

MEMORANDUM TO: Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

FROM: Christian Marsh /I/ CM  
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, 2009, through March  
31, 2010

### 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, 2009, through March 31, 2010. 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. Cost Methodology
2. Affiliation
3. Zeroing

### Background

On May 6, 2011, 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 for the April 1, 2009, through March 31, 2010, period of review (POR). See *Magnesium Metal From the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review*, 76 FR 26247 (May 6, 2011) (*Preliminary Results*). The review covers two manufacturers/exporters, PSC VSMPO-AVISMA Corporation (AVISMA) and Solikamsk Magnesium Works (SMW).

On June 8, 2010, SMW submitted a letter indicating that it made no sales of the subject merchandise to the United States during the POR. We did not receive any comments on SMW's submission. We examined SMW's claim of no shipments by issuing a "No Shipments Inquiry" to U.S. Customs and Border Protection (CBP) and by reviewing electronic CBP data. See Memorandum to the File entitled "Magnesium Metal from the Russian Federation – Request for

U.S. Entry Documents,” dated October 27, 2010. Based on our review of the electronic CBP data, we found that there were entries of subject merchandise produced by SMW to the United States during the POR. On November 29, 2010, we requested clarification from SMW on the entries we found in the electronic CBP data. On December 8, 2010, SMW filed a response indicating that the shipments in question were made by a third party which resold the subject merchandise produced by SMW to the United States without the specific knowledge of SMW. Thus, according to SMW, it had no knowledge of or involvement in the importation of magnesium metal into the United States during the POR. See SMW’s response to the Department’s inquiry, dated December 8, 2010. Based on the information SMW provided on the record, we continue to find that SMW did not have knowledge of exports or involvement in imports of magnesium metal into the United States during the POR. Thus, we did not request SMW to report such sales to the Department for purposes of calculating a dumping margin in this administrative review. In the *Preliminary Results*, we announced that, consistent with the May 6, 2003, Reseller Clarification,<sup>1</sup> we will instruct CBP to liquidate entries of merchandise produced by SMW at the all-others rate.

We invited interested parties to comment on the *Preliminary Results*. On June 6, 2011, the petitioner, U.S. Magnesium, and AVISMA filed their case briefs and on June 10, 2011, the petitioner filed its rebuttal brief. AVISMA filed its rebuttal brief on June 13, 2011. We received no comments concerning SMW or our announcement to instruct CBP to liquidate entries of merchandise produced by SMW at the all-others rate.

## Discussion of the Issues

### 1. **Cost Methodology**

#### a. *Treatment of Chlorine Gas*

Comment 1.A: The petitioner contends that the Department revised AVISMA’s reported costs for the period of January 1 through March 31, 2010 (2010 period), correctly to reflect AVISMA’s treatment of chlorine gas as a byproduct of raw magnesium production in its normal books and records. The petitioner argues that the Department should also revise AVISMA’s reported costs for the period of April 1 through December 31, 2009 (2009 period), using the same allocation methodology (treat chlorine gas as a byproduct of the production of raw magnesium).

The petitioner states that AVISMA calculated its reported costs for the entire POR based on the co-product methodology used by the Department in the *2008/2009 Review*<sup>2</sup> (*i.e.*, raw magnesium and chlorine gas were treated as co-products) because AVISMA acknowledged that the accounting methodology used in its normal books and records for the period of April 1 through December 31, 2009 (*i.e.*, raw magnesium was treated as a byproduct of chlorine gas),

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<sup>1</sup> *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

<sup>2</sup> The petitioner cites *Magnesium Metal From the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 75 FR 56989 (September 17, 2010), and accompanying Issues and Decision Memorandum (*2008/2009 Review*) at Comment 4.

did not reasonably reflect the costs associated with the production of magnesium metal. The petitioner contends that the Department's rejection of AVISMA's cost methodology reflected in its normal books and records for the 2009 period was correct. Citing *Thai Pineapple Public Co., Ltd. v. United States*, 187 F.3d 1362, 1366 (Fed. Cir. 1999) (*Thai Pineapple*), the petitioner acknowledges that the Department has discretion in selecting an alternative cost-allocation methodology for joint products. The petitioner argues that such discretion does not allow the Department to adopt a methodology that is inconsistent with a respondent's normal books and records unless the methodology is shown to distort costs. Moreover, pointing to *Association of American School Paper Suppliers v. United States*, Slip Op. 08-122 (CIT November 17, 2008), the petitioner contends that the Department must explain its decisions adequately when selecting a cost methodology. The petitioner argues that the Department should rely on AVISMA's cost methodology as reflected in its normal books and records for the 2010 period for purposes of calculating AVISMA's costs for the entire POR rather than accept the co-product methodology AVISMA reported which has never been used in AVISMA's books and records.

The petitioner asserts that, pursuant to section 773(f) of the Tariff Act of 1930, as amended (the Act), and the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act (URAA), H.R. Rep. No. 103-316, vol. 1 (1994) (SAA), at 835, the Department must consider AVISMA's historical use of treating chlorine gas as a byproduct of the production of raw magnesium. According to the petitioner, AVISMA used the byproduct treatment of chlorine gas in its books and records during the original period of investigation (POI).<sup>3</sup> The petitioner concludes that, because the methodology of treating chlorine gas as a byproduct of the production of raw magnesium has been used historically by AVISMA, was reinstated by AVISMA during the last three months of the POR, and has been found to be a reasonable reflection of the costs of production by the Department, that methodology should be used to calculate AVISMA's costs for the entire POR.

The petitioner claims that the Department faced a similar situation in *Diamond Sawblades*.<sup>4</sup> According to the petitioner, the Department applied the non-distortive methodology that the respondent in that case, Hyosung Diamond Industrial Co. (Hyosung), used to calculate costs in its normal books and records during the last three months of the POI to the entire POI. The petitioner contends that, similar to the instant case, the methodology used by Hyosung during the last three months of the POI was used prior to the first nine months of the POI.

The petitioner asserts that all the data necessary for the Department to recalculate AVISMA's POR costs using the byproduct methodology are on the record. The petitioner suggests that, in its calculations, the Department value the chlorine-gas byproduct generated at

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<sup>3</sup> The petitioner cites *Magnesium Metal from the Russian Federation: Notice of Final Determination of Sales at Less Than Fair Value*, 70 FR 9041 (February 24, 2005), and accompanying Issues and Decision Memorandum (*LTFV Investigation*) at Comment 8 and *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 73 FR 52642 (September 10, 2008), and accompanying Issues and Decision Memorandum (*2006/2007 Review*) at Comments 1.A and 1.B (describing the history of AVISMA's cost methodologies).

<sup>4</sup> The petitioner cites *Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 FR 29310 (May 22, 2006), and accompanying Issues and Decision Memorandum (*Diamond Sawblades*) at Comment 51.

OPU-2<sup>5</sup> for purposes of calculating the April 1 through December 31, 2009, costs at the same per-unit value assigned by AVISMA in its books and records during the period of January 1 through March 31, 2010. Further, the petitioner claims, the factory-overhead ratio for the 2009 period can be calculated using the same method and data sources used by the Department to calculate the factory-overhead ratio for the 2010 period.

The petitioner argues that, if the Department continues to apply the co-product methodology to the 2009 period for purposes of the final results, the Department must correct the chlorine values used in that calculation. The petitioner asserts that the Department should use AVISMA's chlorine value for the 2010 period as the basis of deriving the 2002 net realizable value (NRV) of chlorine gas rather than the 2002 chlorine gas value estimated by the Department based on a pre-POI study of market prices for bulk chlorine and estimated gasification costs.

