

MEMORANDUM TO: David M. Spooner  
Assistant Secretary  
for Import Administration

FROM: Stephen J. Claeys  
Deputy Assistant Secretary  
for Import Administration

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, 2006, through March  
31, 2007

### 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, 2006, through March 31, 2007. As a result of our analysis, we have made changes in our determination. 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. Calculation of Cost of Production and Constructed Value
  - A. Joint-Cost Allocation - Overview
  - B. Magnesium as a Byproduct
  - C. Magnesium as a Main Product
  - D. Valuation of Chlorine at the Split-off Point
  - E. The Use of an Appropriate Cost Database
  - F. Chlorine-Disposal Costs
  - G. Constructed-Value Profit
2. Constructed Export-Price Offset
3. Selection of an Adverse Facts-Available Rate

### Background

On May 5, 2008, 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, 73 FR 24541 (May 5, 2008) (Preliminary Results). The review covers two manufacturers/exporters, PSC VSMPO-AVISMA Corporation (AVISMA) and Solikamsk Magnesium Works (SMW). We invited interested parties to comment on the preliminary results.<sup>1</sup> At the request of certain parties we held a hearing on July 23, 2008.

## Discussion of the Issues

### **1. Calculation of Cost of Production and Constructed Value**

#### *A. Joint-Cost Allocation - Overview*

AVISMA has argued during this review that magnesium is no longer a main product of the company because, it claims, magnesium is a byproduct of titanium production. If that designation is appropriate, the costs we would assign to magnesium would equal the aggregate sales revenue of magnesium products less the further-processing costs necessary to convert the raw magnesium to saleable products. AVISMA argues that we should modify this calculation and proposes that we assign to magnesium only the further-processing costs necessary to convert raw magnesium to saleable products. Comment 1 of the section of this memorandum entitled “Magnesium as a Byproduct,” below, addresses this issue.

AVISMA has argued further that, if we decide to treat both magnesium and chlorine as main products, for purposes of allocating the joint costs between magnesium and chlorine we should use the sale prices of products “downstream” to chlorine to determine a net realizable value (NRV) for chlorine at the split-off point. It argues that, because it did not sell chlorine gas at the split-off point, the only reasonable means of determining the value for chlorine is to use the sale prices of the downstream titanium products less the costs incurred for the titanium-production stage. We address AVISMA’s arguments concerning the application of a combined NRV methodology to magnesium, chlorine, and titanium below in Comment 2 of the section entitled “Magnesium as a Main Product.”

Finally, in Comment 3 of the section entitled “Valuation of Chlorine at the Split-off Point” we address the arguments concerning the selection of a surrogate chlorine price if we decide not to apply a combined NRV methodology for magnesium, chlorine, and titanium.

To facilitate the discussions of these issues, we are providing this brief public overview of AVISMA’s production process and its cost-accounting practices as they relate to the issues at hand. AVISMA’s Berezniki facility produces the merchandise under consideration, magnesium metal, as well as titanium sponge and other minor products. The other minor products include

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<sup>1</sup> On June 11, 2008, AVISMA filed its case brief. We rejected AVISMA’s case brief because it contained new factual information, including an expert-opinion affidavit which AVISMA has not submitted previously. See our letter to AVISMA dated June 20, 2008. On June 25, 2008, AVISMA re-filed its case brief. We rejected AVISMA’s revised case brief because it contained new arguments on chlorine-gas disposal costs. See our letter to AVISMA dated July 7, 2008. On July 10, 2008, AVISMA re-filed its case brief. We found that several aspects in AVISMA’s revised case brief retained some sections of the rejected new argument. Accordingly, we determined that we would not consider AVISMA’s untimely argument on chlorine-gas disposal costs for the final results. See Memorandum to Laurie Parkhill dated July 14, 2008.

de-icing compounds (calcium chloride or  $\text{CaCl}_2$ ) and fertilizer. See the August 21, 2007, section D questionnaire response at page 3. Magnesium, calcium chloride, and chlorine are produced from a main input called carnalite ( $\text{KMgCl}_3 \cdot 6(\text{H}_2\text{O})$ ), which first goes through a water-removal or dehydration process at OPU-1<sup>2</sup> and then moves on to the electrolysis process at OPU-2, from which two main outputs result, market-quality raw magnesium and chlorine gas along with other minor products. See AVISMA's case brief at 7. The raw magnesium is further processed to produce pure and alloyed magnesium metal (the merchandise under consideration) while the chlorine is used in titanium production, recycled back to the dehydration process, or processed into calcium chloride, a product which AVISMA considers marketable. See January 29, 2008, section D supplemental questionnaire response at page 6 and AVISMA's case brief at 7. AVISMA also uses an amount of magnesium from OPU-2 in titanium production.

The main input for titanium production is ilmenite ( $\text{FeTiO}_3$ ), which is first reduced to titanium "slag" (i.e., iron, titanium oxide and carbon dioxide are produced). AVISMA uses chlorine to separate the titanium from the titanium oxide (forming titanium tetrachloride) and then uses magnesium to separate the chlorine from the titanium tetrachloride (forming titanium and magnesium dichloride ( $\text{MgCl}_2$ )). Titanium continues through the production stages while the magnesium dichloride is recycled through OPU-3. In OPU-3, AVISMA uses electrolysis to separate the magnesium dichloride that exits the titanium production back into so-called technical-quality raw magnesium and chlorine gas. See the January 29, 2008, section D supplemental questionnaire response at page 4. AVISMA refers to OPU-3 as a "closed loop" cycle because the chlorine and magnesium placed into titanium production is recovered and re-used multiple times. According to AVISMA, magnesium dichloride is "generated as a result of titanium tetrachloride reduction ... and is returned back to electrolysis to be broken down once again into chloride and technical-quality raw magnesium to be taken back into titanium production." See January 29, 2008, section D supplemental questionnaire response at page 4. Thus, most of the raw magnesium and chlorine that are a consequence of the titanium production are dedicated to titanium production. They amount to set quantities of magnesium and chlorine that cycle in and out of the titanium-production process.

In order to calculate the cost of raw magnesium or chlorine, one must allocate the costs accumulated from the dehydration stage in OPU-1 through the electrolysis stage in OPU-2 to the products that emerged from this stage of the process, magnesium, and chlorine. From the less-than-fair-value (LTFV) investigation to the previous review of the order, AVISMA treated raw magnesium generated at OPU-2 as a main product and the chlorine as a byproduct in its normal books and records. See January 29, 2008, section D supplemental questionnaire response at page 1. Beginning January 1, 2007, three-fourths of the way through the current POR (April 2006 to March 2007), AVISMA began to treat raw magnesium as a byproduct and chlorine as a main product in its books and records. See the August 21, 2007, section D questionnaire response at page 5. In that response, AVISMA reported its raw-magnesium costs as being only those costs that were incurred after the split-off point to further process the raw magnesium into finished products. Thus, for purposes of reporting its costs to the Department, AVISMA assigned no joint costs to the raw magnesium produced in the dehydration and electrolysis stages (e.g., no direct material costs) and, instead, reported only those processing costs incurred after the split-off point. See the August 21, 2007, section D questionnaire response at page 31. Alternatively,

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<sup>2</sup> OPU-1, OPU-2, and OPU-3 are production points in AVISMA's Berezniki facility.

AVISMA has also submitted a calculation of magnesium costs using an NRV valuation of both of the main products produced at the split-off point (i.e., chlorine gas and raw magnesium), but it based the chlorine value on an NRV using sale prices of titanium.

In the Preliminary Results, we treated the raw magnesium and chlorine as main products and used the net market prices at the split-off point to allocate costs. That is, we used an NRV for magnesium and a surrogate market price for chlorine to allocate all of the joint costs accumulated through the OPU-2 electrolysis process to these two main products. For magnesium, we used AVISMA's pre-investigation magnesium metal sale prices (applied to current production quantities), less the processing costs incurred after the split-off point.<sup>3</sup> For chlorine gas we used the average purchase price of containerized liquid chlorine, submitted by AVISMA in this review, less the estimated processing costs necessary to transform the chlorine gas into a transportable and salable product (i.e., containerized liquid chlorine). Under this methodology, for the Preliminary Results we allocated the joint costs in proportion to the values of the joint products at the split-off point.

### *B. Magnesium as a Byproduct*

Comment 1: AVISMA and Alcoa argue that, by using the Department's own five-factor test for determining whether a joint product is a main product or a byproduct, magnesium qualifies as a byproduct of titanium production.<sup>4</sup> Specifically, they argue the following points: 1) magnesium is now treated as a byproduct in AVISMA's normal records; 2) magnesium has a low relative value compared to the other end products produced by AVISMA; 3) raw magnesium is an unavoidable byproduct of chlorine production and chlorine is an essential major input of titanium; 4) the amount of magnesium produced depends on how much chlorine is needed for titanium production; 5) the further-processing that occurs to the chlorine is greater than the further-processing of magnesium (assuming that titanium production is considered further-processing of chlorine). In conclusion, AVISMA contends, the Department's treatment of raw magnesium and chlorine as main products in the Preliminary Results was improper.

According to AVISMA, the relative importance of the joint products, the second of the Department's five factors, depends largely on the period selected for analyzing the end values. AVISMA acknowledges that, in using sales values in the period preceding the period of investigation (POI) (i.e., 2002), it would be logical to treat magnesium and chlorine as main products. AVISMA argues that, by using an analysis of contemporaneous POR prices and the sale prices of products downstream of the chlorine to determine the chlorine's NRV, the relative value of magnesium products falls significantly below the standard ten-percent guideline used by most accountants to consider a product to be a main product and thus to consign it to byproduct

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<sup>3</sup> When determining the NRV of the subject merchandise for a value allocation, the Department typically looks to prices prior to the period of investigation or review in order to avoid the problem of circularity. The circularity problem occurs when an allegation of dumping calls into question the reliability of using dumped prices to allocate costs to subject merchandise in the process of determining whether dumping occurred during the period. For the Preliminary Results, the Department relied on magnesium prices from time prior to the conduct of the original investigation. See, generally, Comment 3.

<sup>4</sup> Appearing as a U.S. industry customer of the merchandise under consideration, on July 15, 2008, Alcoa submitted comments rebutting the petitioner's case brief. The comments therein correspond closely to AVISMA's own arguments and, therefore, we address the comments collectively.

treatment. AVISMA argues that, considering its merger with VSMPO, the decreasing production of magnesium, and the unimportance of commercial magnesium in the context of the new company, its decision to treat magnesium as a byproduct was entirely rational and is supported by the facts and basic accounting principles. Thus, AVISMA contends, the original calculation method it used for magnesium in its questionnaire response, *i.e.*, assigning to magnesium only the further-processing costs necessary to convert raw magnesium to saleable products, was reasonable and should be accepted by the Department.

US Magnesium LLC (hereinafter, the petitioner) argues that the Department has the discretion, under section 773(f)(1)(A) of the Act, to depart from the accounting method used in a company's records. The petitioner states that only in the last quarter of the 12-month POR did AVISMA change its accounting treatment. It states that, prior to this point, AVISMA has historically treated magnesium as the main product and chlorine as the byproduct.

The petitioner cites to statements made by AVISMA in the investigation and first administrative review that are contradictory to AVISMA's proposed methodologies for this review. For example, it comments, AVISMA stated in the LTFV investigation that "{p}ure magnesium and titanium sponge production lines are separate from each other and located in separate buildings." The petitioner also cites to examples in AVISMA's web site where AVISMA describes magnesium and titanium production separately as follows: "magnesium production process, which is the electrolysis of molten magnesium salts...." and "{t}itanium sponge production based on Kroll process begins with ilmenite ore conversion into titanium slag in ore-thermal furnaces" (the petitioner's rebuttal brief at 10-11). The petitioner argues that no one would build an electrolysis reduction facility to produce chlorine because it would be far easier and cheaper to purchase bulk chlorine from commercial vendors.

The petitioner addresses the five factors. According to the petitioner, AVISMA's historical treatment of magnesium as a main product is well-established and its recent change in accounting treatment must be viewed with great skepticism. The petitioner argues that an analysis of the relative values at the split-off point of OPU-2 shows clearly that both chlorine and magnesium have significant values relative to each other and that magnesium cannot possibly be considered a mere byproduct. The petitioner argues that, because the titanium and magnesium processes are separate and distinct, neither magnesium nor chlorine can be considered an unavoidable consequence of producing titanium. The petitioner rejects AVISMA's assertion that it cannot control the production of raw magnesium because the amount of raw magnesium produced depends on the amount of chlorine necessary for titanium production. The petitioner again argues that AVISMA is attempting to merge two separate and distinct production lines. From the petitioner's perspective, the chlorine may be a necessary reactant for the titanium process but, in terms of unavoidable consequence, only magnesium and chlorine are unavoidable from each other. Likewise, the petitioner rejects AVISMA's discussion on whether the joint products require significant further-processing after the split-off point because AVISMA's focus is on titanium production. The petitioner believes that the appropriate step to consider in the joint-cost analysis is the electrolysis step that generates chlorine gas and magnesium. Finally, the petitioner argues that the record demonstrates that chlorine gas undergoes minimal further-processing whereas raw magnesium is the focus of significant further-processing efforts.

