to value chlorine gas using the replacement-cost approach stems from the false premise that AVISMA is a purchaser of chlorine gas. The petitioner maintains that the respondent is neither a purchaser nor a seller of chlorine gas but a producer of chlorine gas which is consumed internally for the production of titanium products, merchandise not under consideration. Moreover, the petitioner contends, the Department's adoption of the replacement-cost approach for chlorine gas and the NRV approach for magnesium metal distorted the allocation of the joint costs. The petitioner argues that the unreasonableness of the Department's decision to combine two dissimilar accounting methodologies becomes obvious when considering its implications; the NRV methodology used for magnesium metal starts with a market value and then deducts the post-split-off costs in an effort to go upstream to the split-off point whereas the replacement-cost methodology used for chlorine gas starts with a market value and then adds processing and transportation costs, thereby moving further away from the split-off point. The petitioner argues that, similar to magnesium metal, the Department should use the NRV methodology for chlorine gas and deduct the liquefaction costs from the market value of liquid chlorine.

The petitioner states that the NRV methodology is the most widely acknowledged approach for allocating joint costs to co-products. The petitioner asserts that there are numerous

references in accounting literature and precedents where the Department employed the NRV methodology to allocate joint costs. The petitioner contends that use of this methodology has been examined and endorsed repeatedly by the courts. The petitioner contends that a fundamental principle in joint-product cost accounting holds that the value of a joint product increases as it undergoes further processing. Thus, according to the petitioner, to estimate the value of joint product at the split-off point, post-split-off costs must be deducted. Similarly, citing Barry Epstein and Eva Jermakowicz, *Interpretation and Application of International Financial Reporting Standards* at 195 (2008 edition), the petitioner states that International Accounting Standards define NRV as the “estimated selling price in the ordinary course of business, less the estimated costs of completion and the estimated costs necessary to make the sale.” The petitioner maintains that, in the final results of the 2006/2007 review and the *Preliminary Results* of this review, the Department calculated the NRV of magnesium metal properly by subtracting the post-split-off costs incurred to convert raw magnesium to finished magnesium metal. The petitioner asserts that, similarly, in the preliminary results of the 2006/2007 review, the Department calculated the NRV of chlorine gas properly by subtracting the estimated post-split-off liquefaction costs for the hypothetical conversion of chlorine gas into liquid chlorine. According to the petitioner, these calculations are consistent with the Department’s normal approach when allocating joint production costs. The petitioner argues that, in the 2006/2007 review, the Department abandoned the NRV method for chlorine gas used for the preliminary results and adopted the replacement-cost approach for those final results.

The petitioner claims that the replacement-cost approach is not typically contemplated as a method for allocating common costs to co-products. The petitioner states that, when first adopting this methodology in the 2006/2007 review, the Department cited no authority supporting its use for that purpose. According to the petitioner, the Department gave no explanation in the *Preliminary Results* for using the same methodology other than that it had been used in the 2006/2007 review. The petitioner asserts that it was unable to find any previous decision where the Department used the replacement-cost approach for all co-products or where it used different methodologies to calculate the relative values of two or more co-products. In fact, according to the petitioner, prior to the 2006/2007 review of the order, the Department’s use of a replacement-cost methodology has been limited to inventory values in antidumping cases involving economies experiencing hyperinflation.

According to the petitioner, the principles underlying acceptable allocation methodologies and calculations are well settled in the administration of the antidumping law. The petitioner argues that the Department focuses on the need to make “apples-to-apples” comparisons in its determination and that the relevant touchstone when considering the merits of an allocation methodology is “internal consistency,” which the Department has explained in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof from Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part*, 63 FR 20585, 20599 (April 27, 1998) (*TRBs from Japan*) as follows:

{W}e examine the respondent’s allocation methodology to determine if there is internal consistency between the numerator and denominator and the methodology as a whole.... Likewise, the allocation ratio should be applied to the same sale price reflected in the denominator. For example, we would not accept the application of an allocation ratio to

the gross sale price if the denominator was calculated by totaling the value of all sales on the basis of net price.

The petitioner argues that, by using the NRV methodology for magnesium metal while using the replacement-cost methodology for chlorine gas, the Department has devised an allocation methodology that lacks internal consistency and should be rejected because it does not meet the Department's own longstanding criteria.

The petitioner points out that in calculating the value for chlorine gas, the Department adjusted the market value of liquid chlorine by adding amounts for the gasification and transportation costs and built in a factor for yield loss. The petitioner asserts that there is absolutely no evidence on the record supporting the legitimacy or magnitude of these adjustments – they simply appear as line items in the Department's calculation memorandum from the 2006/2007 review which the Department placed on the record of this review without any supporting documentation. The petitioner acknowledges that these adjustment amounts were provided by the respondent in the 2006/2007 review but claims that the respondent did not provide any corroborating evidence or actual source documentation in support of the validity, magnitude, or appropriateness of these adjustments in this review.