AVISMA contends that the Department's approach in the *Preliminary Results* was reasonable and should be used for purposes of the final results. AVISMA disagrees with the petitioner's argument that *Diamond Sawblades* is analogous to the instant case and sets a precedent that only one cost-allocation methodology can be used for the entire POR. AVISMA claims that the petitioner's proposed byproduct calculations for the 2009 period cannot be implemented without full access to the company's internal cost spreadsheets. According to AVISMA, any change to the values of chlorine and raw magnesium in the company's cost calculations triggers changes in the values of various intermediary products throughout the calculation chain. AVISMA asserts that, in the instant case, the existing record is not sufficient to recalculate the costs of the 2009 period using the byproduct methodology.

AVISMA argues that, if the Department determines that only one cost-allocation methodology can be used for purposes of the final results, then AVISMA's reported costs should be used. AVISMA affirms that it calculated its reported costs using the co-product cost-allocation methodology the Department used in the *2008/2009 Review*. AVISMA alleges that, in the *2008/2009 Review*, the Department rejected the methodology of treating raw magnesium as a byproduct of the production of chlorine gas as used in its normal books and records as well as AVISMA's proposed methodology of treating chlorine gas as a byproduct which relied on the estimated costs of the gasification plant under construction at AVISMA's facility. According to AVISMA, extending the experience of the 2010 period to the entire POR would not be appropriate because the 2010 period is the least representative of the POR.

AVISMA argues that, until the new gasification plant is in service and the actual cost of liquid gas from that plant becomes available, it would be less distortive to rely on the Department's co-product methodology from the *2008/2009 Review* rather than to rely on chlorine cost for the 2010 period. AVISMA asserts that the chlorine costs for the 2010 period used in its books and records are based on the same estimated costs that the Department rejected in the *2008/2009 Review*. AVISMA claims that the costs for chlorine gas during the 2010 period were based on outdated 2009 price quotes from potential suppliers of liquid chlorine.

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<sup>5</sup> "OPU" is AVISMA's abbreviation for operating units. OPU-1, OPU-2, and OPU-3 are production points in AVISMA's Berezniki facility.

AVISMA contends that an outside market value can serve as a reasonableness test for the valuation of a joint product. AVISMA alleges that, in the Department's *Results of Redetermination Pursuant to Remand, PSC VSMPO-AVISMA Corp. v. United States*, CIT Consol. Court No. 08-00321 (March 30, 2010), at 23, the Department stated that the value AVISMA assigned to chlorine gas in the *2006/2007 Review* was too high in comparison to the market price of liquid chlorine. AVISMA alleges that the value of raw magnesium calculated by the petitioner for the 2009 period is much higher than the value of finished magnesium products calculated based on sales values for the same time period. As a result, AVISMA argues, the Department should not rely on the petitioner's calculation for the value of raw magnesium.

AVISMA argues that, if the Department decides to use the co-product methodology for the final results, the Department should use 2002 costs for chlorine gas as the basis for deriving the 2002 NRV of chlorine gas rather than the 2010 cost for chlorine gas. AVISMA claims that values for liquid chlorine (the basis of the calculation of the cost of chlorine gas) can fluctuate significantly and unpredictably from year to year such that the 2010 cost of chlorine gas carries little relationship to the 2002 cost of chlorine gas. AVISMA asserts that a consumer price index (CPI)-based inflation adjustment to deflate the 2010 cost of chlorine gas back to 2002 introduces certain distortions into the calculation, particularly when applied over more than a couple of years. AVISMA argues that, because fluctuations in the values of liquid chlorine do not necessarily follow general inflation trends, the Department should use the 2002 cost of liquid chlorine to determine the 2002 NRV of chlorine gas rather than the deflated 2010 cost of liquid chlorine.

Department's Position: We find that it is appropriate to apply the chlorine-gas byproduct methodology to the entire POR and have revised AVISMA's reported costs for the 2009 period to reflect the treatment of chlorine gas as a byproduct of the production of raw magnesium. We calculated AVISMA's POR costs as the weighted-average of the revised 2009 period costs and the 2010 period costs that we calculated for the *Preliminary Results*.

AVISMA produces magnesium metal, titanium sponge, and other minor products. Market-quality raw magnesium and chlorine gas are produced jointly from a main input ore called carnallite, which goes through a dehydration (*i.e.*, water-removal) process at OPU-1 and exits as anhydrous carnallite (*i.e.*, carnallite with reduced water content). The anhydrous carnallite moves on to an electrolysis process at OPU-2 (*i.e.*, the split-off point) that produces market-quality raw magnesium and chlorine gas. The market-quality 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), processed further into a deicer product that is sold or used as a catalyst in titanium production. AVISMA also uses an amount of the resulting market-quality raw magnesium from its OPU-2 electrolysis process in titanium production located elsewhere in the facility.

During the POR, AVISMA used two different accounting methodologies in its normal books and records to determine the costs of raw magnesium. During the 2009 period, AVISMA treated chlorine gas as the major product and raw magnesium as a byproduct of the OPU-2 electrolysis-process split-off point. On January 1, 2010, AVISMA revised its accounting

methodology in its normal books and records and began to treat raw magnesium as the major product and chlorine gas as a byproduct of the OPU-2 electrolysis-process split-off point.<sup>6</sup>

AVISMA deviated from its normal books and records for both the 2009 period and 2010 period and reported its costs consistent with the Department's calculation methodology in *Magnesium Metal From the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 26922 (May 13, 2010) (2008/2009 Preliminary Results). This methodology considered chlorine gas and market-quality raw magnesium produced jointly at the OPU-2 electrolysis process to be co-products.

The National Association of Accountants (NAA) defines a joint product as two or more products so related that one cannot be produced without producing the other(s), each having relatively substantial value and produced simultaneously by the same process up to a split-off point. See *Management Accountants' Handbook, Fourth Edition*; Keller, Bulloch and Shultis at 11.6. The NAA defines a byproduct as a secondary product recovered in the course of manufacturing a primary product whose total sales value is relatively minor in comparison with the sales value of the primary product. *Id.* Similarly, the products in a jointly produced group often vary in importance. Products of greater importance are called major products and products of minor importance are called byproducts. When two or more major products appear in the same group, they are called co-products. The term "joint product" includes major product, co-product, and byproduct because all are produced jointly. *Id.*

Generally, the Department looks at several factors to determine whether joint products are to be considered byproducts or co-products. See *Elemental Sulphur From Canada; Final Results of Antidumping Finding Administrative Review*, 61 FR 8239, 8241-8242 (March 4, 1996), *Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium From Israel*, 66 FR 49349 (September 27, 2001), and accompanying Issues and Decision Memorandum at Comment 3, and *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from South Africa*, 67 FR 35485 (May 20, 2002), and accompanying Issues and Decision Memorandum at Comment 4. These factors include the following: 1) how the company records and allocates costs in the ordinary course of business in accordance with its home-country GAAP; 2) the significance of each product relative to the other joint products; 3) whether the product is an unavoidable consequence of producing another product; 4) whether management intentionally controls production of the product; 5) whether the product requires significant further processing after the split-off point. No single factor is dispositive in our determination. Rather, we consider each factor in light of all of the facts and circumstances surrounding each case.

In the *Preliminary Results*, we relied on the co-product methodology AVISMA reported for the 2009 period for purposes of maintaining consistency with the prior segments of this proceeding. We revised AVISMA's 2010 period costs to reflect the treatment of chlorine gas as a byproduct of raw magnesium adopted by AVISMA in its normal books and records. For the final results, we have re-evaluated the facts related to whether to treat chlorine gas for the 2009 period as a byproduct of the production of raw magnesium or treat it as a co-product of the OPU-

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<sup>6</sup> See AVISMA's August 4, 2010, questionnaire response at 31-35. For the translation of AVISMA's change of accounting policy, see AVISMA's February 11, 2011, questionnaire response at exhibit SD-10.