Department's Position: We disagree with AVISMA's and Alcoa's proposed treatment of raw magnesium as a byproduct of titanium production and for the final results have continued to

treat raw magnesium and chlorine as main products produced in a production process separate and distinct from the production of titanium.

In this case, it is magnesium and chlorine that are produced in the OPU-2 electrolysis joint process, not titanium. Rather than joint products emerging from the titanium process, chlorine and magnesium are separate and distinct reactant inputs into the titanium process. The ilmenite ore (FeTiO<sub>3</sub>) from which the titanium is extracted is the main input into the joint process that creates the main products iron and titanium. Titanium and iron exit the titanium process, as does magnesium dichloride which is then separated in the OPU-3 closed loop and used again in titanium production. See January 29, 2008, section D supplemental questionnaire response at page 4. As such, chlorine and magnesium are simply intermediate catalysts and do not appear in the final composition of the finished titanium products.

Throughout the POR, both chlorine and magnesium were transferred from OPU-2 to replenish the chlorine and magnesium that was lost in the process. Thus, magnesium was equally as important to titanium production as is chlorine. In terms of titanium production, the joint costs (including the ilmenite ore, processing costs, chlorine, and magnesium) must be allocated to the iron and titanium that are produced jointly. The important factor here is that chlorine and magnesium can be identified and valued objectively before they enter the process for producing titanium.

The split-off point within the magnesium-production process is the point where magnesium and chlorine become distinct products. This split-off point for marketable magnesium and chlorine is part of the magnesium/chlorine line and not part of the titanium line. See the January 29, 2008, section D supplemental questionnaire response at page 4. In evaluating whether a product is a byproduct or a main product, the Department has stated clearly that, “{i}n a case involving joint products, the Department considers the significance of individual joint products resulting from a common production process.” See Final Results of the Antidumping Administrative Review of Elemental Sulphur from Canada, 61 FR 8239, 8241-42 (March 4, 1996) (Elemental Sulphur from Canada). Thus, magnesium cannot be considered a byproduct of titanium and it is at the joint electrolysis point that an analysis must be performed in order to direct the allocation of the costs accumulated up to this split-off point.

AVISMA states correctly that the Department generally looks at several factors in order to determine whether joint products are main products or byproducts. See Elemental Sulphur from Canada, Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel, 66 FR 43949 (September 27, 2001), and accompanying Issues and Decision Memorandum at Comment 3 (Pure Magnesium from Israel), 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 (Structural Steel Beams from South Africa). 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. Below we address each of the five factors as they pertain to the facts in this case.

The first factor is how the company records and allocates costs to the joint products in the

ordinary course of business. In AVISMA's normal books and records, chlorine gas was treated as a byproduct and raw magnesium was treated as a main product, distinct from titanium production, during the time periods that covered both the LTFV investigation (calendar year 2003) and the first administrative review of the order (October 2004 through March 2006). See, e.g., January 29, 2008, section D supplemental questionnaire response at page 1. Citing changes in its operational structure that were a result of the July 1, 2005, merger with its titanium-processing affiliate, AVISMA began treating magnesium as a byproduct and chlorine as the main product as of January 1, 2007. See August 21, 2007, section D questionnaire response at page 5. Thus, for the majority of the POR and for one-and-a-half years after the merger, AVISMA continued to treat magnesium as a main product. We also find that, while the corporate structure changed, AVISMA's merger with its affiliate VSMPO did not change the production process at the Berezniki facility.

Moreover, the byproduct method proposed by AVISMA does not follow either the byproduct method used currently in AVISMA's books or the method used historically in its books treating magnesium as a main product. Under the new byproduct method, AVISMA records as the cost of magnesium products the byproduct value of raw magnesium plus the actual post-split-off costs. See August 21, 2007, section D questionnaire response at page 21. For this review, however, AVISMA reported only the further-processing costs it incurred after the electrolysis process (the post-split-off costs) as the cost of manufacturing (COM) of magnesium metal. See August 21, 2007, section D questionnaire response at page 31. Thus, under this method AVISMA is reporting a lower cost for magnesium than the amount it normally allots in its records under either the main-product or byproduct methodology. Consequently, even if we were to accept the treatment of raw magnesium as a byproduct, we disagree that it is appropriate to assign no pre-split-off point costs to the byproduct when the sum of that product's extended sale prices exceeds the total further-processing costs. In cases where the further-processing costs of a joint product are greater than its possible sales value, the Department has recognized that the product had little or no value at the split-off point. Hence, in such situations, the Department did not allocate any joint costs to the byproduct and instead valued the byproduct at its post-split-off costs only. See Elemental Sulphur from Canada, 61 FR at 8244. Such is not the case here. The sales values of magnesium-metal products exceed the post-split-off costs, indicating that the raw magnesium emerging from the joint process does have value and should be assigned a portion of the total joint costs (in the case of a byproduct, this assignment is at the product's NRV while, if there are two main products, the joint costs are allocated based on the relative NRVs of those products).

Finally, we believe that a change in methodology in the midst of a segment of a proceeding raises questions as to the motive for the change in methodology. AVISMA submits that, regardless of the timing of the change, its management considered magnesium a byproduct well prior to the POR. Irrespective of management's purported views or intentions, however, the overriding consideration in our analysis of this factor is ascertaining the methodology the company actually used in its books and records. Because AVISMA relied on two separate methodologies during the POR, only one of which treated magnesium as a byproduct, AVISMA's books and records do not provide clear support for treating magnesium as a byproduct. Consequently, we do not consider this factor to support treatment of magnesium as a byproduct.

The second factor is the significance of each product relative to the other joint products.

In performing this analysis, typically we determine the NRV of each joint product at the split-off point. We start with the average sales value for the various joint products, extend these values by each product's production quantities, and subtract the respective product-specific costs incurred after the split-off point. Two factors complicate this analysis in the instant case - the absence of any chlorine sales by AVISMA and the fact that magnesium prices themselves are the subject of an antidumping duty review (*i.e.*, our preference is to not rely on AVISMA's sales of subject merchandise in our analysis because we are ascertaining whether AVISMA has made these sales at less than normal value). While these factors complicate the analysis, we believe that the use of AVISMA's magnesium prices during the period prior to any allegations of dumping, and of a comparable surrogate market value for chlorine, overcomes these factors. The results of our analysis indicate that the NRVs for both magnesium and chlorine are significant; this determination supports treating magnesium as a main product.

Due to the proprietary nature of this analysis, we have prepared detailed calculations in a separate memorandum. See Memorandum to Neal Halper, through Michael Martin, from Heidi Schriefer entitled "Cost of Production and Constructed Value Adjustments for the Final Results – PSC VSMPO-AVISMA Corporation and VSMPO-Tirus US Inc.," dated September 2, 2008 (Final Results Cost Calculation Memorandum). As for using titanium prices to determine an NRV for chlorine or even expanding the analysis to magnesium and titanium, as stated above we disagree with the validity of such an analysis and find AVISMA's arguments unpersuasive. See also our response to Comment 2 below.

The third and fourth factors that we use in determining whether joint products are main products or byproducts 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 look at whether management takes steps to minimize or maximize the output quantities of certain outputs. In this case, AVISMA can control the amount of carnalite ore it processes in order to control the quantities of chlorine and magnesium that are produced in the OPU-1 dehydration and OPU-2 electrolysis stages. The ratio of chlorine to magnesium contained in carnalite ore is fixed; thus, the output of each joint product is unavoidable.

In support of its case for considering chlorine a main product and magnesium a byproduct, AVISMA claims that it decided to reduce the quantity of carnalite that it processed, and, consequently, the quantity of magnesium and chlorine that it produced, to a level that would provide only the quantity of chlorine necessary for its titanium production line. Thus, AVISMA contends, this intentional reduction underlines the importance of chlorine, not magnesium, to the company. The record provides evidence, however, that AVISMA's decision to reduce its POR carnalite inputs was not related solely to the company's titanium-production needs. In October 2006, there was an accident at AVISMA's principal carnalite supplier which caused severe shortages of this input. See January 29, 2008, section D supplemental questionnaire response at page 5. In fact, AVISMA acknowledged in its August 21, 2007, submission that shortages of carnalite still continue because of this event. *Id.* at page 5. Thus, the event at the supplier was a major cause in the reduction of carnalite processed and in the decreased quantities of joint products produced.

We also disagree with AVISMA's assertions that raw magnesium is an unavoidable

byproduct because chlorine is an essential major input of titanium. Magnesium is equally necessary to AVISMA in its titanium production. The ilmenite ore from which AVISMA extracts titanium and iron contains no magnesium or chlorine; thus, neither magnesium nor chlorine can be unavoidable byproducts of titanium. Titanium and iron, not magnesium, are unavoidably produced from ilmenite. Instead, both magnesium and chlorine are necessary reactant inputs into AVISMA's processing of ilmenite ore that eventually exit the process as magnesium dichloride. See January 29, 2008, section D supplemental questionnaire response at page 4 and exhibit SD-15. The magnesium dichloride is processed in OPU-3 where it is separated into technical magnesium and chlorine, both of which are recycled into the titanium process again. See *id.* Thus, the closed-loop process at OPU-3 means that much of the magnesium and chlorine requirements for titanium are recovered and re-used. We find that magnesium and chlorine are identifiable inputs, of known quantities, whose value can be calculated separately prior to input and upon removal from the titanium process.

Furthermore, both magnesium and chlorine are commodities that are readily available to industrial users. In fact, record evidence supports the fact that AVISMA could have purchased these or other commodities and avoided processing carnalite into magnesium and chlorine. See January 29, 2008, section D supplemental questionnaire response at page 24.

We also disagree with AVISMA's assertion that its production process does not allow its magnesium-metal production to operate as a stand-alone entity. It is clear from prior segments of this proceeding that AVISMA can dispose of chlorine gas. In fact, AVISMA disposed of excess chlorine gas during the POR covered by this administrative review. See January 29, 2008, section D supplemental questionnaire response at page 6. AVISMA could also sell chlorine gas if it added the necessary liquefaction equipment. While there may be synergies in producing both magnesium and titanium together, the point is that the production of one does not require the production of the other.

Finally, while AVISMA's focus has been on the chlorine gas that is transferred to the titanium-production line, significant quantities of the raw magnesium produced in the OPU-2 joint process are transferred to the titanium-production line to replenish losses in the magnesium that is also an essential input to titanium production. See August 21, 2007, section D questionnaire response at page 17 and April 7, 2008, section D supplemental questionnaire response at exhibit 2SD-9. Specifically, the chlorine is introduced to form titanium tetrachloride and then the magnesium is introduced to react and form magnesium dichloride and, in the process, release the titanium. As discussed previously, the magnesium dichloride is then processed in OPU-3 and the separated magnesium and chlorine are reintroduced into the titanium line. We do not find that magnesium is an unavoidable consequence of the production of chlorine for the titanium line. Instead, we find that AVISMA's management produces magnesium and chlorine intentionally rather than purchasing either of these titanium inputs. Thus, we do not consider the third and fourth factors to support treating magnesium as a byproduct of either titanium or chlorine.

The fifth factor is whether the product requires significant further-processing after the split-off point. We disagree with AVISMA's assertion that its titanium production constitutes further-processing of chlorine. In fact, AVISMA uses chlorine gas as a catalyst input for titanium production. As stated previously, in terms of the titanium process, chlorine does not figure into the final composition of the finished titanium products. Thus, the chlorine is not "further processed" but rather is used as a catalyst that exits as magnesium dichloride which is

then processed and reused in production. For magnesium, there is clearly further-processing of the raw magnesium that AVISMA undertakes to produce the pure and alloyed magnesium that it sells. Management undertakes this further-processing intentionally as the magnesium could be sold in its pure state. Thus, due to AVISMA's decision to further-process the raw magnesium rather than dispose of the product at the split-off point, we find that this factor does not support the treatment of magnesium as a byproduct.

In summary, based on our analysis of the five factors above, we consider raw magnesium and chlorine to be main products of the OPU-1 and OPU-2 production processes for the following reasons: the relative values at the split-off point are significant; both products have been treated as main products in AVISMA's books and records during some point of the POR; management undertakes the production of both products intentionally either for resale or for use as inputs in titanium; both products are inputs to, not unavoidable consequences of, titanium production; management further-processes the raw-magnesium joint product intentionally. Thus, we consider it appropriate to allocate a portion of the joint costs accumulated through the electrolysis process to both magnesium and chlorine gas.