Citing independent sources in its briefs, the petitioner claims that the gasification cost has been overestimated when compared with the liquefaction cost because converting liquid chlorine to gas requires no more than depressurizing the liquid by opening a valve. In addition, it explains, the Department should not add the transportation costs because the market value of liquid chlorine is from the Berezniki market, the place where the respondent's magnesium plant is located. Moreover, the petitioner states, the transportation costs are for containers while the respondent's liquid-chlorine purchases would be in bulk. Finally, the petitioner contends, AVISMA never provided an explanation of what was causing the material losses or provided documentation in support of this yield-loss factor.

The petitioner requests that the Department use the NRV method for chlorine gas and calculate the NRV of chlorine gas by deducting the liquefaction costs from the market value of liquid chlorine. The petitioner asserts that, if the Department continues to use the replacement-cost approach for chlorine gas, it should limit the evaporation costs to liquefaction costs because evaporation costs cannot be more than liquefaction costs and it should exclude the transportation costs and the yield-loss factor.

AVISMA contends that the Department's decision to value chlorine gas using the replacement-cost approach in this review was appropriate because AVISMA is a consumer and also a potential buyer of chlorine gas. In addition, the respondent asserts, the NRV methodology to value chlorine gas as advocated by the petitioner is unwarranted because AVISMA was never a seller of chlorine gas, never converted chlorine gas into liquid chlorine, and does not produce chlorine gas now in excess of what is required for titanium production. The respondent prefers that the Department value the chlorine gas using the cost information provided in this review rather than the cost information provided in the 2006/2007 review.

AVISMA claims that, as a significant user of chlorine gas, it has constructed a liquid-chlorine gasification plant that will enable AVISMA to buy liquid chlorine on the open market,

store it, and gasify the amount necessary to satisfy the chlorine-gas requirements of its titanium-sponge production not covered by the chlorine gas produced from its existing electrolysis processes. AVISMA states that the steps it has taken to obtain the technology necessary for converting liquid chlorine into gas included hiring a consulting firm to conduct a feasibility study of purchasing liquid chlorine and developing a design for the plant. These designs, according to AVISMA, were then implemented and the company built a liquid chlorine storage tank, the equipment for gasification of chlorine, and a controlled environment for this operation to take place. AVISMA claims also that the Department officials toured the liquid-chlorine gasification plant and verified that AVISMA is a user of chlorine gas and has taken concrete steps to become a purchaser of liquid-chlorine. AVISMA claims that in the past it has purchased magnesium chloride and tetrachloride to increase the supply of chlorine gas for titanium production.

AVISMA rebuts the petitioner's position by stating that the Department did not use two internally inconsistent methodologies but used one methodology for allocating joint costs to the two joint products, raw magnesium and chlorine gas. AVISMA argues that, as the Department explained in the *Preliminary Results*, the joint costs were allocated based on the relative values of these two joint products. AVISMA points out that the methods used to calculate these relative values differed because AVISMA actually sold magnesium metal, not liquid chlorine. AVISMA asserts, however, that it sold titanium products made from chlorine gas. AVISMA contends that the Department used the most direct method of determining the value of chlorine gas by looking at what the company would have to pay to replace the chlorine gas rather than taking the NRV approach of valuing chlorine gas based on the sale prices of titanium products. AVISMA argues that, if the Department accepts the NRV methodology to value chlorine gas as proposed by the petitioner, the starting price should be of the titanium products, not liquid chlorine.

AVISMA contends that there is no evidence on the record to support the petitioner's claim that evaporation costs should not exceed liquefaction costs and that liquid chlorine can be turned into gas through heating and opening a valve. AVISMA claims that such a conversion of liquid chlorine to chlorine gas is neither possible nor safe. AVISMA maintains that there is evidence on the record to support the adjustments of the evaporation costs, transportation costs, and the yield-loss factor which the Department made to the market value of liquid chlorine to calculate the value of chlorine gas. AVISMA claims further that the transportation costs are supported by the liquid-chlorine invoices and the evaporation costs were based on a feasibility study. Moreover, according to AVISMA, in the current review the Department verified the estimated evaporation costs based on the same feasibility study, as modified for the current input values.

Department's Position: AVISMA produces magnesium metal, titanium sponge, and other minor products. At the magnesium plant, carnalite ore (*i.e.*, the main input) goes through a water-removal or dehydration process at OPU-1 ("OPU" is AVISMA's abbreviation for the operating unit) and exits as anhydrous carnalite. At OPU-2, anhydrous carnalite moves through an electrolysis process (*i.e.*, the split-off point) that produces two main joint products: raw magnesium and chlorine gas. The raw magnesium is processed further to produce the merchandise under consideration, pure and alloyed magnesium metal. The chlorine gas is either recycled back into the dehydration process (*i.e.*, OPU-1) or transferred to the titanium plant for use in production of titanium sponge. See AVISMA's August 4, 2009, response at 6-12.