2 electrolysis process (*i.e.*, split-off point). Based on our evaluation of the five factors as described below, we find it appropriate to treat chlorine gas as a byproduct of the production of raw magnesium for the entire POR.

We have examined how AVISMA records and allocates the joint-production costs in the ordinary course of business. During the 2009 period, AVISMA treated raw magnesium as a byproduct of the production of chlorine gas in its normal books and records. On January 1, 2010, AVISMA revised its accounting methodology in its normal books and records and began to treat raw magnesium as the main product and chlorine gas as a byproduct of the OPU-2 electrolysis process. AVISMA explained that this change was implemented because the increase in the values for raw magnesium for the period prior to the change in accounting policy (*i.e.*, 2007 to 2009) was so significant that subtracting the value of the offset for raw magnesium from the joint costs resulted in a negative value for chlorine.<sup>7</sup> Therefore, AVISMA argues that the value of raw magnesium in comparison to the value of chlorine gas does not justify the treatment of raw magnesium as a byproduct of the OPU-2 electrolysis process.

We find that the allocation methodology AVISMA used in the ordinary course of business during the 2009 period is not reasonable. AVISMA's change in its accounting treatment of raw magnesium and chlorine gas during the POR (*i.e.*, from 2009 to 2010) recognizes that the value of chlorine gas is significantly less in comparison to that of raw magnesium. Although adopted in the last quarter of the POR, the increases in the values of raw magnesium were significant enough prior to the adoption of the new methodology, including the first three quarters of the POR, to warrant the change in accounting policy in the last quarter of the POR.<sup>8</sup>

For purposes of our evaluation, we also examined the cost-allocation methodologies AVISMA used historically in the ordinary course of business. AVISMA used the chlorine-gas byproduct allocation methodology in its normal books and records during the periods covered by the original investigation, the first administrative review, and the majority of the second administrative review. See *LTFV Investigation* at Comment 8 and *2006/2007 Review* at Comment 1.B. AVISMA did not participate in the third administrative review. See *Magnesium Metal From the Russian Federation: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 39919 (August 10, 2009). AVISMA treated raw magnesium as a byproduct of the joint-production process in the fourth review. See *2008/2009 Preliminary Results*, unchanged in *Magnesium Metal From the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 75 FR 56989 (September 17, 2010) (*2008/2009 Review*).

AVISMA has never treated raw magnesium and chlorine gas as co-products in its normal books and records. See, *e.g.*, AVISMA's August 4, 2010, questionnaire response at D-31-D-35, *LTFV Investigation* at Comment 8, *2006/2007 Review* at Comment 1.B, and *2008/2009 Review*. Moreover, AVISMA is arguing in effect to use the same co-product cost allocation methodology that, at its urging, the CIT remanded to the Department for reconsideration with respect to the second administrative review. See *PSC VSMPO - AVISMA Corp. v. United States*, 724 F. Supp.

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<sup>7</sup> See AVISMA's August 4, 2010, questionnaire response at D-33.

<sup>8</sup> *Id.*

2d 1308 (CIT 2010). While we continue to consider our cost allocation approach of treating raw magnesium and chlorine gas as co-products to be reasonable for that POR and in accordance with law, we believe that the facts of the current review support treating chlorine gas at the OPU-2 split-off as a byproduct of magnesium for the entire POR.

We also examined the significance of each product relative to the other joint products. In performing this analysis, we typically determine the NRV of each joint product at the split-off point. We compared the NRVs of raw magnesium for the 2009 period and the 2010 period to the NRVs of all other joint products generated at the split-off point, including chlorine gas. See memorandum entitled “Cost of Production and Constructed Value Calculation Adjustments for the Final Results - PSC VSMPO-AVISMA Corporation and VSMPO -Tirus US Inc.,” dated concurrently with this memorandum (Final 2009/2010 Cost Memo) for detailed calculations. We calculated the NRV of raw magnesium by obtaining the sales prices of the finished product to which AVISMA refers as MG-90 in its normal books and records and deducted the additional processing costs post-split-off point associated with refining raw magnesium into this finished product. We selected MG-90 for our analysis because of its representativeness of the finished magnesium products and because it was produced in both the 2009 period and 2010 period. We calculated the NRV of the other joint products of the OPU-2 electrolysis process, with the exception of chlorine gas, in the same manner as we did for raw magnesium. See Final 2009/2010 Cost Memo.

AVISMA states on page 39 of its December 10, 2010, submission that a market value for chlorine gas does not exist because chlorine can be traded only in liquid form. While a market price of chlorine gas may not be available on the record of this review, the market price of AVISMA’s deicer product, which is made from the excess chlorine gas, is available and can be used for the analysis. This product is processed shortly after the split-off point and includes the chlorine gas in question. To be conservative, we have chosen to use another value from the record. Specifically, we relied on the cost of chlorine gas AVISMA calculated and used in its normal books and records during the 2010 period which is based on the market price for liquid chlorine (*i.e.*, the only market price available for chlorine). See Final 2009/2010 Cost Memo.

AVISMA’s calculation of the 2010 period cost of chlorine gas adds the purchase (*i.e.*, market) price of liquid chlorine to the costs of the additional processing necessary to convert the liquid chlorine into chlorine gas. See AVISMA’s December 10, 2010, questionnaire response at exhibit 25. Our analysis of the NRVs of raw magnesium, chlorine gas, and the other joint products of the OPU-2 electrolysis demonstrates that, for both the 2009 period and 2010 period, the relative NRV of chlorine gas is not significant when compared to the total NRVs of all products generated from the split-off point. See Final 2009/2010 Cost Memo. The analysis shows that the relative NRV of chlorine gas for 2009 as compared to all joint products was lower than the relative NRV percentage in 2010 when AVISMA treated chlorine gas as a byproduct in its normal books and records. *Id.*

The third and fourth factors of our analysis are whether the product is an unavoidable consequence of producing another product and whether management intentionally controls the production of the joint products. If a product in question is avoidable but is produced intentionally, it supports the notion that the product is a main product. If a product in question is

not avoidable, it neither supports nor refutes a decision to treat a product as a main product or a byproduct. These factors address whether management takes steps to minimize or maximize the output quantities of certain outputs. In this case, AVISMA can control the amount of carnallite ore it processes in order to control the quantities of raw magnesium and chlorine gas that are produced in the OPU-2 electrolysis stage. The ratio of chlorine to magnesium contained in carnallite is fixed. See AVISMA's August 4, 2010, questionnaire response at D-7 and D-8. Thus, the output of each joint product is unavoidable. Because raw magnesium and chlorine gas are both unavoidable joint products and because AVISMA controls the output of both in the same manner (*i.e.*, through the production of carnallite ore), we determine that these factors do not support or confirm treating chlorine gas as a byproduct or as a co-product of the joint-production process.

The last factor we considered in our analysis is whether raw magnesium or chlorine gas requires significant further-processing after the split-off point. During the POR, AVISMA further-processed the raw-magnesium output from the split-off point (*i.e.*, the OPU-2 electrolysis process) into refined and alloyed magnesium products. See AVISMA's August 4, 2010, questionnaire response at D-11. Management undertakes this further-processing intentionally as the magnesium can be sold immediately after the split-off point. Chlorine gas is not processed further but is either recycled back into the dehydration process (*i.e.*, OPU-1) or used as an input into titanium production. See AVISMA's August 4, 2010, questionnaire response at D-6-D-11. Because chlorine gas can be reused in production directly without processing it further, we find that this factor does not support or confirm the treatment of chlorine gas as a byproduct or as a co-product of the joint production process.