Pursuant to section 773(f)(1)(A) of the Act, we must rely on a company's normal books and records if such records reasonably reflect the costs associated with production of the merchandise under consideration. As discussed above, AVISMA treated magnesium as a byproduct in its books and records for only a portion of the POR. Further, we do not consider AVISMA's recent change to treating magnesium as a byproduct and chlorine a main product to be reasonable. The fact that the NRV of magnesium is significant when compared to the value of chlorine leads us to the conclusion that AVISMA's new method is unreasonable. See the Final Results Cost Calculation Memorandum. Thus, for the final results, we have treated magnesium and chlorine gas as main products and have allocated the joint costs accumulated through the OPU-2 electrolysis process to magnesium and chlorine based on each product's respective NRV. See Comment 2 below for issues relating to the selection of a surrogate value for chlorine.

### *C. Magnesium as a Main Product*

Comment 2: AVISMA and Alcoa argue that, if the Department determines that magnesium is a main product, then the proper allocation should be based on the end values of both magnesium and titanium products. That is, they argue, in determining the NRV for purposes of allocating the joint costs between the magnesium and chlorine main products, the Department should use the sale prices of products downstream of chlorine (*i.e.*, titanium products) to determine the chlorine's NRV. Specifically, AVISMA objects to the Department's use of a surrogate market price for chlorine in order to perform this allocation.

They state that, in the Preliminary Results, the Department relied on AVISMA's reported POR purchases of liquid chlorine, less the amount reported by AVISMA as estimated evaporation costs. (The Department used AVISMA's estimate of evaporation costs as a surrogate for the post-split-off cost of transforming the chlorine gas produced into a transportable saleable product.) AVISMA argues that it never incurs such costs nor, in fact, does it even have the facilities necessary for transforming the gas into liquid. According to AVISMA, both U.S. generally acceptable accounting principles (GAAP) and International Financial Reporting Standards (IFRS) describe an NRV as a selling price "in the ordinary course of business."

Because it is a consumer of chlorine and not a seller, AVISMA claims, the first sales involving chlorine that are made in its normal course of business are the sales of titanium and other minor products. Consequently, AVISMA concludes, the Department's reliance on the NRV of a hypothetical product, liquid chlorine, was manifestly incorrect.

AVISMA argues that the use of a surrogate market price of chlorine at the split-off point is contrary to both accounting principles and to the Department's own established practice. Specifically, AVISMA refers to an accounting textbook that states, "The estimated net realizable value (NRV) method allocates costs on the basis of the relative estimated net realizable value (expected final sales value in the ordinary course of business minus the expected separable costs of production and marketing)" (citing Cost Accounting: A Managerial Emphasis at 576). AVISMA focuses on the wording "final sales value" to support its assertion that only the prices of end products can ever be used for NRV calculations.

AVISMA cites to Final Determination of LTFV Investigation of Certain Orange Juice from Brazil, 71 FR 2183, 2188 (January 13, 2006) and Elemental Sulphur From Canada; Final Results of Antidumping Finding Administrative Review, 61 FR 8239 (March 4, 1996) (Elemental Sulphur from Canada) to support its argument that the Department's normal methodology in joint-product cases is to compare the NRVs derived from actual sales values of actual finished goods produced by the respondent. Citing to Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Canned Pineapple Fruit From Thailand, 64 FR 69481 (December 13, 1999), Structural Steel Beams from South Africa, and Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol From Taiwan, 61 FR 14064 (March 29, 1996), among others, AVISMA asserts that, in all relevant joint-product cases involving NRV calculations, the Department's calculations commenced with the gross revenues of actual end products. In citing to Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium From Israel, 66 FR 49349 (September 27, 2001) (Pure Magnesium from Israel) and Structural Steel Beams from South Africa, AVISMA finds that, similar to the instant case, the joint products involved were intermediate products used as inputs to the finished goods eventually sold. AVISMA asserts that, nevertheless, the Department still based its NRVs on the actual sales values of the downstream finished goods. While observing that the Department did in fact review chlorine-gas values as part of its joint-product analysis in Pure Magnesium from Israel, AVISMA distinguishes the instant case by stating that the Pure Magnesium from Israel respondent had a purifying and processing plant where the byproduct chlorine gas was purified, liquefied, and then sold. Because a review of the Department's past practice establishes that an NRV has never been based on a hypothetical end value of a main product never produced or sold, AVISMA concludes that, for the final results, the Department's NRV analysis must rely on the sales prices of the magnesium and titanium finished products actually produced and sold by the company.

Furthermore, AVISMA believes that the NRV analysis should focus on the company-wide level. It believes that the Department's approach in the Preliminary Results is not appropriate in its focus on a single segment of production (i.e., magnesium) rather than incorporating the economic reality of AVISMA's entire production facility. In fact, AVISMA submits, the Department has in the past debated whether the revenues used in the NRV joint-cost allocation should be at a company or plant level. In Elemental Sulphur from Canada, AVISMA contends, the Department determined that "sulphur production should be evaluated within the context of its {the company's} overall natural gas operations" rather than on a plant-by-plant

basis. Thus, AVISMA concludes, the Department should not restrict its current analysis to a single production process.

AVISMA argues that its production process does not allow its magnesium metal production to operate as a stand-alone entity nor can the titanium sponge line operate without raw magnesium. Therefore, AVISMA argues, electrolysis units OPU-2 and OPU-3 should not be considered as separate stand-alone processes because the outputs from these units flow to other processes. According to AVISMA, the finished magnesium metal products are derived not only from production at OPU-2 but also from multiple joint products of the entire production process such as electrolytes, barium flux, and titanium fusion cake. Thus, AVISMA contends, its magnesium and titanium production processes are so interrelated that the economics of the production facility should guide the allocation of costs among the jointly produced products. In fact, AVISMA argues, the intermediate products do not have so-called universal values but instead only have values specific to the economics of the production facility that produces them. Thus, for the final results, AVISMA claims that the Department must rely on the actual end values at a company-wide level or, at a minimum, at a division-wide level.

AVISMA also claims that the Department was inconsistent in making the two key determinations for this review: the byproduct versus main-product analysis and the NRV allocation of joint costs to main-products analysis. It argues that the Department considered AVISMA as a whole (AVISMA division of VSMPO-AVISMA) when it made the byproduct versus main-product determination but then limited its joint-cost allocation to a single production unit (i.e., OPU-2). AVISMA argues that it is only in this context that the Department arrived at the conclusion that magnesium and chlorine should be treated as main products. AVISMA alleges that, if the analysis for determining whether the joint products were main products or byproducts had also been limited to OPU-2, the Department may have arrived at a different conclusion that may have then led to a different treatment of the joint costs. Because the Department performed the byproduct versus main-product analysis at the AVISMA division level, AVISMA contends that the NRVs must also be determined at the AVISMA division level by using the output of titanium and magnesium products. It argues that, because the finished products, particularly titanium, derive their inputs from both processes, the derived NRVs represent the outputs of both OPU-2 and OPU-3. Thus, AVISMA asserts, the joint costs of OPU-2 and OPU-3 should be combined and allocated to the joint products based on the NRVs derived from the values of the company's end products.

Should there be any concern that titanium products are too far removed from the electrolysis process to be used as the basis for valuing the chlorine main product, AVISMA assures the Department that such concern is misplaced. According to AVISMA, the post-split-off further-processing steps for both raw magnesium and chlorine gas are not significant; hence the magnesium and titanium end products are not too far removed from the joint process to be used as the basis for the joint products' NRV calculations. As the Department has used the sales value of the corresponding finished goods as the starting point for its NRV analysis of main products consistently in the past, AVISMA concludes that the sales values of the titanium and magnesium finished goods should be used for the NRV determination in this case.

Finally, AVISMA points out that the Department's decision not to follow its normal practice in the Preliminary Results creates a dangerous precedent that invites parties to venture outside their normal books to shop for the most advantageous joint-product values. Furthermore, AVISMA argues, the Department's decision not to follow its own precedent limits the

company's ability to calculate its own costs with any degree of accuracy and hampers its ability to monitor its prices in order to avoid dumping. Therefore, based on the preceding arguments, AVISMA concludes that in the final results the Department must calculate the NRVs of the joint products based on the end magnesium and titanium product values.

The petitioner states that it agrees with most of the Department's joint-cost allocation methodology but it argues that the chlorine value the Department selected for use in the NRV cost allocation is fundamentally flawed and is inconsistent with prior practice. (See Comment 3 below regarding chlorine values.) The petitioner argues that the Department was correct in rejecting AVISMA's proposal to determine the NRV for chlorine by using the ultimate sales price for titanium products. It finds that such an approach would be inconsistent with AVISMA's books and records, Department practice, and mainstream accounting.

The petitioner argues that AVISMA attempts to relegate magnesium to byproduct status and to rely on titanium prices to value chlorine because of the merger. The petitioner argues that, when basing its byproduct designation on the relative size of VSMPO-AVISMA titanium and magnesium operations, AVISMA is confusing a cost-accounting methodology with a structural description of a large multifaceted operation that has a core business – titanium – and several non-core businesses – including magnesium metal, aluminum and steel products. It argues that AVISMA cites to no authority to justify such treatment.

Citing to accounting literature, the petitioner states that joint products are produced in a single production process from common raw materials and are characterized by a cognizable split-off point from which two or more products emerge. It argues further that according to accounting literature these emerging products are not produced in distinct multiple step production lines, they are not housed in different buildings, and they are not produced at facilities separated by hundreds of miles. The petitioner argues that AVISMA's "economics of the production facility" approach ignores the basic accounting rule that defines joint products as two or more products that are produced simultaneously and are so closely related that one cannot be produced without the other. The petitioner argues that, because magnesium and titanium production takes place in separate production lines, magnesium cannot be considered a byproduct of titanium production and titanium prices cannot be used to value chlorine.

The petitioner argues that AVISMA seeks to replace the historical NRV value for chlorine with an approach that focuses on its far-removed titanium products that do not even contain chlorine, as chlorine is merely a reactant as opposed to a raw material incorporated into the titanium product. Thus according to petitioner, AVISMA seeks the illogical result of assigning its titanium profits to chlorine.

Furthermore, the petitioner argues that accounting literature recognizes the flaws associated with calculating an NRV that is based upon a downstream product far removed and that, to avoid distortions, the literature expresses a strong preference for using the market value at the split-off point. The petitioner claims that the Department's preference for using a market value at the split-off point rather than resorting to downstream product prices recognizes this fact. Finally, the petitioner concludes that, because chlorine is a widely traded product and there are prices for chlorine on the record, there is no reason to resort to titanium prices in order to value chlorine.

Department's Position: We disagree with AVISMA's and Alcoa's argument that, in allocating costs between the two joint products, magnesium and chlorine, we should use the end

values of titanium products in order to set a value for chlorine. As we explained in response to Comment 1, it is magnesium and chlorine that are produced jointly in the OPU-2 electrolysis process, not titanium. The split-off point within the titanium-production process is the point where titanium ( $\text{TiO}_2$ ) and iron become distinct products from the ilmenite input. Thus, a reasonable value allocation, in terms of the titanium-production process, would allocate the cost of ilmenite ore and the associated joint-processing costs (the conversion costs of the titanium line) to the joint products titanium and iron. In the subsequent titanium-processing steps, chlorine and magnesium are catalysts placed into the production line and are not a result of titanium production. The chlorine and magnesium associated with titanium production can be assigned a value prior to entering titanium production. No further complex downstream NRV allocation is necessary.

Moreover, it is illogical to create a value for chlorine using an NRV method that does not result in a value that reflects a real world-market price of chlorine or, as AVISMA calls it, a “universal price.” This is what would happen if we use high-value titanium prices as the starting point for deriving chlorine values. The profits earned on the titanium products are pushed back and incorporated solely into the value of chlorine, which AVISMA would then have us use to allocate costs between magnesium and chlorine at the earlier OPU-1 dehydration and OPU-2 electrolysis stages.

We also point out that AVISMA’s attempt to apply an overall joint-cost methodology to what are two separate joint-production processes that occur in two different production lines creates an inflated chlorine value. A typical NRV joint-process cost allocation relies on the production quantities that exit the split-off point and their appropriate NRVs. AVISMA’s NRV calculation is based on the production quantities of finished titanium sponge and magnesium metal rather than the quantities of chlorine and magnesium that are a result of the joint process. The quantities of titanium production are directly related to the quantity of ilmenite ore that is put into the titanium-production line and has no material relationship with the quantity of chlorine or magnesium that AVISMA produces in the magnesium and chlorine line. Consequently, because titanium was produced on a completely different line with a completely different input ore and was produced in much greater quantities than the magnesium and chlorine, an overstated value for chlorine results from the use of the profit AVISMA earned on titanium.