We did not use two different methodologies to allocate the joint costs to raw magnesium and chlorine gas. We only used one methodology, the value-based allocation methodology.¹ That is, we allocated the joint costs from OPU-2 between raw magnesium and chlorine gas based on the relative values of the two products. For the purposes of allocating the joint costs of the OPU-2 split-off point, we needed to determine the values of raw magnesium and chlorine gas. The value of raw magnesium is relatively easy to identify. We calculated the value of raw magnesium at the OPU-2 split-off point by deducting the post-split-off costs incurred by AVISMA to convert raw magnesium into magnesium metal products from the sale prices of the magnesium metal products AVISMA sold. We were unable to do a similar calculation for chlorine gas because AVISMA did not convert any chlorine gas into saleable products. During the POR, AVISMA used all the chlorine gas (net of the recycled quantities) as an input into titanium production. See AVISMA's August 4, 2009, response at page 10. Thus, while AVISMA values the chlorine gas for its use in the titanium plant at an internally set value, neither a direct nor indirect market price is available for the POR. The issue is how to approximate the fair-market value of chlorine gas to AVISMA.

As we indicated in our cost verification report, AVISMA is building a liquid-gas storage and gasification plant. Therefore, AVISMA will be able to buy liquid chlorine on the open market, store it, and convert to gas the amount necessary to satisfy the requirements of its titanium-sponge production not covered by the existing internal production.² We determine that it would be inappropriate to use the estimates of costs associated with this future facility, however, for the purposes of choosing a chlorine gas value. The operating costs of the plant are estimates as it has not yet started production. Furthermore, the facility is not yet completed. The total capitalized fixed-asset value may not as of yet be finalized. Moreover, any use of these estimates would also require speculation of the actual future operating capacity of the new facility. We also disagree with AVISMA that, if the NRV approach is used to value chlorine gas, then the starting price for chlorine gas should be of the titanium products. The requisite data for this approach is not on the record.

AVISMA is clearly a consumer of chlorine gas and a potential buyer of liquid chlorine. For this review, it is appropriate to value chlorine gas based on what AVISMA would have spent in order to obtain the chlorine gas necessary to operate its titanium production unit. In selecting a value of chlorine gas at the split-off point, we looked at AVISMA as a purchaser of liquid chlorine rather than as a seller. A surrogate price that approximates such a value would incorporate the market price of bulk purchases of liquid chlorine, plus the cost to convert it from liquid to gas, ready for input into titanium processing as well as any transportation costs.

¹ The National Association of Accountants lists two principle types of bases for allocating joint costs to co-products: (1) bases assumed to measure benefits which individual co-products receive from common cost factors; (2) bases assumed to measure the ability of individual co-products to absorb joint costs. Keller, Bulloch, and Shultis, *Management Accountants' Handbook* at chapter 11 page 9 (4th edition), 1992. The general practice is to allocate joint costs either using a volume-based method (*i.e.*, the benefits received) or a value-based method (*i.e.*, the ability to absorb).

² See 2008-2009 Cost Verification Report at 7 and 20.

In the LTFV investigation, AVISMA produced excess chlorine gas which was disposed of by burning. See LTFV Cost Verification Report at 21.³ At that time, AVISMA was looking into the possibility of setting up a liquefaction plant to convert the excess chlorine gas into saleable liquid chlorine and, therefore, it conducted a cost study. For the final determination in the LTFV investigation, we considered AVISMA as a potential seller of liquid chlorine and valued chlorine gas at the split-off point by deducting the liquefaction costs from the market value of liquid chlorine. See LTFV Final Cost Memo at Attachment 1.⁴ We derived the liquefaction costs and market value of liquid chlorine from the cost study. See LTFV Cost Verification Report at 21.

For this review, we cannot value chlorine gas in the same manner as we did for the LTFV investigation because we now determine that AVISMA was solely a consumer of chlorine gas during the POR. This is supported by AVISMA's construction of a gasification plant instead of a liquefaction plant. See 2008-2009 Cost Verification Report at 7.