In summary, based on our analysis of the five factors described above, we have determined that it is reasonable to treat raw magnesium as the main product of the OPU-2 electrolysis process and chlorine gas as a byproduct for the entire POR. Our determination weighed heavily on the first and second factors as we do not consider the third, fourth, and fifth factors to be indicative of a byproduct or co-product in this case. Because AVISMA treated chlorine gas as a byproduct of the joint-production process in its normal books and records during the POR and because the NRV of chlorine gas was not significant in comparison to the total NRV of all products generated at the split-off point during the POR, we revised AVISMA's costs for the 2009 period to reflect the treatment of chlorine gas as a byproduct. We calculated AVISMA's POR costs as the weighted average of the revised 2009 period costs and the 2010 period costs that we calculated for the *Preliminary Results*. See Final 2009/2010 Cost Memo.

Contrary to AVISMA's assertion, we find that the record is sufficiently detailed to allow us to revise the company's costs to reflect the byproduct treatment of chlorine gas. In its submissions to the Department, AVISMA submitted the cost-calculation worksheets for all intermediary products of the OPU-2 electrolysis process, raw magnesium, and refined magnesium.<sup>9</sup> We did not recalculate the costs of every intermediate and finished product AVISMA produced. Instead, we determined which intermediary and finished products were significant to the cost calculations of raw magnesium and refined magnesium, recalculated the

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<sup>9</sup> See AVISMA's August 4, 2010, questionnaire response at exhibits D-4, D-5, and D-6, AVISMA's October 19, 2010, questionnaire response at exhibits 1-4, and AVISMA's February 11, 2011, questionnaire response at exhibit 6.

costs of those products, and then used the revised costs to recalculate the costs of raw and refined magnesium. See Final 2009/2010 Cost Memo for detailed calculations.

Although we did not rely on AVISMA's gasification-plant costs in the *2008/2009 Review* because AVISMA did not use those costs in its normal books and records during that POR, in this POR, AVISMA incorporated the estimated costs of the gasification plant into its cost calculations in the normal course of business. See AVISMA's August 4, 2010, questionnaire response at exhibits D-4 and D-5. AVISMA's use of the estimated gasification-plant costs in its normal books and records demonstrates that such estimates are reliable for purposes of valuing inventory, calculating the cost of sales for financial statement purposes, and making business decisions. In regard to AVISMA's argument that the value of liquid chlorine was based on outdated price quotations and that we should rely instead on 2010 contract values, we look to AVISMA's normal books and records where AVISMA relied on the 2009 price quotations to determine the value of chlorine gas during the POR. See AVISMA's August 4, 2010, questionnaire response at exhibits D-4 and D-5. The contracts for liquid chlorine in exhibit SD-23 of AVISMA's December 10, 2010, submission show that the dates of final agreement of the contracts were subsequent to the POR. If we were to use the prices for liquid chlorine subsequent to the POR to value chlorine gas for purposes of our byproduct analysis, it would be necessary for us to use the NRVs of all products of the OPU-2 process for the same time period in order to make a proper comparison. This information is not available on the record of this review. Further, such an analysis would not necessarily reflect market conditions or prices of the products during the POR. Therefore, to maintain the contemporaneity of our byproduct analysis and the market conditions within the POR, we have relied on the prices of liquid chlorine used by AVISMA in its normal books and records during the POR.

AVISMA argues that the Department should not base the POR costs on the 2010 period cost-allocation methodology because the per-unit costs for the 2010 period are the least representative of the POR based on production volume.<sup>10</sup> This argument is not on point. Our decision to treat chlorine gas as a byproduct of magnesium production for the 2009 period, and thus the POR, is based on our evaluation of the five factors discussed above, not on the representativeness of production volumes between the two periods. The monthly production volumes of raw magnesium during the 2010 period were lower but not unusually low in comparison to the monthly production volumes during the 2009 period. See AVISMA's December 10, 2010, questionnaire response at exhibit SD-13.

AVISMA also argues that the value of raw magnesium calculated by the petitioner for the 2009 period is much higher than the value of finished magnesium products calculated based on finished-inventory values for the same time period. AVISMA based this claim on sales values in the domestic and export markets shown in its finished-goods inventory ledgers. See AVISMA's August 4, 2010, questionnaire response at exhibit 8. We also find this argument to be off-point.

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<sup>10</sup> The basis of this argument is the production volume of chlorine gas, not raw magnesium. See AVISMA's December 10, 2010, questionnaire response at exhibit SD-13 and AVISMA's rebuttal brief, dated June 13, 2011, at footnote 16. When we compared the monthly production volume of raw magnesium of the 2010 period to the monthly production volume of raw magnesium for the 2009 period, we found that the monthly production volumes for the 2010 period were higher than those of the 2009 period.

Our analysis of whether a product should be treated as a major product or byproduct of a joint process is based on the five factors discussed above. We do not consider the sales value of a product in relation to the cost of that same product to be indicative of whether that product should be treated as the major product or a co-product of a joint process. Instead, our focus, as described above, lies properly on the NRVs of the products produced at the split-off point and the relation of those NRVs to each other.

Finally, because we did not use the co-product methodology to calculate AVISMA's POR costs, the parties' arguments regarding the value of liquid chlorine to be used under that methodology are moot.

*b. Basis for Selling Expenses and Profit*

Comment 1.B: The petitioner contends that, if the Department determines that all of AVISMA's home-market sales were made at less than the cost of production, it will be necessary for the Department to calculate selling expenses and profit for constructed value (CV) based on section 773(e)(2)(B) of the Act. The petitioner points to *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 616 F.3d 1300, 1302 (CAFC 2010), where the court affirmed that sales outside the ordinary course of trade include below-cost sales. As such, the petitioner asserts, the Department should rely on the financial information specific to the AVISMA division and profit using financial information from the company-wide entity that includes AVISMA. According to the petitioner, these calculations are permitted under section 773(e)(2)(B)(i) of the Act (alternative (i)) as AVISMA is the specific producer and the titanium sponge produced by AVISMA meets the same general category of merchandise standard set forth in alternative (i) and the SAA at 840. The petitioner cites *Polyethylene Retail Carrier Bags From Thailand: Preliminary Results of Antidumping Duty Administrative Review*, 76 FR 30102, 30106 (May 24, 2011), as evidence that the Department has relied on financial data of a company that produces the same general category of merchandise as a respondent to determine CV selling expenses and profit for that respondent.

The petitioner claims that these calculations are also permitted by section 773(e)(2)(B)(iii) of the Act (alternative (iii)) which allows the Department to use any reasonable method to calculate AVISMA's selling expenses and profit. The petitioner emphasizes that, because AVISMA is the only respondent in this administrative review, AVISMA's own financial information is the only data available on the record of this proceeding. Further, the petitioner recognizes, the Department prefers to rely on a single source to calculate CV selling expense and profit. The petitioner argues that the same source is not required under alternative (iii). The petitioner asserts that, because the subject merchandise is produced and sold exclusively by AVISMA, the Department should rely on the financial information for that division for purposes of calculating selling expenses. The petitioner claims that the derived selling expenses for the AVISMA division are likely understated in the overall calculation with respect to the subject merchandise due to the impact of including internal transfers of titanium sponge to the division of the company-wide entity which require minimal sales activities. The petitioner argues that, because the AVISMA division's financial information is inappropriate for purposes of determining profit, the Department should rely on the financial information of the company-wide entity, which includes AVISMA. The petitioner points to *Notice of Final Determination of Sales*

*at Less Than Fair Value: Extruded Rubber Thread from Indonesia*, 64 FR 14690 (March 26, 1999), and accompanying Issues and Decision Memorandum at Comment 2 where the Department stated that a positive profit must be included in the calculation of CV.