The only further-processed chlorine product that AVISMA sold was calcium chloride. See January 29, 2008, section D supplemental questionnaire response at page 6. Based on our NRV analysis, this product had little value. See Final Results Cost Calculation Memorandum. Yet both the petitioner and respondent acknowledge that the chlorine has some value and benefit to AVISMA’s titanium-production line. Thus, we believe the best alternative to valuing chlorine in this review is the use of a surrogate market price. By valuing the chlorine at a surrogate market price, we use a realistic value for chlorine and the same value could reasonably be used for both the magnesium and titanium processes without creating artificial distortions. Assigning to chlorine a value derived from the sale prices of titanium products does not result in a valuation reflective of the benefit obtained from the chlorine input. Considering that the end product, titanium, does not even contain chlorine, the price and entire profit of titanium cannot reasonably represent the contributed value of chlorine. The titanium prices represent the contributed value of the titanium imbedded in the ilmenite ore, just as iron prices would represent the value of the iron in the ore. AVISMA’s method would assign the entire titanium profit to the chlorine used

as an intermediate reactant that is recycled and reused. Thus, we do not think that an NRV analysis using magnesium and titanium values at the end of production is an appropriate methodology.

A more valid approach to valuing the chlorine is to consider what AVISMA would have to spend in order to obtain the chlorine necessary to operate its titanium-production unit. This approach is supported by accounting literature.<sup>5</sup> We emphasize that the focus is on the benefits received from the joint products as of the split-off point. In this case, AVISMA received from the magnesium-production process the chlorine that it would otherwise have had to purchase. Furthermore, this method keeps the value allocated to chlorine tied to a real world price and avoids the distortion of tying the value of chlorine to the profits earned on titanium. See our response to Comment 3.

We disagree with AVISMA's interpretation of antidumping case history pertaining to value allocations. Our decisions on value allocations are very fact-specific. We have not had a joint-product scenario where one of the joint products was used as a catalyst to facilitate a second joint-product scenario. Perhaps most analogous is Lumber from Canada where wood chips were used by some respondents as the main direct material for making pulp and paper products. In that case, similar to this case, we did not rely on the prices of pulp and paper in order to allocate sawmill costs to wood chips. Instead, we relied on market prices of wood chips the respondents sold to or purchased from other unaffiliated parties. In instances where a respondent did not sell wood chips we relied on the wood-chip prices of other respondents. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539 (April 2, 2002) (Lumber from Canada), and accompanying Issues and Decision Memorandum at Comment 11. Thus, even though the wood-chip input was consumed in the production of pulp and paper, we did not rely on the prices of downstream products but instead chose to look at the value of the joint product from the split-off point.

We disagree with AVISMA's assertion that Elemental Sulphur from Canada stands for a preference for the use of the prices of all end products (AVISMA's economics-of-the-facility argument). Specifically, the question in the sulphur proceeding to which AVISMA referred was whether to perform a separate main-product or byproduct analysis for the sulphur jointly produced at each gas field operated by Husky. The petitioner in that case asserted that certain "sour" gas fields produced more sulphur relative to gas than other fields. Thus, the question was whether to make a byproduct or main-product determination (and calculation) for each of dozens of gas fields which all produced the same joint products or to look at Husky's gas operations as a whole. In that case, the Department decided to make its decision based on the average across all fields. See Elemental Sulphur from Canada, 61 FR at 8242.

Here, however, we have two separate and distinct production lines – one line produces magnesium and chlorine and the other produces titanium and iron. Hence, AVISMA's reliance on Elemental Sulphur from Canada is misplaced as in that case the Department analyzed as one all similar production sites with the same joint products.

We also disagree with AVISMA's contention that Structural Steel Beams from South

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<sup>5</sup> Horngren, Datar, and Foster, Cost Accounting, A Managerial Emphasis at 547-548 (9<sup>th</sup> ed.) 1997: "The sales at split-off method allocates joint costs based on the relative sales value at the split-off point of the total production in the accounting period...The sales value at split-off point method exemplifies the benefits-received criterion of cost allocation. Costs are allocated to products in proportion to their ability to contribute revenue. This method is both straightforward and intuitive."

Africa and Pure Magnesium from Israel support the use of titanium values in the valuation of chlorine. AVISMA states that those cases also involved joint products that merely served as intermediate products yet the Department still relied on the actual sales values of the downstream finished goods. In an NRV allocation, the Department's goal is to rely on values for the joint products that are as close to the split-off point because they are the products whose value we are trying to derive. In Structural Steel Beams from South Africa and Pure Magnesium from Israel, the finished products of vanadium, steel beams, liquid chlorine, and pure magnesium had little additional materials added and consisted mainly of the product produced at the split-off point. Such is not the case for chlorine in the titanium process. As mentioned previously, chlorine is used as a catalyst in titanium production to assist in releasing the titanium from the main input, ilmenite. AVISMA's methodology attributes to its chlorine inputs all profit earned on titanium production. While chlorine may play an important role in the production of titanium, we do not find that the use of values of products at the end of the titanium line would appropriately reflect the value of chlorine.

In fact, AVISMA would not have to use titanium prices in order to derive an NRV for chlorine; it could take the sale prices of calcium chloride, less the further-processing for that product. The excess chlorine exiting OPU-2 was further-processed and then sold as calcium chloride to outside parties. See January 29, 2008, section D supplemental questionnaire response at page 6. Thus, the value of the chlorine gas emerging from the joint process could be established based on the sales of these chlorine-derivative products. Such a methodology would be in keeping with the Department's normal practice, but the use of the low calcium-chloride values would result in the assignment of little or no cost to chlorine. We find this is not an appropriate NRV for chlorine because we do not find that such a low price would reflect the benefit that the titanium production receives from the use of the chlorine gas nor the price AVISMA would have to pay to acquire the necessary chlorine. Nevertheless, AVISMA's willingness to dispose of excess chlorine through the production and sale of calcium chloride points out the absurdity of using the very high titanium prices as the starting point in the chlorine NRV computation. Thus, we have adopted the use of a surrogate market value for the intermediate chlorine product for use in the NRV allocation in this case.

We have also revised our NRV methodology in the Preliminary Results to assign to the quantities of chlorine processed into calcium chloride the 2002 average net sales value of this end product. See Final Results Cost Calculation Memorandum. While the sales values of calcium chloride do not reflect the benefit of chlorine to titanium production, we have used these values to calculate the NRV for the chlorine used in the production of calcium chloride. This is reasonable because this is the actual end value of the chlorine that was further-processed into this "albeit inexpensive" (as described by AVISMA) yet marketable chlorine-based product. See January 29, 2008, section D supplemental questionnaire response at page 6. Based on our analysis, we find that the post-split-off costs incurred by AVISMA to process the excess chlorine exceed the sales values of calcium chloride. The post-split-off costs relative to the further-processed chlorine products that were inventoried can be found at exhibit 3 of AVISMA's April 17, 2008, section D supplemental questionnaire response. Thus, for purposes of calculating the chlorine value for use in allocating the joint costs between magnesium and chlorine, we have assigned the quantity of chlorine that was processed into calcium chloride an NRV of zero.

*D. Valuation of Chlorine at the Split-off Point*

In the Preliminary Results, the Department calculated the NRV for the chlorine gas produced in the joint electrolysis process based on AVISMA's POR-average purchase price for liquid chlorine, less the reported estimated evaporation costs. The Department relied on AVISMA's reported estimate for transforming liquid chlorine to a gaseous form as the best information available for estimating the costs that would be incurred to further-process the chlorine gas produced in the electrolysis process into a salable, transportable product.

Comment 3: AVISMA argues that, if the Department continues to rely on a surrogate price for chlorine gas rather than the sale prices of products downstream of the chlorine to determine the chlorine's NRV, then the Department must recognize AVISMA as a buyer of liquid chlorine and not a seller of chlorine gas. According to AVISMA, the Department's NRV calculations in the Preliminary Results create a liquid-chlorine product that is not produced nor can it be produced by AVISMA. Furthermore, AVISMA argues, the Department has not documented that such a facility is even economically viable or what such a facility would actually cost. Thus, AVISMA argues, if titanium end values are not used in the calculation, the best alternative is to use replacement values (i.e., what it would cost AVISMA to purchase the chlorine that it needs for titanium production). In its opinion, such an approach would yield a more reliable estimate and is supported by prominent accounting texts in the context of joint products. If adopted, AVISMA suggests that replacement value is the POR-average delivered purchase price paid for liquid chlorine plus the cost of transforming the liquid into a usable form. It argues that such a method would be closer to the actual economics of AVISMA's facilities because the company has made estimates for gasification.

AVISMA objects to what it describes as the petitioner's effort in this case to "cherry-pick" the replacement prices on the record of chlorine, which range from a low of 3,830 RUR/MT to a high of 6,623 RUR/MT. Indeed, AVISMA states, had the Department adopted any of these suggestions for its calculations, it would have arrived at a negative chlorine value. Such a calculation, AVISMA claims, provides absurd results that ignore the economics of the actual production facility. AVISMA also disagrees with the liquid-chlorine price the Department used for the Preliminary Results and urges the Department to use its own chlorine-price data. It argues that these amounts represent real prices AVISMA actually paid for liquid chlorine. Finally, it argues that any replacement value the Department calculates for chlorine must include freight costs.

The petitioner argues that the Department determined the NRV of chlorine appropriately by relying on the market value for liquid chlorine and deducting the estimated post-split-off costs to convert it to liquid. The petitioner disagrees with the use of prices of magnesium metal and chlorine gas from separate time periods and with the use of a chlorine-gas price from a different region than the one where AVISMA's magnesium and titanium-sponge factory is located.

Citing to Final Determination of Sales at Less Than Sales Value: Canned Pineapple Fruit from Thailand, 60 FR 29553, 29560 (June 5, 1995) the petitioner acknowledges that the Department's long-standing preference is to use pre-POI information in order to avoid reliance on prices that are part of an antidumping duty order and which may produce distorted value-based cost allocations. The petitioner argues that the Department's use of main-product prices with a four-year time difference may likewise produce distorted value-based cost allocations due

to factors such as inflation, changing input costs, and changes in supply and demand. While the Department has relied on current rather than pre-POI market prices on occasion to determine NRVs for joint products, the petitioner contends that there is not a single case where the Department relied on market values from different time periods.

Additionally, the petitioner claims that AVISMA attempted to mislead and manipulate the final margin calculations by submitting the requested pre-POI magnesium prices but providing only current-POR chlorine prices. According to the petitioner, this use of more current prices of non-subject merchandise shifts costs artificially away from subject merchandise. Because chlorine prices were a significant focus of the LTFV investigation, the petitioner finds it implausible that AVISMA was unable to provide pre-POI prices for chlorine. In fact, the petitioner comments, in the LTFV investigation AVISMA submitted its own marketing study that calculated an average 2002 selling price for bulk liquid chlorine and the Department reduced this price by the estimated cost of converting a liquid to a gas, using the result as the byproduct offset to magnesium-production costs.

Therefore, because such information was available, the petitioner argues that AVISMA should not be allowed to benefit from its failure to provide the pre-POI chlorine prices the Department requested. As an alternative, the petitioner proposes that the Department rely on the chlorine-gas price the Department used as a byproduct offset in the LTFV investigation. In support, the petitioner argues that this price is from the same time period as the magnesium prices used in the Preliminary Results, the price was verified by the Department and the Department relied on it in a prior segment, and the price is an estimate for chlorine gas as opposed to liquid chlorine. Thus, the petitioner concludes, the chlorine value from the LTFV investigation is far more accurate than the self-serving chlorine information provided by AVISMA in this review.

Finally, the petitioner opposes the use of the chlorine prices submitted by AVISMA in this review because they reflect prices in a location that is hundreds of miles from the production facility and are for sales of chlorine in containers rather than in bulk. According to the petitioner, the 2001 Berezniki price it put on the record is more accurate because it is a pre-POI price from the same location as the factory and reflects a bulk rather than container price. Thus, the petitioner concludes, should the Department disagree with the use of the chlorine-gas prices from the LTFV investigation, the 2001 Berezniki bulk price provides a more accurate alternative for use in the NRV allocation of joint costs.

Department's Position: We agree with AVISMA that in this case the appropriate question is what it would have spent in order to obtain the chlorine necessary to operate its titanium-production unit. In the Preliminary Results, we calculated an NRV for chlorine using liquid-chlorine market prices less estimated post-split-off cost of converting the gas to a liquid even though AVISMA never sold chlorine and does not appear to be planning to sell chlorine. Yet AVISMA is clearly a consumer of chlorine. Thus, the better analysis is premised on AVISMA as a purchaser of chlorine than as a seller. Accordingly, we have changed our preliminary position and find that the use of a replacement-cost approach (*i.e.*, what would AVISMA have spent to acquire the chlorine gas) is the most reasonable alternative. In selecting a sales value at the split-off point for purposes of allocating the joint costs, 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 chlorine plus

the cost to convert it from liquid to gas, ready for input into titanium processing, as well as any transportation costs.