In determining the appropriate value for chlorine gas we have considered the record evidence as it applies to AVISMA. Chlorine gas is a toxic substance and, thus, for an entity producing excess chlorine gas, that product must be disposed of (*i.e.*, burned), converted to a liquid form and sold, or used internally.⁵ The value of chlorine gas for an entity that needs chlorine gas for its production is significant because the entity will have to buy chlorine either in liquid or solid forms and convert the chlorine into chlorine gas. The petitioner's argument is based entirely on the premise that AVISMA is still producing excess chlorine gas and contemplates disposing of the excess chlorine gas by converting it to liquid chlorine. The petitioner's argument is at odds with record evidence establishing that AVISMA is no longer producing excess chlorine gas and burning it, it is not a seller of chlorine gas, and it does not have a liquefaction plant. Instead, AVISMA is a consumer of chlorine gas, a potential purchaser of large quantities of liquid chlorine, and is in the process of building a gasification plant.

We conclude that there were no inconsistencies in calculating the values of raw magnesium and chlorine gas at the split-off point for our *Preliminary Results*. For raw magnesium, we started with the market value of magnesium metal which was produced and sold by AVISMA and deducted the post-split-off costs incurred by AVISMA. As we indicate above, we could not do a similar calculation for chlorine gas because AVISMA did not produce chlorine gas in excess of what was required for its titanium production and did not convert chlorine gas to liquid chlorine. For chlorine gas, we started with the bulk market value of liquid chlorine and added the transportation and gasification costs to calculate a value for chlorine gas. We chose to start with liquid chlorine because prices are readily available in the market and AVISMA contemplates use of liquid chlorine as a source for its chlorine-gas requirements. See 2008-2009 Cost Verification Report at 20.

³ See the petitioner's September 17, 2009, submission entitled "Petitioner's Factual Information Submission to the U.S. Department of Commerce" at Exhibit 4.

⁴ *Id.* at Exhibit 4.

⁵ See 2006-2007 *Final Results* and accompanying Issues and Decision Memorandum at Comment 1F.

As stated by the petitioner, International Accounting Standards define NRV as the “estimated selling price in the ordinary course of business, less the estimated costs of completion and the estimated costs necessary to make the sale.”⁶ In this case, we can value raw magnesium at the split-off point because in the ordinary course of business AVISMA produces and sells magnesium metal. Because AVISMA uses its chlorine gas internally, however, it does not have any cost of selling the chlorine gas. In addition, because the chlorine is already in gas form AVISMA would not incur any additional completion costs. Thus, we have reasonably calculated the value of chlorine gas to AVISMA by taking the market price of bulk liquid chlorine plus the cost of gasifying the liquid chlorine. This method follows AVISMA’s proposed approach of taking a market price of bulk liquid chlorine and adding the costs from its future gasification plant.

The value of a joint product does not always increase as it undergoes further processing. Only the cost and not the value of the joint product increases as it undergoes further processing. Many joint products lose value when further processed. For example, fresh orange juice produced at the split-off point from orange fruit input may have more value than the further-processed frozen concentrated orange juice.

We disagree with the petitioner that we have never used replacement costs to value joint products in past cases. In *Live Cattle from Canada*,⁷ the Department valued two joint products at replacement costs. A respondent produced fuel-grade ethanol, wet distillers grain (WDG), and thin stillage (TS) as joint products from wheat, water, enzymes, and yeast. The company transferred all of the WDG and TS produced in the ethanol division to its cattle division for feeding cattle and thereby reduced the amounts of barley, other grains, and silage that would otherwise be consumed. The Department valued WDG and TS using a formula tied in part to the average monthly price of barley.⁸ Also, we find the petitioner’s cite to *TRBs from Japan* to be out of context. In *TRBs from Japan*, the Department ensured that the allocation ratio was applied on the same basis as it was calculated.⁹ In this case, the issue is how to value chlorine gas at the split-off point.

The petitioner has not provided any evidence in support of its position that the gasification costs cannot exceed the liquefaction costs. AVISMA provided estimated gasification costs for this review based on the feasibility study and current input prices that would be incurred at the gasification plant that is under construction. The gasification costs provided by AVISMA in this review parallel the amounts that were on the record for the 2006/2007 review and used for the *Preliminary Results*.

⁶ Barry Epstein and Eva Jermakowicz, *Interpretation and Application of International Financial Reporting Standards* at 195 (2008 edition).

⁷ *Notice of Final Determination of Sales at Less Than Fair Value: Live Cattle from Canada*, 64 FR 56738, 56754-55 (October 21, 1999) (*Live Cattle from Canada*).

⁸ *Id.*

⁹ *TRBs from Japan*, 63 FR at 20599.

Finally, we disagree with the petitioner that the transportation costs should not be added because the market value of liquid chlorine is from the Berezniki market, the location of the respondent's magnesium plant. Quotes provided by AVISMA for the current review indicate that the source of liquid chlorine is not located solely in Berezniki. Moreover, even locally sourced liquid chlorine incurs some delivery costs.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results of the review in the *Federal Register*.

Agree _____

Disagree _____

Paul Piquado
Acting Deputy Assistant Secretary
for Import Administration

Date