The petitioner argues that, if the Department does not agree with the proposed methodology to calculate selling expenses and profit, the Department should rely on AVISMA's selling and profit values from the *2008/2009 Review*. The petitioner contends that the Department used this approach in the *2006/2007 Review* where the Department relied on the selling expenses and profit reported by AVISMA in the *2005/2006 Review*.<sup>11</sup> The petitioner also cites for support *Notice of Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 FR 7011 (February 14, 2007), and accompanying Issues and Decision Memorandum at Comment 2 and *Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review*, 67 FR 46172 (July 12, 2002), and accompanying Issues and Decision Memorandum at Comment 1. The petitioner claims that AVISMA supported the use of the selling expense and profit values from *2005/2006 Review* for purposes of the *2006/2007 Review* even though the cost methodology of the *2005/2006 Review* differed from the cost methodology of the *2006/2007 Review*.

AVISMA contests the petitioner's proposed calculations of selling expenses and profit to be used in the event that the Department must rely on CV. According to AVISMA, the petitioner's proposal to use VSMPO-AVISMA's profit information is unreasonable because the profit is derived from products that are not in the same general category of products as the subject merchandise and such a calculation would violate the statutory profit cap. AVISMA points to *Atar S.r.l. v. United States*, 703 F. Supp. 2d 1359, 1363-64 (CIT 2010), where the court stated that, in cases where the record lacks data on profit normally realized by other companies on sales of the same general class of merchandise, the Department still must attempt to comply with the profit-cap requirements through the use of facts otherwise available. AVISMA concludes that, if the Department determines that AVISMA's profit value is unusable, then AVISMA's selling expenses should not be used. Conversely, AVISMA argues, if VSMPO-AVISMA's profit value is usable then VSMPO-AVISMA's selling expenses should be used to calculate CV.

Department's Position: Our comparison of AVISMA's revised costs to its reported sales shows that all of AVISMA's sales in the comparison market were made at prices below cost. Section 773(b)(1)(B) of the Act instructs the Department to calculate normal value based on the CV of the subject merchandise in such cases where no sales were made at prices which permit recovery of all costs within a reasonable period of time (*i.e.*, in the ordinary course of trade). Therefore, we have relied on the CV of the subject merchandise for purposes of these final results.

We calculated CV in accordance with section 773(e) of the Act, which states that CV shall be based on the sum of a respondent's cost of materials and fabrication for the subject merchandise, plus amounts for selling, general and administrative (SG&A) expenses, profit, and U.S. packing costs. We relied on AVISMA's reported cost of manufacturing (COM) as revised

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<sup>11</sup> The petitioner cites *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 72 FR 51791 (September 11, 2007) (*2005/2006 Review*).

to reflect the byproduct cost allocation for chlorine gas discussed in response to Comment 1, AVISMA's revised G&A and financial expenses based on our calculations of COM, and AVISMA's reported U.S. packing costs. See Memorandum entitled "Final Results Analysis Memorandum for PSC VSMPO-AVISMA Corporation," dated concurrently with this memorandum and Final 2009/2010 Cost Memo.

Because we determined that AVISMA's home-market sales were not made in the ordinary course of trade, we cannot determine selling expenses and profit under section 773(e)(2)(A) of the Act, the preferred method. Therefore, we have relied on section 773(e)(2)(B) of the Act to determine selling expenses and profit. Specifically, we used the selling expenses and profit rate as calculated in accordance with the preferred method in the 2008/2009 review. See memorandum entitled "Constructed Value Selling and Profit Values from the Previous Antidumping Duty Administrative Review of Magnesium Metal from the Russian Federation (2008/2009)," dated July 18, 2011 (placing selling-expense and profit data submitted by AVISMA in the 2008/2009 review on the record of the current review).

In situations where selling expenses and profit cannot be calculated under the preferred method, section 773(e)(2)(B) of the Act sets forth three alternatives. See, e.g., *Certain Lined Paper Products From India: Notice of Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 10876 (February 28, 2011), and accompanying Issues and Decision Memorandum at Comment 3. The statute does not establish a hierarchy for selecting among these alternative methodologies. See SAA at 840. Nonetheless, we examined each alternative in searching for an appropriate method. As part of that analysis, we have considered the petitioner's proposal to use financial information specific to the AVISMA division and profit information for the company-wide entity, which includes AVISMA to calculate selling expenses and profit for CV under alternatives (i) or (iii). Alternative (i) of section 773(e)(2)(B) of the Act specifies that selling expenses and profit may be calculated based on "actual amounts incurred by the specific exporter or producer ... on merchandise in the same general category" as subject merchandise. In considering this alternative, we examined the financial statements of AVISMA. As stated by the petitioner, the sales reflected in AVISMA's financial statements include transfers to the titanium producer included in the company-wide entity. See AVISMA's August 2, 2010, questionnaire response at B-5. As such, we determined that the selling expenses calculated using the AVISMA division's financial statements may not reflect the actual selling expenses incurred by AVISMA for sales to customers in the home market. Therefore, we looked to the other alternatives under section 773(e)(2)(B) of the Act to determine whether a more reasonable reflection of selling expenses to customers in the home market was obtainable. In regard to CV profit, the SAA at 839 states specifically that CV must include an amount for profit. We determined that we could not rely on AVISMA's financial statements for CV profit because they did not reflect a positive profit value. We also concluded that use of the company-wide entity's profit information for CV profit, as suggested by the petitioner, is not appropriate because its profit is derived from products that are not in the same general category of products as the subject merchandise. See, e.g., AVISMA's August 4, 2010, questionnaire response at D-4. Therefore, because we cannot calculate a rate for CV profit using AVISMA's own information, we looked to the other alternatives under section 773(e)(2)(B) of the Act to calculate CV profit.

Section 773(e)(2)(B)(ii) of the Act provides that selling expenses and profit may be calculated based on the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review. We could not calculate selling expenses and profit based on this alternative because the only other respondent to this proceeding, SMW, was not required to submit sales data for this review. See “Background” section above and *Preliminary Results*, 76 FR at 26249. Therefore, we have calculated AVISMA’s CV selling expenses and profit based on section 773(e)(2)(B)(iii) of the Act.

Pursuant to alternative (iii) of section 773(e)(2)(B) of the Act, the Department has the option of using any other reasonable method to calculate CV profit as long as the result is not greater than the amount realized by exporters or producers “in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise” (*i.e.*, the “profit cap”). As such, we relied on AVISMA’s CV selling expenses and profit calculated for sales of magnesium metal made in the ordinary course of trade during the immediately preceding review period. See Final 2009/2010 Cost Memo. We selected this methodology because it mimics most closely the preferred method of calculating profit under section 773(e)(2)(A) of the Act and because it is based on actual amounts incurred and realized by AVISMA in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the comparison market. For that reason, we found this approach preferable to the petitioner’s proposal under alternative (iii) to use the company-wide entity’s profit information, which is derived from the production and sale of merchandise other than the foreign like product. We also considered AVISMA’s suggestion of calculating selling expenses and CV profit based on the financial information of the company-wide entity (*i.e.*, the only other available information on the record of this proceeding). We determined that using AVISMA’s own data from the 2008/2009 review is preferable because the majority of the sales by the company-wide entity relate to products other than the foreign like product.

Moreover, relying on AVISMA’s own data from the 2008/2009 review allows us to determine that the calculated profit is within the profit cap insofar as the data are based on the actual experience of the producer connected with the sale, for consumption in the foreign country, of the same general category of products as the subject merchandise. CV profit calculated using the company-wide entity’s data cannot afford the Department the same level of assurance. Although the selling expenses and CV profit calculated for the 2008/2009 review covers a time period that is not contemporaneous with the POR, the 2008/2009 period reflects the twelve months immediately prior to this POR. As stated by the petitioner, we used this same approach for selling expenses and profit in a previous segment of this case where we relied on the selling expenses and profit rate calculated in the previous administrative review period. See *Magnesium Metal from the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 24541, 24545 (May 5, 2008).<sup>12</sup> Therefore, we determine that the use of AVISMA’s own selling expense and profit information for the 2008/2009 review is a reasonable approach in calculating CV selling expenses and profit rate for these final results.