We disagree with AVISMA that we should use its actual purchases of liquid chlorine in containers. As a large commercial producer, we find it reasonable to assume that AVISMA would be making purchases in bulk (versus containers) if it were purchasing all of its chlorine needs. Thus, given that the actual purchases placed on the record by AVISMA were not for bulk chlorine, we have not used that data. We agree that the cost of conversion to gas should be added to the purchase price of bulk liquid chlorine because the replacement value should reflect all additional costs necessary to supply the chlorine gas. We agree with the petitioner that, if the chlorine and magnesium prices used are not contemporaneous, we should minimize the impact of other factors such as inflation. Thus, we have indexed all components of the calculation to reflect pre-POI prices/costs. With regard to magnesium, we also affirm that our preference is to avoid the circularity of using allegedly dumped prices in the calculation. In past cases we have relied on prices from different periods and have, if necessary, even relied on the allegedly dumped prices for valuing the merchandise under consideration. See Lumber from Canada at Comment 4. These cases only demonstrate, however, that we often must select from a limited pool of information on the record or otherwise reasonably available.

For the final results, we have relied on the prices of bulk liquid chlorine from a study performed by AVISMA prior to the POI. See the LTFV Cost Verification Exhibit 15 (placed on the record by petitioner as exhibit 59 of its September 17, 2007, factual-information submission) and Final Results Cost Calculation Memorandum. AVISMA provided the study to us as support for valuation of its chlorine-byproduct offset during the LTFV investigation. It was a market study of the prices of bulk liquid chlorine that was prepared by AVISMA for determining the feasibility of selling chlorine. We agree with the petitioner that bulk prices are more representative of the cost that AVISMA would face in purchasing chlorine because it is a large commercial producer with commercial-sized input requirements. As AVISMA is, by its own submission, the world's largest titanium producer, we find it reasonable to believe that the company would make purchases of chlorine in bulk for purposes of titanium production.

We then adjusted this "sales value" for the costs necessary to transform the chlorine liquid into a gaseous form for use in titanium production. For this adjustment, we used AVISMA's estimated cost of evaporation (presented in 2003 prices) but indexed to reflect pre-POI prices.

#### *E. The Use of an Appropriate Cost Database*

In its responses, AVISMA submitted three separate cost databases (COP 1, COP 2, and COP 3), each providing a different variation of the manner in which it had allocated total joint costs to joint products. COP 2 and COP 3 allocated the total joint costs accumulated through the electrolysis process (i.e., the split-off point or also referred to as OPU-2 in the discussions above) in the marketable magnesium production facility to the raw-magnesium and chlorine-gas joint products based on magnesium and estimated chlorine gas NRVs. In COP 2 AVISMA calculated a single per-unit joint cost for raw magnesium while in COP 3 the company allocated the total magnesium pool of joint costs to downstream magnesium products based on their respective NRVs. In COP 1, AVISMA allocated joint costs to raw magnesium and chlorine gas using the NRVs of magnesium and titanium products.

In its April 16, 2008, submission, AVISMA revised the magnesium NRVs to address the NRVs of magnesium products produced during the POR but not sold during 2002. AVISMA assigned the average 2002 sales prices to these products. In its revised submission AVISMA relied on a ratio of the POR-average sales price to the POR sales price of the main magnesium product produced in both periods. AVISMA had applied the ratios to the 2002 price of the magnesium products produced in both periods to derive the 2002 price of the magnesium products not sold in 2002.

Comment 4: AVISMA argues that in the Preliminary Results the Department apparently misunderstood the COP 1 and COP 3 databases to be reliant on POR end values. Specifically, the company disagrees with the Department's statement in the April 29, 2008, Memorandum to Neal M. Halper, Director, Office of Accounting, through Michael P. Martin, Lead Accountant, from Heidi K. Schriefer, Senior Accountant, entitled "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results - PSC VSMPO-AVISMA Corporation and VSMPO - Tirus US Inc" that "AVISMA relied on the relationship of POR magnesium prices to assign value to the magnesium products that were not produced in 2002." Instead, AVISMA asserts, while it provided two corrections to the cost databases in its most recent section D submission, neither correction changed the fact that the NRVs were based on 2002 end values.

According to AVISMA, the Department's reference to the relationship of POR magnesium prices refers to the second, and relatively inconsequential, change that addressed the issue of what end values to use for products produced during the POR but not produced in 2002. AVISMA holds that it had used the average 2002 sales values previously for such products but this resulted in significantly distortive values that were contradictory to the Department's intent in the value-based allocations. To remedy this issue, AVISMA states, it estimated the 2002 values of non-produced products based on their relationship to Mg-90, one of the larger-volume magnesium products, in the current POR. Because AVISMA then applied this POR factor to 2002 values, AVISMA disagrees that such an approach is a divergence from the Department's intent to use pre-investigation values. Thus, should the Department continue to treat magnesium as a main product rather than a byproduct, AVISMA encourages the Department to use the COP 1 database which relies on the magnesium and titanium 2002 end values (and POR production quantities). Should the Department disagree with the methodology AVISMA employed to assign NRVs to products not produced during 2002, AVISMA contends that the Department may still rely on COP 1, *i.e.*, costs allocated using the end values of magnesium and titanium sales values, but make the appropriate adjustments because all information necessary to make such adjustments to COP 1 is on the record.

The petitioner argues that AVISMA has not demonstrated that a revision to its COP 2 data is warranted. It argues that the Department should not use AVISMA's COP 1 data because it determines the NRV of chlorine by using the pre-POI values for finished titanium products and subtracting post-split-off costs.

Department's Position: As discussed in response to Comment 2, we have determined that the use of titanium sale prices to derive an NRV for chlorine is not reasonable; thus, we have not relied on COP 1. Neither have we relied on COP 3 in which AVISMA calculated the total pool of costs similar to its method in COP 2 but then it distributed the costs to products based on each individual product's NRV. We find that, because there are no physical differences in the raw-

magnesium output from the joint electrolysis process (i.e., it is one product – raw magnesium), it is more appropriate to calculate a single weighted-average cost for the raw-magnesium input into the production of magnesium metal. Thus, we have continued to rely on the methodology AVISMA employed in COP 2 whereby the total pool of joint costs allocated to magnesium is assigned as a single average unit cost. No parties commented on using COP 3 as compared to COP 2.

For COP 2, the NRVs for magnesium products were based on 2002 sales values. For the POR products that were not sold during 2002 and therefore did not have a 2002 sales value, AVISMA used the average 2002 sales value. We did not revise AVISMA's COP 2 based on AVISMA's April 16, 2008, methodology which was reported for COP 1 and COP 3 because the information was submitted just before the Preliminary Results. We have had an opportunity to review the methodology and, for the final results, we have adopted AVISMA's alternative solution for deriving the NRVs for POR magnesium products that were not produced or sold during 2002. Specifically, we have relied on the relationship of the missing products to the main magnesium product that was produced and sold in both periods to derive 2002 NRVs for the products not sold in 2002. See Final Results Cost Calculation Memorandum. We believe this is a reasonable approximation of the 2002 value of such products had they been produced in 2002. Therefore, for the final results, we have continued to rely on COP 2 adjusted to reflect the POR-relationship approach to derive NRVs for magnesium products not sold in 2002 and to reflect the "replacement value" approach for the chlorine NRV.

#### *F. Chlorine-Disposal Costs*

In the Preliminary Results the Department adjusted AVISMA's total pool of joint costs to account for the estimated cost of disposing excess chlorine gas that AVISMA was unable to consume in its titanium-production facility or through other miscellaneous products. The Department estimated the disposal costs based on the differential between AVISMA's average inventory value for chlorine gas and the average value used as the chlorine-gas byproduct offset to magnesium-metal costs (assumed to be reduced by disposal costs) prior to the 2007 change in accounting methods whereby magnesium metal became the byproduct on AVISMA's books.

Comment 5: AVISMA disagrees with the Department's characterization of this amount as disposal costs. First, AVISMA points out that the excess chlorine is not disposed but rather is further-processed into a salable product, calcium chloride ( $\text{CaCl}_2$ , a product AVISMA states that can be sold to oil-extracting companies or used as a road de-icer). AVISMA also argues that the post-split-off costs are only related to chlorine and are not actually on the record. Furthermore, AVISMA declares that the average byproduct offset used in AVISMA's books during 2006 reflects the weighted-average of the inventory value for chlorine gas and the inventory values for calcium chloride. Thus, according to AVISMA, the byproduct-offset figure does not represent the chlorine value net of disposal costs but only the average market value of chlorine in AVISMA's books. AVISMA concludes that, if the Department disregards the chlorine values used by the company in its normal books for purposes of the joint-cost allocation, then it follows that those same values should not be used to calculate chlorine-disposal costs.

Additionally, AVISMA states that the exhibit on which the Department relied to make this adjustment contains an error in chlorine-production quantities. AVISMA claims that the

correct figure can be estimated based on the information on the record. If the Department continues to make this adjustment in the final results, AVISMA urges the Department to rely on the correct quantities.

The petitioner argues that the Department's adjustment for chlorine disposal was appropriate. It states that chlorine is a toxic substance and any excess must be converted to a non-toxic form. Further, it points out that in its books AVISMA assigns a value to the excess chlorine gas that is only a fraction of the value of the usable chlorine gas. Consequently, the petitioner argues, the excess chlorine gas was clearly considered an unwanted byproduct. As such, it argues that accounting literature recognizes that the downstream processing costs associated with a toxic byproduct must include the aggregate joint costs, especially here where the chlorine is directly relevant to the cost of producing magnesium. In addition, it argues that, because AVISMA has not provided any explanation as to why its newly proposed chlorine quantity figure is more accurate, AVISMA's production quantities as submitted should not be adjusted.

Department's Position: We have reviewed again all submissions and find the record shows that the calcium chloride AVISMA produced as a means of disposing of excess chlorine was inventoried in AVISMA's normal books and all residual costs accumulated in the disposal-processing unit were included in the costs of the workshops that generated the gases that were ultimately processed there. See the Department's December 30, 2006, LTFV Cost Verification Report at section IV.A and AVISMA's October 18, 2006, supplemental section D questionnaire response in the 2004/2006 administrative review at 6 and at exhibit SD-6, which were placed on the record by the petitioner as exhibit 59 of its September 17, 2007, factual-information submission. Therefore, for the final results, we have not added estimated disposal costs to the total pool of joint costs.

#### *G. Constructed-Value Profit*

Because the Department found that all home-market sales were made at prices below the cost of production in the Preliminary Results, the Department was unable to calculate CV profit under the preferred method (i.e., based on the home-market sales of the merchandise under consideration). The Department also found that AVISMA's own financial information was "not sufficiently detailed to permit a calculation of selling expenses and profit specific to subject merchandise or specific to a category of products in the same category as the subject merchandise" under section 773(e)(2)(B)(i) of the Act. See Preliminary Results, 73 FR at 25545. Therefore, for the Preliminary Results the Department relied on AVISMA's selling expenses and CV profit calculated in the previous administrative review.

Comment 6: The petitioner argues that the use of the profit from the previous review was in error because more contemporaneous profit information was available on the record. The petitioner contends that, in the current review, AVISMA submitted the profit earned on its 2006 home-market sales of magnesium metal and fabricated magnesium products. Thus, according to petitioner, a profit amount can be determined for the same general category of products as the subject merchandise over a period that covers nine months of the current review. Quoting from Notice of Preliminary Determination of Sales at Less Than Fair Value and Affirmative

Preliminary Determination of Critical Circumstances: Electrolytic Manganese Dioxide from Australia, 73 FR 15982, 15985 (March 26, 2008), the petitioner maintains that the Department held that “{c}ontemporaneity is important because markets change over time and the more current the data the more reflective it would be of the market which the respondent is operating.” In fact, according to the petitioner, significant macro- and micro-economic factors, such as the changes in the Russian economy between 2005 and 2006, demonstrate that using the profit information from the previous review is distortive.

Additionally, the petitioner submits that should there be a concern about selling, general and administrative (SG&A) expenses being derived from a different source than profit, as held by the Department in Certain Fresh Cut Flowers From Colombia: Final Results of Antidumping Duty Administrative Review, 63 FR 31724 (June 10, 1998), at Comment 12, where it stated that “{t}here is no requirement or preference that profit and SG&A be drawn from the same source.” For these reasons, the petitioner proposes that the Department calculate CV profit based on AVISMA’s 2006 financial information for the final results.

AVISMA argues that the Department’s use of first-POR data to value profit was correct. It argues that the Department should reject the petitioner’s request to use 2006 AVISMA profit data because the petitioner has requested that the Department reject POR 2006 cost data. It asserts that this same cost data is the basis for the profit figures espoused by the petitioner. It argues that it would be inconsistent to use 2006 profit levels from AVISMA’s books and records while at the same time rejecting the 2006 costs underlying the “profit” for purposes of recalculating AVISMA’s costs.