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<sup>12</sup> Because we ultimately found that AVISMA made sales of the foreign like product in the ordinary course of trade for the 2006/2007 final results, it was not necessary to calculate CV profit for the final results. See *2006/2007 Review* at Comment 1.G.

## 2. Affiliation

Comment 2: AVISMA argues that neither the statute nor the evidence on the record of this proceeding supports the Department's finding that AVISMA is affiliated with one of its home-market customers. Specifically, AVISMA argues that section 771(33)(F) of the Act provides that "{t}wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person" fall within the definition of affiliated parties. AVISMA argues further that section 771(33)(G) of the Act states that "{a}ny person who controls any other person and such other person" are considered to be affiliated. AVISMA asserts that the Department's regulations at section 351.102(b)(3) state that, in determining whether control over another person exists, the Department will consider factors such as corporate or family groupings, franchise or joint-venture agreements, debt-financing, and close-supplier relationships.

AVISMA asserts that the Department's regulations also provide that the Department will not find that control exists on the basis of these factors unless the relationship has the potential to have an impact on decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. AVISMA argues that the evidence on the record does not support a finding of affiliation in this case. AVISMA contends that the Department did not explain in its affiliation memorandum how the alleged relationship between AVISMA and its home-market customer has the potential to have an impact on decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.

Citing *TIJID, Inc., v. United States*, 29 CIT 307, 314-315, 366 F. Supp. 2d 1286, 1293 (2005) (*TIJID*), AVISMA argues that two parties must be legally or operationally in a position to exercise restraint or direction over a third party and that 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, in order for the Department to find that affiliation exists, the Department must demonstrate that both elements have been fulfilled. Citing *TIJID*, AVISMA argues that the Department did not address the second element of the affiliation test. AVISMA asserts that, under the Department's tautological analysis, any joint venture between two companies makes all the companies affiliated with each of the joint-venture companies affiliated with each other. AVISMA argues that the Department's own regulations require the additional finding of potential to impact decisions concerning the production, pricing, or cost. AVISMA argues that the Department has not demonstrated how the common control of the Rusinvestpartners joint venture by its owners could affect any aspect of the sale or production of subject merchandise. AVISMA argues that there is no evidence on the record indicating that an affiliation between AVISMA and its home-market customer exists despite the Department's attempts to suggest such a relationship.

The petitioner asserts that the Department determined properly that, based on the record, a control relationship existed during the POR that had the potential to have an impact on the production, pricing, or cost of the subject merchandise or foreign like product, pursuant to the statute. Specifically, the petitioner argues that, contrary to AVISMA's assertion, the Department explained the ownership of the companies and found that the corporate entity consisting of Russian Technologies, a subsidiary of Russian Technologies and AVISMA, and the corporate entity consisting of Renova and AVISMA's home-market customer in question are legally in a position to exercise restraint or direction over each other through participation in the

joint venture. The petitioner argues further that the Department requested information which AVISMA refused to provide and, based on available evidence, determined correctly that the relationship between Russian Technologies, its subsidiary, and AVISMA and Renova *via* the Rusinvestpartners joint venture has the potential to have an impact on decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.

The petitioner argues that AVISMA attempts to shift the burden improperly onto the Department for proving that the control relationship had the potential to have an impact on production, pricing, or cost decisions. Citing the *Preamble* to the Department's regulations,<sup>13</sup> the petitioner argues that, where a control relationship exists, the respondent has to demonstrate that the relationship does not have the potential to affect the subject merchandise or foreign like product.

The petitioner argues that AVISMA's reliance on *TIJID* is inapposite. The petitioner contends that the Department cited *TIJID* correctly as authority for the rule that the Department need only find the potential for control. Specifically, citing *Ferro Union, Inc. v. United States*, 44 F. Supp. 2d 1310, 1324-25 (CIT 1999) (*Ferro Union*), the petitioner argues that the Court of International Trade (CIT) stated that the determination of control is not dependent on actually exercising control but rather on the capacity to exercise control.

Citing *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances, in Part*, 75 FR 57449 (September 21, 2010), and accompanying Issues and Decision Memorandum at Comment 17, the petitioner argues that the Department determined properly that the parents' interactions of parties through or with the Rusinvestpartners joint venture have the potential to affect AVISMA's pricing and/or delivery decisions. Thus, according to the petitioner, record evidence and administrative precedent support the Department's affiliation finding in the *Preliminary Results*. The petitioner argues further that the Department provided AVISMA with an opportunity to demonstrate that these relationships do not have the potential to affect sales of the subject merchandise to AVISMA's home-market customer, but AVISMA refused to provide any contrary evidence. The petitioner argues that AVISMA should not be allowed to benefit from its refusal to cooperate by evading its burden to provide evidence supporting its argument that it is not affiliated with its home-market customer. The petitioner requests that the Department reject AVISMA's argument regarding affiliation and continue to find that AVISMA and its home-market customer are affiliated.

Department's Position: Section 771(33)(F) of the Act includes the following language within its definition of affiliated persons: "two or more persons directly or indirectly controlling, controlled by, or under common control with, any person." Section 771(33) of the Act states further that control exists when one person is "legally or operationally in a position to exercise restraint or direction over another person." In addition, the SAA accompanying the URAA states:

The traditional focus on control through stock ownership fails to address adequate modern business arrangements, which often find one firm "operationally in a position to

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<sup>13</sup> *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27298 (May 19, 1997) (*Preamble*).

exercise restraint or direction” over another in the absence of an equity relationship. A company may be in a position to exercise restraint or direction, for example, through corporate or family groupings, franchise or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other.<sup>14</sup>

Further, 19 CFR 351.102(b)(3) states that the Department “will not find that control exists on the basis of these factors unless the relationship has the potential to have an impact on decisions concerning the production, pricing or cost of the subject merchandise or the foreign like product.”

In our March 31, 2011, memorandum entitled “Magnesium Metal from the Russian Federation: Affiliation Analysis” (Affiliation Memorandum), we explained that, in order to determine affiliation through joint control of a third party pursuant to section 771(33)(F) of the Act, we examine whether two parties are legally or operationally in a position to exercise restraint or direction over a third party. See, e.g., *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews and Final Rescission and Partial Rescission of Antidumping Duty Administrative Reviews*, 71 FR 54269 (September 14, 2006), and accompanying Issues and Decision Memorandum at Comment 10.A and *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. We explained further that, under 19 CFR 351.102(b), we will not find that control exists “unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.” See *TIJID*, 29 CIT at 314-15, and *Mitsubishi Heavy Indus., Ltd. v. United States*, 23 CIT 326, 335-36 (1999).

We explained also that actual control over the third party is not required by the statute. See *TIJID*, 29 CIT at 314, and section 771(33) of the Act. Rather, a person is considered to be in a position of control if that person is legally in a position to exercise restraint or direction over the other person. *Id.*; see also *Ferro Union*, 44 F. Supp. 2d at 1324-25 (stating that the determination of control is “not dependent on actually exercising control, but rather on the *capacity* to exercise control”) (emphasis in original).

Based on the information presented on the record, we explained in the Affiliation Memorandum that, due to the ownership structure between AVISMA, its parent company, Russian Technologies, and a subsidiary of Russian Technologies, Russian Technologies is in a position to exercise legal and/or operational control over AVISMA and its subsidiary. AVISMA does not dispute this fact. Moreover, the record indicates that during the POR the remaining ownership shares of AVISMA not held by Russian Technologies were held by 58 shareholders, which further supports a finding that Russian Technologies is in an exclusive position to exercise legal and/or operational control over AVISMA. See AVISMA’s August 2, 2010, section A questionnaire response at exhibit 4. We also continue to find Russian Technologies, its subsidiary, and AVISMA to be a corporate entity for purposes of determining affiliation. See

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<sup>14</sup> See SAA at 838.

Affiliation Memorandum at 3. The Department finds that the extent of Russian Technologies control over AVISMA and its other subsidiary is such that it is appropriate to treat these companies as a single corporate entity (the RT entity) for purposes of examining affiliation under section 771(33) of the Act.

We explained also in the Affiliation Memorandum that publicly available information placed on the record of the instant review indicated that AVISMA's home-market customer is part of the Renova Business Structure. Because the record evidence supports a finding that Renova is the owner of AVISMA's home-market customer and the record does not support a finding that there are any other owners of AVISMA's home-market customer, we determine that Renova is the sole owner of AVISMA's home-market customer pursuant to section 771(33)(F) of the Act. See the Department's supplemental questionnaire, dated January 27, 2011. Based upon this information, we consider Renova and AVISMA's home-market customer also to be a single corporate entity (the Renova entity) for purposes of determining affiliation. AVISMA does not dispute this fact.

Record evidence establishes that the Rusinvestpartners joint venture is equally owned by the RT entity and the Renova entity. On this basis, we determined that the RT entity (including AVISMA) and the Renova entity (including AVISMA's home-market customer) are in a position to exert the requisite control over the Rusinvestpartners joint venture. See Affiliation Memorandum at 3. AVISMA does not dispute this fact. Thus, for purposes of the final results, we continue to find the RT entity (including AVISMA) and the Renova entity (including AVISMA's home-market customer) to be affiliated, as defined by section 771(33)(F) of the Act.

We disagree with AVISMA that we have not provided sufficient explanation how the relationship between AVISMA and its home-market customer has the potential to have an impact on decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. As we explained in our Affiliation Memorandum, due to the ownership structure of the companies at issue, the relationship between the RT entity and the Renova entity has the potential to have an impact on decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. For example, pricing decisions could be compensated through the sales or other interactions between the two entities through or with the Rusinvestpartners joint venture.

The Department also disagrees with AVISMA's assertion that the burden rests on the Department to prove that the relationship between Russian Technologies/its subsidiary/AVISMA and Renova *via* the Rusinvestpartners joint venture has the potential to have an impact on decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. The *Preamble* states explicitly that, where a control relationship exists, the respondent has to demonstrate that the relationship does not have the potential to affect the subject merchandise or foreign like product. See *Preamble*, 62 FR at 27298. AVISMA did not provide sufficient information on the record to demonstrate the contrary.

Thus, for the final results, we continue to find that AVISMA is affiliated with its home-market customer *via* the Rusinvestpartners joint venture pursuant to section 771(33)(F) of the Act.

### 3. Zeroing

Comment 3: AVISMA argues that, to the extent that the Department makes changes to the margin calculation for the final results, the Department should calculate the margin for AVISMA without zeroing non-dumped sales.

Citing *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363, 1371-73 (CAFC 2011) (*Dongbu Steel*), AVISMA argues that the Court of Appeals for the Federal Circuit (CAFC) held recently that the final results of an administrative review in which zeroing was used must be remanded to direct the Department to explain how it can interpret the language at section 771(35)(A) of the Act differently with respect to the use of zeroing in investigations and the use of zeroing in administrative reviews. AVISMA contends that in *Dongbu Steel* the CAFC discusses the Department's position in which the Department conceded that administrative reviews and investigations follow the same statutory provision and that the same issue is applicable to both investigations and administrative reviews.

AVISMA argues that the Department's application of zeroing in this administrative review is inconsistent with the Department's interpretation of 771(35)(A) of the Act in investigations. AVISMA asserts that the *Preliminary Results* do not explain how the language of the statute as applied to the zeroing issue may be construed in one way with respect to investigations and the opposite way with respect to administrative reviews. Thus, according to AVISMA, the *Preliminary Results* do not comply with the binding CAFC precedent.

Citing *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 FR 81533 (December 28, 2010) (*Proposed Modification for Reviews*), AVISMA argues that the Department has expressed its intention to eliminate its zeroing practice in administrative reviews. AVISMA contends that the Department proposes to modify its methodology for calculating weighted-average margins of dumping and assessment rates to provide offsets for non-dumped comparisons while using monthly average-to-average comparisons in administrative reviews in a manner that parallels the World Trade Organization (WTO)-consistent methodology the Department applies currently in original investigations.

Citing *United States-Measures Related to Zeroing and Sunset Reviews (US-Zeroing (Japan))*, WT/DS322/R, WT/DS322/AB/R (adopted January 23, 2007), *United States-Final Anti-Dumping Measures on Stainless Steel from Mexico (US-Stainless Steel (Mexico))*, WT/DS344/R, WT/DS344/AB/R (adopted May 20, 2008), *United States-Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DC294/R, WT/DS294/AB/R (adopted May 9, 2006) (*US-Zeroing (EC)*), *United States-Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, WT/DS350/AB/R (adopted February 19, 2009) (*US-Continued Zeroing (EC)*), AVISMA argues that the WTO Appellate Body has ruled in several cases that the use of zeroing in administrative reviews as well as in investigations is inconsistent with the obligations under the WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade. According to AVISMA, in the *Proposed Modification for Reviews* the Department recognized its obligation to change the practice in administrative reviews. AVISMA argues that the Department should now discontinue the use of zeroing in this case because it has recognized its obligation to change the practice, having issued proposed regulations and accepted comments.

For the final results, AVISMA requests that the Department revise its methodology to allow negative model-specific margins to be included in the aggregate margin calculation.

The petitioner argues that AVISMA's reliance on the Department's proposed amendment to its regulations as a basis for changing its methodology in the current administrative review is meritless. Citing *Dongbu Steel*, the petitioner asserts that it is well known that proposed amendments to regulations are not considered final and typically are not applicable to pending cases.

The petitioner argues further that the express term of the cited proposal does not apply to this administrative review and therefore AVISMA's reliance on the proposed amendment is therefore misplaced.

Citing *First Administrative Review of Steel Garment Wire Hangers From the People's Republic of China; Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 27994 (May 13, 2011), and accompanying Issues and Decision Memorandum at Comment 1, the petitioner argues that the Department has considered and rejected the argument made by parties that the Department's interpretation of the statute is inappropriate and that *Dongbu Steel* takes precedence. The petitioner contends that the Department should again disagree with AVISMA's argument that the CAFC's recent decision in *Dongbu Steel* requires the Department to change its methodology in this administrative review.

The petitioner argues that *Dongbu Steel* does not control this issue because the CAFC found that the Department did not explain adequately why it has interpreted the statutory provision inconsistently and remanded the case for further proceedings to give the Department the opportunity to explain its reasoning. According to the petitioner, the CAFC did not declare the zeroing methodology to be invalid in administrative reviews and it is possible that the Department will provide a justification for its interpretation of the statute that satisfies the CAFC in the *Dongbu Steel* decision. The petitioner asserts that, until the Department has had an opportunity to provide that explanation, the involved parties have had an opportunity to comment on the Department's conclusions of law, and the CAFC has reviewed the Department's conclusion, the decision in *Dongbu Steel* is not final. Thus, according to the petitioner, the decision in *Dongbu Steel* cannot control this issue.

The petitioner argues that, even if the *Dongbu Steel* decision were final, it would not represent "binding" precedent as AVISMA claims. Rather, according to the petitioner, the Department continues to be bound by the CAFC's decision in *SKF USA Inc. v. United States*, 630 F.3d 1365 (CAFC 2011) (*SKF*), where the CAFC held that the Department's application of the zeroing methodology in administrative reviews but not in investigations is a permissible interpretation of the antidumping duty statute. Citing *CEMEX, S.A. v. United States*, 384 F.3d 1314, 1321 n.5 (CAFC 2004), the petitioner argues that a new CAFC opinion such as *Dongbu Steel* cannot overturn controlling precedent unless it is overruled by the Supreme Court or an *en banc* decision of the CAFC. The petitioner asserts that, because the *Dongbu Steel* was not reviewed *en banc*, it has not overruled the CAFC's decision in *SKF*. The petitioner contends that as a result, *SKF* remains the controlling law and AVISMA's reliance on the *Dongbu Steel* decision is misplaced.