AVISMA states that the petitioner is arguing for the use of financial statements for the year 2006 under the option of section 773(e)(2)(B)(i) of the Act. It indicates that the statute under this provision calls for use of the “actual amounts incurred and realized by the specific exporter... being examined.” AVISMA asserts that the petitioner is arguing that the cost figures therein are not “actual amounts incurred.” Finally, AVISMA argues that the only option open to the Department is section 773(e)(2)(B)(iii) of the Act: any other reasonable method.

Department’s Position: This issue is moot. For the Final Results we found that AVISMA made sales of the foreign like product in the ordinary course of trade and, therefore, we relied on these sales in determining normal value in accordance with section 773(a)(1)(B)(i) of the Act.

## **2. Constructed Export-Price Offset**

Comment 7: The petitioner contends that the Department erred in granting a constructed export-price (CEP) offset to normal value when calculating an antidumping margin for AVISMA for the Preliminary Results. The petitioner argues that a CEP offset was not warranted for several reasons.

First, the petitioner argues, the Department’s use of selling expenses from a prior administrative review, due to the unavailability of selling expenses in this review, is not appropriate.<sup>6</sup> The petitioner argues that the selling expenses are reflective of the actual selling activities undertaken by the company during the POR. Therefore, it contends, it is not

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<sup>6</sup> The Department disregarded all sales made by AVISMA in the comparison market as sales below cost in the Preliminary Results.

appropriate to disconnect the selling activities in this review, examined in the context of a level-of-trade analysis, from the underlying selling expenses incurred in this review, as the petitioner alleges the Department has done in using a prior review's selling expenses. Further, the petitioner states, in the prior segments of the proceeding, the Department denied AVISMA a CEP offset. The petitioner alleges that, because AVISMA did not identify from prior segments of the proceeding significant changes in selling activities that occurred in this review and because the Department is relying on home-market selling expenses from a prior review, granting a CEP offset would be inconsistent with the Department's prior determinations concerning AVISMA.

The petitioner argues that, irrespective of the Department's reliance on home-market selling expenses from a prior review, AVISMA has not met its burden of demonstrating its entitlement to a CEP offset. Citing, among others, Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52065 (September 12, 2007), and accompanying Issues and Decision Memorandum at Comment 13, the petitioner contends that the Department's case precedent has been to deny a CEP offset where record evidence does not establish substantial differences in the selling activities between the United States and the home market. Citing Corus Staal USA Inc. v. United States, 259 F. Supp. 2d 1253, 1270-71 (CIT 2003) (Corus), and Timken Co. v. United States, 11 C.I.T. 786, 673 F. Supp. 495, 513 (CIT 1987) (Timken), the petitioner argues that the Department's practice of holding a respondent to its burden of establishing its entitlement for a CEP offset has been affirmed by the courts. The petitioner argues that AVISMA did not meet its burden, heightened by the fact that the factual scenario in this review appears to resemble those in the prior segments of the proceeding in which the Department denied a CEP offset.

The petitioner contends that AVISMA provided limited or no discussion and no documentary support for the claimed differences in selling activities it identified in its selling-functions chart. The petitioner contends that similar claims for the same selling activities were discounted by the Department in the LTFV investigation. With respect to sales, order input and processing, logistics and transportation, and technical services, the selling activities identified by AVISMA, the petitioner argues that the number of people assigned to each market does not amount to claimed differences in selling activities. The petitioner cites Notice of Final Results and Final Rescission in Part of Antidumping Duty Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan, 73 FR 1202 (January 7, 2008) (Pipe Fittings from Taiwan), and the accompanying Issues and Decision Memorandum at Comment 2.

With respect to sales, order input, and processing, the petitioner cites the Department's December 23, 2004, "Magnesium Metal from Russian Federation: Verification Report for JSC AVISMA Titanium-Magnesium Works" (LTFV Verification Report), issued in the LTFV investigation, and argues that the Department's verification findings contradicted AVISMA's claims. The petitioner argues that AVISMA submitted no information in this review disputing the validity of the Department's findings in or showing how the facts changed from the original investigation. Accordingly, the petitioner argues, the differences in this selling activity between the United States and home market are not sufficiently significant.

With respect to logistics and transportation, the petitioners argue that, although AVISMA claims that its home-market sales require substantially more logistical support than its sales to the United States, it provides no evidence to support its claim. Further, the petitioner argues, AVISMA's claim appears to be contradicted by the sale terms AVISMA offers in both

markets which, at face value, do not lead to a conclusion that home-market sales are made at a more advanced level of distribution and by the Department's position in Magnesium Metal from the Russian Federation: Notice of Final Determination of Sales at Less Than Fair Value, 70 FR 9041 (February 24, 2005) (Magnesium Metal from Russia – LTFV) and accompanying Issues and Decision Memorandum at Comment 6 (where it stated that shipping to the United States appears more complex than AVISMA claims).

With respect to technical services, the petitioner argues that AVISMA provided no support for its claimed advanced home-market technical-services activity or disputed the Department's contrary findings in the LTFV investigation with respect to this activity. To support its assertion, the petitioner cites page 12 of LTFV Verification Report.

The petitioner claims that AVISMA's response to the Department's instructions to describe the significant changes in selling activities that took place since the original investigation or since the first administrative review that warrant a departure from its decisions in those segments of the proceeding where it denied a CEP offset did not yield any support to AVISMA's entitlement to a CEP offset in this review. Specifically, the petitioner argues that AVISMA's claim that it is now able to quantify the differences in selling activities amounted to identifying a difference involved in AVISMA's shipment pattern in both markets. The petitioner argues that AVISMA has not explained meaningfully how the relationship of the number of monthly shipments to the United States and the number of home-market sales gives rise to significant differences in selling activities. Further, the petitioner argues that AVISMA's claim of a more varied product mix in this review is not supported by an explanation or evidence of the record as to how this results in differences in selling activities.

Finally, the petitioner argues that, although AVISMA provided more discussion of alleged differences in selling functions at the Department's second request in its February 6, 2008, supplemental questionnaire, AVISMA again did not support its assertions with any evidentiary documentation.

AVISMA argues that, in determining the level of trade for CEP sales, 19 CFR 351.412(c)(1)(ii) requires the deduction from the starting CEP price of all expenses associated with economic activity in the United States pursuant to section 772(d) of the Act. AVISMA contends that in its questionnaire responses it demonstrated that, once the expenses associated with economic activities of its U.S. affiliate has been deducted from the CEP price, virtually none of the selling functions performed by AVISMA for its home-market customers remain at the CEP level of trade. Citing Micron Technology, Inc. v. United States, 243 F.3d 1301 (CAFC 2001), AVISMA asserts that the courts approved the test for determining whether a CEP offset is appropriate when the level-of-trade analysis uses CEP sale prices after adjustments required under section 772(d) of the Act.

AVISMA argues that the only activities remaining at the CEP level of trade is order processing and freight and delivery services. AVISMA asserts that these activities do not equate to the advanced selling services AVISMA performs in the home market which involve a substantial number of additional selling functions.

AVISMA challenges the petitioner's assertion that a CEP offset in this review is not appropriate because it was not granted in prior segments of the proceeding. Citing E.I. DuPont de Nemours & Co. v. United States, 22 CIT 19 (CIT 1998), and Sulfanilic Acid From the People's Republic of China; Final Results of Antidumping Duty Administrative Review, 61 FR 53711 (October 15, 1996), AVISMA argues that judicial and administrative precedents dictate

that each segment of the proceeding is an independent one; the facts of each segment of the proceeding are unique to that segment and must be considered separately. Accordingly, AVISMA argues, the Department determined correctly to grant a CEP offset based on the facts on the record of this review.

In reiterating the discussion AVISMA provided in its questionnaire responses, AVISMA asserts that there are substantial differences in selling functions between the home market and the CEP levels of trade. Mainly, AVISMA argues, mere differences in the number of customers, the number of invoices processed, the quantities sold, and the product mix associated with each market warrant a conclusion that there are substantial differences in selling functions between the home and U.S. markets with the former being at a more advanced level of distribution. AVISMA claims that the Department's granting of a CEP offset in this review is supported by its recent practice. AVISMA cites Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Antidumping Duty Administrative Review, 72 FR 74267, 74270 (December 31, 2007), and Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Administrative Review in Part, 72 FR 65701 (November 23, 2007).

Department's Position: We agree with the petitioner that the POR-specific expense information is preferable to use in the accurate implementation of the conclusions we reach in our level-of-trade analysis. We do not agree with the petitioner, however, that the availability (or lack thereof) of POR-specific expense information should, in itself, dictate the implementation of our level-of-trade decisions. We determined preliminarily that a CEP offset to constructed value was appropriate in calculating a dumping margin for AVISMA. See Preliminary Results, 73 FR at 24546. Section 773(a)(7)(B) of the Act limits the calculation of a CEP offset to home-market indirect selling expenses (including inventory carrying costs) (hereinafter, indirect expenses) incurred in the comparison market up to the amount of U.S. indirect expenses deducted from CEP under section 772(d)(1)(D) of the Act. We also stated in the Preliminary Results that, “{b}ecause we disregarded all home-market sales as below-cost sales there are no sales made in the ordinary course of trade that we can use to calculate selling expenses and profit for constructed value pursuant to section 773(e)(2)(A) of the Act for AVISMA... pursuant to section 773(e)(2)(B)(iii) of the Act, we have calculated an estimate of direct and indirect selling expenses and profit for AVISMA in this review using the selling expenses and profit we calculated for AVISMA in the 2005–06 administrative review.” See Preliminary Results, 73 FR at 24545. We applied this methodology in the Preliminary Results because at that time there were no comparison-market sales from which to calculate indirect expenses for use in the calculation of constructed value or for use in calculating the CEP offset.

Section 773(e)(2)(B)(iii) of the Act limits the use of alternative sources of selling expenses for purposes of calculating constructed value only. For other calculations, where the need to use certain information exists but such information is not available or not usable for various reasons, it has been our practice to fill the gaps in data on the record in a manner consistent with section 773(e)(2)(B) of the Act (e.g., with information from other participating respondents in the same review or to use information from prior reviews). See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of

Review in Part, 72 FR 58053 (October 12, 2007), and accompanying Issues and Decision Memorandum at Comment 18 (where we used certain respondents' selling expenses in the calculation of cost of production and constructed values for unaffiliated respondents because the former were also suppliers of subject merchandise to the latter). As we explained above, such a situation existed in the Preliminary Results for AVISMA. Therefore, we find that our preliminary use of home-market indirect expenses, reported by AVISMA in the 2004-2006 review, to calculate a CEP offset in this review was a reasonable solution, given the circumstances.

The petitioner argues that a CEP offset is not warranted because in the prior review from which the Department is taking home-market indirect expenses the Department denied a CEP offset to AVISMA. The petitioner's argument is incorrect because it confuses the purpose for which we used the 2004-2006 home-market indirect expenses. We did not use these expenses to determine whether AVISMA qualified for a CEP offset. As discussed herein, that determination was made based on the information AVISMA provided in this review concerning its selling activities during the POR. We used these expenses in the Preliminary Results to implement a CEP offset, given the lack of usable home-market indirect expenses at that time.

For purposes of these final results, the Department has found sales in the comparison market at prices at or above AVISMA's cost of production; thus, in granting a CEP offset, the Department would no longer need to rely on AVISMA's 2004-2006 selling expenses. Upon our review of the record, however, we agree with the petitioner that our preliminary decision to grant a CEP offset to AVISMA in this review was incorrect. As discussed below, we find that AVISMA did not demonstrate its entitlement to a CEP offset. We re-examined the record evidence for purposes of these final results and found that AVISMA's discussion on which we relied in making our decision to grant a CEP offset reflected unsupported conclusory or contradictory statements. Our decision to grant a CEP offset must be supported by substantial evidence and our re-examination of the record leads us to conclude that AVISMA did not provide such evidence.

The respondent bears the burden of demonstrating its entitlement to a favorable adjustment such as a CEP offset. In Timken, the court stated that the Department acted "reasonably in placing the burden of establishing adjustments on a respondent that seeks the adjustments and that has access to the necessary information. Were the ITA to act otherwise, respondents would have an incentive to destroy or to fail to produce the more detailed information that would either support or rebut their own assertions..." See Timken, 673 F. Supp. at 513; see, also, Koyo Seiko Co. v. United States, 905 F. Supp. 1112, 1277 (Oct. 13, 1995). In Corus, the court stated that the respondent "bears the burden of establishing that it is entitled to a level-of-trade adjustment." See Corus, 259 F. Supp. 2d at 1272.

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: to conclude that 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 did not meet this evidentiary burden. Further, in re-evaluating the record evidence we find that AVISMA did not demonstrate significant changes in selling activities from the original investigation and from the first administrative review which may have warranted a departure in this review from our decisions in those segments of the proceeding where we denied a CEP offset to AVISMA.