Department's Position: We have not changed our calculation of the weighted-average dumping margins for the final results of review with respect to our zeroing methodology.

Section 771(35)(A) of the Act defines “dumping margin” as the “amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise” (emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export price (EP) or constructed export price (CEP). We disagree with the respondent that our zeroing practice is an inappropriate interpretation of the Act. Because no dumping margin exists with respect to sales where normal value is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of section 771(35) of the Act. See, e.g., *Timken Co. v. United States*, 354 F.3d 1334, 1342 (CAFC 2004) (*Timken*), *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347-49 (CAFC 2005) (*Corus I*), and *SKF*, 630 F.3d at 1375.

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

This does not mean that we disregard non-dumped sales in calculating the weighted-average dumping margin. It is important to recognize that the weighted-average margin will reflect any non-dumped merchandise examined during the POR; the value of such sales is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

The CAFC explained in *Timken* that denial of offsets is a “reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to ‘mask’ sales at less than fair value.” See *Timken*, 354 F.3d at 1342. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the Department to demonstrate “masked dumping” before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. See, e.g., *Timken*, 354 F.3d at 1343, *Corus I*, 395 F.3d at 1347-49, and *NSK Ltd. v. United States*, 510 F.3d 1375, 1381 (CAFC 2007) (*NSK*).

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparison in antidumping investigations. See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27,

2006) (*Final Modification*). With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department's interpretation of the statute was unchanged in other contexts.

It is reasonable for the Department to interpret the same ambiguous language differently when using different comparison methodologies in different contexts. In particular, the use of the word "exceeds" in section 771(35)(A) of the Act can reasonably be interpreted in the context of an antidumping investigation to permit negative average-to-average comparison results to offset or reduce the amount of the aggregate dumping margins used in the numerator of the weighted-average dumping margin as defined in section 771(35)(B) of the Act. The average-to-average comparison methodology typically applied in antidumping duty investigations averages together high and low prices for directly comparable merchandise prior to making the comparison. This means that the determination of dumping necessarily is not made for individual sales but rather at an "on average" level of comparison. For this reason, the offsetting methodology adopted in the limited context of investigations using average-to-average comparisons is a reasonable manner of aggregating the comparison results produced by this comparison method. Thus, with respect to how negative comparison results are to be regarded under section 771(35)(A) of the Act, it is reasonable for the Department to consider whether the comparison result in question is a product of an average-to-average comparison or an average-to-transaction comparison.

In *U.S. Steel*, the CAFC considered the reasonableness of the Department's interpretation not to apply zeroing in the context of investigations using average-to-average comparisons while continuing to apply zeroing in the context of investigations using average-to-transaction comparisons pursuant to the provision at section 777A(d)(1)(B) of the Act.<sup>15</sup> Specifically, in *U.S. Steel*, the CAFC was faced with the argument that, if zeroing was never applied in investigations, then the average-to-transaction comparison methodology would be redundant because it would yield the same result as the average-to-average comparison methodology. The Court acknowledged that the Department intended to continue to use zeroing in connection with the average-to-transaction comparison method in the context of those investigations where the facts suggest that masked dumping may be occurring. See *U.S. Steel*, 621 F.3d at 1363. The Court then affirmed as reasonable the Department's application of its modified average-to-average comparison methodology in investigations in light of the Department's stated intent to continue zeroing in other contexts. *Id.*

In addition, the CAFC in *SKF* recently upheld, as a reasonable interpretation of ambiguous statutory language, the Department's continued application of zeroing in the context of an administrative review completed after the implementation of the *Final Modification*. See *SKF*, 630 F.3d at 1375. In that case, the Department had explained that the changed interpretation of the ambiguous statutory language was limited to the context of investigations

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<sup>15</sup> See *U.S. Steel Corp. v. United States*, 621 F.3d 1351 (CAFC 2010) (*U.S. Steel*).

using average-to-average comparisons and was made pursuant to statutory authority for implementing an adverse WTO report. We find that our determination in this administrative review is in accordance with the CAFC's recent decision in *SKF*.

We disagree with AVISMA's argument that the CAFC's recent decision in *Dongbu Steel* requires us to change our methodology in this administrative review. The holding of *Dongbu Steel* and the recent decision in *JTEKT Corp. v. United States*, 642 F.3d 1378 (CAFC 2011) (*JTEKT*) were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations *versus* administrative reviews, but the CAFC did not hold that these differing interpretations were contrary to law. Importantly, neither *Dongbu Steel* nor *JTEKT* overturned prior CAFC decisions affirming zeroing in administrative reviews, including *SKF*, which we discuss above, in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. Unlike the circumstances examined in *Dongbu Steel* and *JTEKT*, the Department here is providing additional explanation for its changed interpretation of the statute subsequent to the *Final Modification* whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in *Dongbu Steel*, *JTEKT*, and *SKF*.

Regarding the WTO reports cited by AVISMA finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement, the CAFC has held that WTO reports are without effect under U.S. law "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA. See *Corus I*, 395 F.3d at 1347-49; accord *Corus Staal BV v. United States*, 502 F.3d 1370, 1374-75 (CAFC 2007), and *NSK*. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 USC 3533(g) and *Final Modification*, 71 FR at 77722. Specifically, with respect to *US-Zeroing (Japan)*, *US-Stainless Steel (Mexico)*, *US-Zeroing (EC)*, *US-Continued Zeroing (EC)*, the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review.

With regard to AVISMA's reliance on the Department's *Proposed Modification for Reviews* as a basis for changing the Department's zeroing methodology in the instant administrative review, the Department's *Proposed Modification for Reviews* has not been finalized and therefore is not applicable to this pending case. Further, proposed regulations by their very nature are not binding on an agency. See *Viraj Forgings Ltd. v. United States*, 206 F. Supp. 2d 1288, 1293 (CIT 2002) (rejecting plaintiff's reliance on a proposed rule as basis for receiving a zero margin). The *Proposed Modification for Reviews* is only a proposal that remains subject to review of comments from the public and statutory consultation requirements involving Congressional committees, among others. See section 123(g)(1) of the URAA. It does not provide legal rights or expectations for parties in this administrative review. The *Proposed Modification for Reviews* further makes clear that, in terms of timing, any changes in methodology will be prospective only, and "will be applicable in . . . all {administrative} reviews

pending before the Department for which a preliminary result is issued more than 60 business days after the date of publication of the Department's Final Rule and Final Modification." See *Proposed Modification for Reviews*, 75 FR at 82535. Additionally, the *Proposed Modification for Reviews* would not apply to the present administrative review because normally "{a} final rule or other modification . . . may not go into effect before the end of the 60-day period beginning on the date which consultations {between the Trade Representative heads of the relevant departments or agencies, and appropriate Congressional committees}. . . begin." See section 123(g)(2) of the URAA. Because the final results in this administrative review will be completed prior to the effective date of the final rule, any change in the treatment of non-dumped sales pursuant to the *Proposed Modification for Reviews* (if implemented) would not apply to this administrative review.

Accordingly and consistent with the Department's interpretation of the Act described above, in the event that any of the export transactions examined in this review are found to exceed normal value, the amount by which the price exceeds normal value does not offset the dumping found with respect to other transactions.

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 \_\_\_\_\_X\_\_\_\_\_                      Disagree \_\_\_\_\_

*/S/ Ronald Lorentzen*

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Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

*9/6/2011*

\_\_\_\_\_  
Date