AVISMA first asserted its entitlement to a CEP offset in its original questionnaire response. See AVISMA's July 26, 2007, submission at pages 16-18 and Exhibit 6. In our supplemental questionnaires, we provided AVISMA with multiple opportunities to substantiate its assertion. See our December 10, 2007, and February 6, 2008, supplemental questionnaires. As detailed below, AVISMA did not do so.

In Exhibit 6 of its July 26, 2007, Section A questionnaire response, AVISMA provided a selling-functions chart in which it identified the following selling functions applicable to AVISMA's sales in the home market: sales forecasting, strategic economic planning, engineering services/technical support, sale promotion, inventory maintenance, order input/processing, direct sales personnel, freight and delivery/logistics, packing, advertising, market research, and compensation through offset to accounts payables and receivables. Order input/processing and packing were the only selling activities AVISMA identified for sales to its U.S. affiliate.<sup>7</sup>

In its Section A narrative response, AVISMA identified what it claimed were the most relevant selling functions for both markets: sales support, logistics support, engineering/technical support, and technical support for new products. With respect to sales support, AVISMA asserted that, due to a greater number of home-market customers in relation to a single U.S. affiliated customer, the number of personnel dedicated in servicing home-market customers must be greater than the number of personnel dedicated to servicing the U.S. affiliate. See AVISMA's July 26, 2007, submission at pages 16-18. As a result, AVISMA estimated that home-market sales involve four times more personnel than U.S. sales. *Id.*

AVISMA provided no discussion 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, in sales documentation involved, etc. Further, there may not be a significant correlation between the number of personnel assigned to one market and the effort expended on that market to give rise to significant differences in a selling activity (or intensities thereof) between the two markets. See Pipe Fittings from Taiwan and accompanying Issues and Decision Memorandum at Comment 2, where we stated:

“{A} larger sales staff selling all of {the respondent's} products to the United States for both subject merchandise and non-subject merchandise may be a logistics function of a larger overall market (i.e., more employees are needed to serve a larger market). The CEP offset measures the level of effort of each selling activity, and not necessarily the number of employees dedicated to sell all merchandise to each market.”

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<sup>7</sup> Selling activities in the home market were coded as having either “medium” or “high” levels of intensity whereas order input/processing selling activity for U.S. sales was coded as having a “low” level of intensity and packing as a “medium” level of intensity.

Therefore, we find that AVISMA did not establish that it provides substantially more sales-support effort in the home market than for its affiliated U.S. customer.

With respect to logistics support, AVISMA asserted that home-market sales require more support because they use individual truck loads whereas the shipments to the United States are by rail. See AVISMA's July 26, 2007, submission at pages 16-18. Although AVISMA estimated that home-market sales involve four times more personnel than U.S. sales (*id.*), AVISMA provided no discussion as to how this estimate reflects the differences between the markets in the number of shipments, in the sale and shipment terms, in packaging types, in shipment-related documentation, etc. AVISMA's estimate also allocates the personnel time in processing railway bills and related paperwork to home-market sales. This estimate appears to contradict the sales terms AVISMA reported for its home-market customers coupled with AVISMA's statement that it does not get reimbursed for the provision of freight arrangements. *Id.* Further, AVISMA provided no discussion addressing logistics support pertaining to ocean and inland-freight transportation associated with its U.S. shipments. In addition, similar to our statement concerning the sales-support function, the personnel time dedicated to one market does not necessarily translate into a greater effort expended in servicing that market to the extent that it results in significant differences in a selling activity (or intensities thereof) between the two markets. See Pipe Fittings from Taiwan and accompanying Issues and Decision Memorandum at Comment 2. Therefore, we find that AVISMA did not establish that it provides substantially more logistics-support effort in the home market than for its affiliated U.S. customer.

In its July 26, 2007, submission at pages 16-18, AVISMA asserted the following: it provides engineering/technical support for "electric tool parts from magnesium" and for new magnesium products in the home market; its technical personnel are responsible for the layout of materials in the trucks, containers, and rail cars for home-market shipments; four technical persons are dedicated to home-market sales and none for sales to its U.S. affiliate. AVISMA did not support these assertions. It did not quantify the percentage of home-market business related to magnesium electric tool parts and new magnesium products in relation to AVISMA's established magnesium business nor did it indicate whether the same technical personnel are also involved in the layout of materials in rail cars for shipments to the United States. Accordingly, we find that AVISMA did not establish that it provides substantially more technical-support effort in the home market than for its affiliated U.S. customer.

In its original Section A questionnaire response AVISMA provided no discussion at all with respect to the remaining selling functions it listed in its selling-functions chart (sales forecasting, strategic economic planning, sale promotion, inventory maintenance, packing, advertising, market research, and compensation through offset to accounts payables and receivables). In sum, AVISMA did not provide evidence that significant differences in selling functions existed between the markets.

In our December 10, 2007, supplemental questionnaire, we pointed AVISMA to Magnesium Metal from Russia - LTFV and the accompanying Issues and Decision Memorandum at Comment 6 (where we discussed our rationale for denying a CEP offset to AVISMA), and Magnesium Metal from the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review, 72 FR 25740 (May 7, 2007) (unchanged in Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review, 72 FR 51791 (September 11, 2007), where we continued to deny a CEP

offset to AVISMA). In the supplemental questionnaire, we asked AVISMA to “describe the significant changes in selling activities that took place since the original investigation or since the first administrative review that warrant a departure from conclusions the Department reached in those segments of the proceeding where it determined that a CEP offset was not warranted.” See our December 10, 2007, supplemental questionnaire at page 3. In its January 22, 2008, response, at page 7, AVISMA stated simply that our prior decisions with respect to the CEP offset were incorrect and that each segment of the proceeding stands on its own where the decisions must be made based on the record of the review. AVISMA did not answer our question. AVISMA also stated that, in its July 26, 2007, section A response at pages 16-17, it was able “to quantify the differences in selling functions in a manner that it has not been able to do in previous reviews.” This provides another example where AVISMA made little more than conclusory statements and did not provide substantial evidence showing that significant differences exist in selling functions between the United States and the home market.

We provided AVISMA with another opportunity to demonstrate its entitlement to a CEP offset in our February 6, 2008, second supplemental questionnaire. With respect to the sales-forecasting/strategic and economic-planning selling function that AVISMA reported in its selling-function chart, we asked AVISMA to describe all changes that took place since the original investigation that substantiated its assertion that it did not provide this function with respect to its sales to the United States. See pages 1-2 of our February 6, 2008, supplemental questionnaire.<sup>8</sup> AVISMA did not answer this question. AVISMA stated that it did not provide this service to its U.S. affiliate. See AVISMA’s February 21, 2008, response at pages 5 and 6. Further, in the narrative AVISMA provided no detail explaining why it had designated this function as having a “medium” level of intensity. *Id.* Thus, AVISMA did not substantiate its assertion with respect to this selling function.

With respect to technical services, in our second supplemental questionnaire we asked AVISMA to describe changes that took place since the original investigation that substantiated AVISMA’s assertion that it provides substantial technical services to its home-market customers and none to its U.S. affiliate. See page 2 of our February 6, 2008, supplemental questionnaire.<sup>9</sup> Further, we asked AVISMA to support its assertion in its original questionnaire response that it provides technical support/engineering services for new magnesium products by showing that AVISMA sold new magnesium products to home-market customers during the POR and by quantifying expenses associated with the provision of these services. *Id.* AVISMA did not answer these questions nor did it provide the requested information. Instead, AVISMA stated that it does not provide this service to its U.S. affiliate. See AVISMA’s February 21, 2008, response at page 6. Further, the narrative AVISMA provided in its supplemental questionnaire did not establish a connection between the nature of certain technical services it provides and the customers for its reported home-market sales during the POR. *Id.* Thus, AVISMA did not substantiate its assertion with respect to this selling function.

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<sup>8</sup> In the original investigation, based on the Department’s verification of AVISMA, the Department found that AVISMA performs sales-forecasting, economic, strategic, and production-planning activities with respect to sales to its U.S. affiliate. See Magnesium Metal from Russia - LTFV and accompanying Issues and Decision Memorandum at Comment 6.

<sup>9</sup> In the original investigation, based on the Department’s verification of AVISMA, the Department found that a low level of technical services was provided in both markets. See Magnesium Metal from Russia - LTFV and accompanying Issues and Decision Memorandum at Comment 6.

With respect to sales support, AVISMA stated that it has direct sales personnel to work with its Russian customers whereas it has no sales personnel solely responsible for direct sales to its affiliate in the United States. See AVISMA's February 21, 2008, response at page 8. It is unclear from this statement whether sales personnel that work with Russian customers may also service AVISMA's U.S. affiliate. In fact, this was precisely the case in the original investigation as the Department found at verification. See Magnesium Metal from Russia - LTFV and accompanying Issues and Decision Memorandum at Comment 6. Further, AVISMA provided no discussion or support that alleged differences in sales-support levels between the markets result in a significantly higher effort being expended in servicing home-market customers.

With respect to order-input processing, AVISMA asserted that, while each month there are multiple home-market orders with varying terms of sale, there is a single monthly shipment to its U.S. affiliate. Moreover, AVISMA stated that it issues pro-forma invoices, tax, and shipping documents for its home-market sales. See AVISMA's February 21, 2008, response at pages 7 and 8. AVISMA did not explain how the relation of the number of orders to the number of sales and shipments affects documentation-processing for each market. AVISMA stated that for transfer sales to its affiliate the order-processing and paperwork is minimal. *Id.* Thus, AVISMA attempted to minimize significantly any additional documentation associated with international sales even though such sales typically require documentation such as certificates of origin, customs declaration forms, ocean bills of lading, letters of credit, etc., the processing of which may require substantial effort. Thus, AVISMA did not substantiate that there is a significant difference in the level of order processing between the markets.

With respect to transportation/logistics support, AVISMA stated that it arranged freight for some customers in the home market and, although it also arranges shipments to the United States, these shipments are routine and constant in volume. See AVISMA's February 21, 2008, response at page 9. This answer does not demonstrate that logistics-related support services provided by AVISMA involve significantly higher levels of effort for home-market customers. Further, in the verification of AVISMA's response in the original investigation, we found that shipping to the United States appears more complex than AVISMA claims. See Magnesium Metal from Russia - LTFV and accompanying Issues and Decision Memorandum at Comment 6. AVISMA made no real effort in this review to refute our findings on this issue in the original investigation.

With respect to inventory maintenance, AVISMA reported that it provides a medium level of intensity for inventory-maintenance services for its home-market customer and that it provides no inventory-maintenance services at all for its sales to the United States. See AVISMA's July 26, 2007, questionnaire response at Exhibit 6. In our second supplemental questionnaire we asked AVISMA to demonstrate, using production and shipment records, that subject merchandise is shipped immediately following the completion of production. See page 2 of our February 6, 2008, supplemental questionnaire. AVISMA did not provide the requested information, stating instead that it maintains an inventory of most commonly ordered products for home-market customers purchasing on a spot basis. See AVISMA's February 21, 2008, response at page 7. AVISMA did not discuss or provide support that demonstrates that the alleged differences in inventory-maintenance services between the markets result in a significantly higher effort being expended in servicing the home-market customers.

The record is clear that, with respect to a majority of selling functions AVISMA identified in its responses, it provides a discussion that either conflicts with other statements on

the record or is based on unsupported conclusory statements. In a number of instances AVISMA did not provide the information we requested in order to clarify or support AVISMA's assertions. For some selling functions AVISMA identified, such as packing and compensation through offset to accounts payables and receivables, it provided no discussion at all. For other selling functions, such as sales-forecasting and economic and strategic planning, advertising and sales promotion, and market research, AVISMA stated simply that it provides them for home-market customers but not for its U.S. customer. Because AVISMA has not provided evidence that there are substantial differences in selling activities between AVISMA's sales in the home market and to the United States and, consequently, that the home-market sales involve an advanced marketing stage, for purposes of these final results we find that AVISMA did not meet its burden of demonstrating its entitlement to a CEP offset. Accordingly, we have reversed our preliminary decision to grant a CEP offset and have made no such offset in the calculation of the final dumping margin for AVISMA.

### **3. Selection of an Adverse Facts-Available Rate**

Comment 8: The petitioner argues that the Department should assign one of the highest rates alleged in the petition, ranging from 54.40 to 68.94 percent, as the adverse facts available (AFA) rate to SMW for the final results. The petitioner cites to Certain Preserved Mushrooms from the People's Republic of China: Partial Rescission and Preliminary Results of the Sixth Administrative Review, 71 FR 11183 (March 6, 2006) (Mushrooms from PRC) (unchanged in Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review, 71 FR 40477 (July 17, 2006)) to support its argument.

The petitioner contends that the AFA rate of 21.71 percent the Department assigned to SMW in the Preliminary Results is not adverse as it is nearly equivalent to the non-AFA rate of 18.65 percent, the margin the Department calculated for SMW in the original investigation. Citing Magnesium Metal from Russia - LTFV and accompanying Issues and Decision Memorandum at Comments 13-24, the petitioner contends that the AFA rate of 21.71 percent is only three percentage points higher than SMW's rate in the investigation and that rate contained no adverse inferences in any part of its calculation. Therefore, citing F. Lii de Cecco de Filippo Fara S. Martino S.p.A v. United States, 216 F. 2d 1027, 1032 (CAFC 2000) (F. Lii de Cecco), the petitioner argues that the rate assigned to SMW in this review does not provide SMW with a sufficient incentive to co-operate in subsequent reviews.

The petitioner asserts that the Department's calculation of the preliminary margin for AVISMA in this review resulted in a weighted-average margin of 17.68 percent. Because the Department's calculation of this rate for AVISMA does not include any adverse inferences, the petitioner argues, the only plausible explanation for the existence of dumping margins at or above 17.68 percent for AVISMA must be market-driven forces during the POR. Consequently, the petitioner argues, the rate assigned to SMW reflects the actual data submitted by a Russian producer in this review and not a rate reflective of adverse inferences. As such, the petitioner argues, the rate assigned to SWM is a cooperative, market-driven rate which does not induce cooperation in future reviews.

Finally, the petitioner argues that the correction of errors it alleged with respect to the calculation of AVISMA's constructed value will likely result in changes to AVISMA's

calculated transaction-specific margins for the final results. Accordingly, the petitioner argues, the corroboration of the rates alleged in the petition, using AVISMA's recalculated transaction-specific margins calculated for the final results, may become possible.

SMW argues in its rebuttal that the petitioner's reliance on Mushrooms from PRC is misplaced because in that case the Department was able to corroborate the highest rate in the petition whereas in this review the Department could not. SMW challenges the petitioner's assertion that the AFA rate of 21.71 percent is not sufficiently adverse. SMW argues that the AFA rate is nearly seven times the rate calculated for SMW in the first administrative review, which is also SMW's current deposit rate. SMW argues that the margin calculated for SMW in the original investigation of 18.65 percent serves to support, as appropriate, the AFA rate selected by the Department because the AFA rate of 21.71 percent reflects a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase," quoting from F. Lii de Cecco.

SMW asserts in its comments that the Department concluded properly that the rates in the petition do not have probative value for use as AFA because the lower of those rates is higher than the highest transaction-specific margin calculated for AVISMA in this review. Citing World Finer Foods, Inc. v. United States, 2000 WL 897752 (CIT 2000), SMW asserts that corroboration of secondary information is crucial when it involves margins alleged in the antidumping petition. SMW argues that the rates in the petition are aberrational and are discredited further by actual margins of 18.65 and 21.71 percent calculated by the Department for SMW and AVISMA, respectively, in the original investigation, and by margins of 0.41 and 3.77 percent calculated by the Department for SMW and AVISMA, respectively, in the first administrative review. Clearly, SMW argues, the fact that these actual calculated margins are significantly lower than the margins alleged in the petition demonstrates that the petition rates have no probative value.

SMW challenges the Department's outright dismissal of margins calculated by the Department in the first administrative review and the Department's rationale that they are not sufficient to deter non-compliance. Citing F. Lii de Cecco and Shandong Huarong General Group v. United States, 2005 WL 2365322 (CIT 2005), SMW argues that the purpose of section 776(b) of the Act is to provide respondents with an incentive to cooperate, not to impose punitive or aberrational margins, while the purpose of section 776(c) of the Act is to assign an AFA rate that reflects an estimate of a respondent's rate under cooperation with an additional increase to deter non-compliance. Accordingly, SMW argues, the Department should select as AFA a rate of 3.77 percent that the Department calculated for SMW in the first administrative review and impute an appropriate upward adjustment to that rate. In SMW's opinion, such an exercise would produce an AFA rate that is both accurate and deters non-compliance.

Alternatively, SMW argues that the Department also erred in disregarding, as an AFA rate, the margin of 18.65 percent that the Department calculated for SMW in the original investigation. Citing Allegheny Ludlum Corp. v. United States, 276 F. Supp. 2d 1344, 1359 (CIT 2003) (Allegheny Ludlum) SMW argues that such a rate is appropriate because it is reliable and relevant and it has a probative value as AFA rate for SWM in this review. SMW argues that such a rate is sufficiently high to encourage future participation because it is nearly five times that of SMW's current deposit rate and it is also relevant to SMW's own results.

With respect to SMW's proposition of selecting, as AFA, a rate of 3.77 percent that the Department calculated for SMW in the first administrative review and then imputing an

appropriate upward adjustment to that rate, the petitioner rebuts that SMW mentions nothing about this adjustment nor cites any precedent where something similar has been done. Further, the petitioner argues, in order to induce cooperation, the Department's practice has been to select the highest margin in any segment of the proceeding. The petitioner cites Stainless Steel Bar from Spain: Final Results of Antidumping Duty Administrative Review, 72 FR 42395 (August 2, 2007) (SS Bar from Spain), as well as numerous other cases. The petitioner asserts that the courts have upheld the Department's practice, opining that the highest prior margins bear relationship to uncooperative respondents' current margins. The petitioner cites Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F. 3d 1330, 1339 (CAFC 2002, citing Rhone Poulenc, Inc. v. United States, 899 F. 2d 1185, 1190 (CAFC 1990), Shanghai Taoen Int'l Trading Co. v. United States, 360 F. Supp. 2d 1339, 1345 (CIT 2005) citing D&L Supply Co. v. United States, 113 F.3d 1220, 1223 (CAFC 1997)). The petitioner contends that SMW's argument ignores this extensive practice.

The petitioner challenges SMW's assertion that the rates in the petition are discredited by low rates calculated in previous segments of the proceeding. Citing Mushrooms from PRC, 71 FR at 11183, 11186, the petitioner argues that the Department applied, as AFA, the highest rate in the petition to an uncooperative respondent.

With respect to SMW's argument that the Department should consider, as AFA, a rate of 18.65 percent it calculated for SMW in the original investigation, the petitioner rebuts that SMW's reliance on Allegheny Ludlum is misplaced. In that case, the petitioner asserts, the Department relied, as AFA, on the rate it calculated previously for the same respondent that was deemed uncooperative in a subsequent review. The petitioner asserts that it did so because the court determined that there was no appropriate other higher rate that could be used.

Department's Position: In selecting a rate based entirely on adverse facts available, it is our practice to select the highest margin on the record of the proceeding which we are able to corroborate (if such margin reflects secondary information) in accordance with the requirements of section 776(c) of the Act. See, e.g., SS Bar from Spain and accompanying Issues and Decision Memorandum at Comment 6, Elemental Sulphur from Canada: Final Results of Antidumping Duty Administrative Review, 65 FR 11980 (March 7, 2000), and accompanying Issues and Decision Memorandum at Comment 3, and Brass Sheet and Strip from Germany: Final Results of Antidumping Duty Administrative Review, 63 FR 42823, 42824 (August 11, 1998). Clearly, our practice of and ability to select the highest rate on the record of the proceeding is guided by the corroboration requirements of section 776(c) of the Act. See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Preliminary Results of Antidumping Duty Administrative Reviews and Intent to Rescind Reviews in Part, 73 FR 25657 (May 7, 2008) (where we relied, as AFA, on the next highest rate calculated in the proceeding because we could not corroborate the highest rate). In the Preliminary Results we stated that, "to determine whether the petition rates are reliable and relevant in this administrative review, we compared the transaction-specific margins of AVISMA for the POR to the petition rates and found that the petition rates were not relevant for use in this administrative review and, therefore, do not have probative value for use as AFA." See Preliminary Results, 73 FR 24543. Accordingly, we selected, as AFA, the next highest rate on the record of the proceeding of 21.71 percent, which we were able to corroborate for purposes of the Preliminary Results.

The Court of Appeals for the Federal Circuit has upheld our use of the highest margin. In Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1339 (CAFC 2002) (Ta Chen) (citing Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190 (CAFC 1990)), the court held that, “[i]n cases in which the respondent fails to provide Commerce with the most recent pricing data, it is within Commerce’s discretion to presume that the highest prior margin reflects the current margins.” Further, as stated in Shanghai Taoen Int’l Trading Co. v. United States, 360 F. Supp. 2d 1348 (CIT 2005) (Shanghai Taoen) (citing D&L Supply Co. v. United States, 113 F.3d 1220, 1223 (CAFC 1997)), “the purposes of using the highest prior antidumping duty rate are to offer assurance that the exporter will not benefit from refusing to provide information, and to produce an antidumping duty rate that bears some relationship to past practices in the industry in question.”

We do not agree with the petitioner’s assertion that the AFA rate of 21.71 percent we assigned to SMW for the Preliminary Results is not adverse enough because it is only three percentage points above the non-AFA rate of 18.65 percent we calculated for SMW in the LTFV investigation and the “co-operative, market-driven” rate of 17.68 percent calculated for AVISMA in the Preliminary Results. The selected AFA rate of 21.71 percent is sufficiently higher than SMW’s current cash-deposit rate of 3.71 percent and also higher than SMW’s deposit rate of 18.65 percent for entries of subject merchandise during this review period. Therefore, consistent with the courts’ rationale in Ta Chen and Shanghai Taoen, we find the selected AFA rate of 21.71 percent is appropriate because it ensures that SMW does not obtain a more favorable result by refusing to cooperate in this administrative review and it provides ample incentive to cooperate in future administrative reviews.

We also find SMW’s proposition that we use, as AFA, the rates we calculated for SMW in the previous segments of the proceeding, 18.65 percent in the LTFV and 3.77 percent in the first administrative review (with an additional increase to deter non-compliance), misguided. SMW appears to advocate the relevancy aspect of these rates as they pertain to SMW as the main reason for its proposition. As a preliminary matter, per our discussion supra, the judicial and administrative precedent supports the use of the highest rate in the proceeding that can be corroborated. Further, use of SMW’s previous rates of 18.65 percent and/or 3.77 percent negates the purpose of an adverse inference proffered by section 776(b) of the Act because it does not result in SMW obtaining a less-favorable result in the instant review from its refusal to cooperate.

SMW proposes a selection of the calculated rate of 3.77 percent rate as a starting point for imputing an AFA rate. We encountered a similar suggestion in another case, SS Bar from Spain and accompanying Issues and Decision Memorandum at Comment 6. Similar to our discussion in SS Bar from Spain, SMW does not propose a methodology by which to impute an additional increase sufficient to redress non-compliance nor does it cite any precedent where such methodology was implemented. Ultimately, the selection of an arbitrary amount to add to the previously calculated rate would be subjective and not based on record evidence. See SS Bar from Spain and accompanying Issues and Decision Memorandum at Comment 6. In F. Lii de Cecco the court stated at 1032 that the Department must meet its burden of determining “a reasonably accurate estimate” of the respondent’s actual rate, “albeit with some built-in increase intended as a deterrent to noncompliance.” In SS Bar from Spain, citing to Shanghai Taoen at 1347, we stated that “the court opined that ‘Commerce’s burden is greater where information on the record demonstrates that an alternative rate may be appropriate. Where the highest available

rate is the most probative rate on the record, Commerce's burden is satisfied. While the highest prior margin is obviously not a precise indicator of current dumping practices, it provides at least some guidance as to the probable dumping margin in the period for which the exporter is not providing information, and it is preferable in that respect to an arbitrarily selected figure that has no pretension to accuracy.'" See SS Bar from Spain and accompanying Issues and Decision Memorandum at Comment 6.

In the Preliminary Results the Department demonstrated the probative value of the selected AFA rate. More importantly, the methodology we used to support the relevancy aspect of the AFA rate for SMW for the Preliminary Results (i.e., comparing the selected AFA rate to SMW's highest calculated transaction-specific margins in a previous review and to AVISMA's highest calculated transaction-specific margins in the current review) is similar to one the court upheld in NSK Ltd. v. United States, 346 F. Supp. 2d. 1312, 1335 (CIT 2004). Therefore, consistent with the court's rationale in F. Lii de Cecco and Shanghai Taoen, we find that application of the AFA rate of 21.71 percent is an appropriate adverse facts-available rate for SMW.

Finally, contrary to the petitioner's assertion, certain adjustments we made to AVISMA's cost-of-production and constructed-value data did not change AVISMA's transaction-specific margins to the point of permitting the corroboration of any rates contained in the petition. Specifically, the highest transaction-specific margin we calculated for AVISMA for the final results is considerably less than the lowest rate of 54.40 percent alleged in the petition. See analysis memorandum entitled "Administrative Review of the Antidumping Duty Order on Magnesium Metal from the Russian Federation - Final Results Analysis Memorandum for PSC VSMPO-AVISMA Corporation."

### Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the review in the Federal Register.

Agree \_\_\_\_\_

Disagree \_\_\_\_\_

\_\_\_\_\_  
David M. Spooner  
Assistant Secretary  
for Import Administration

\_\_\_\_\_  
Date