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Investigation  
POI: 10/01/2017-09/30/2018  
**Public Document**  
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**DATE:** July 1, 2019

**MEMORANDUM TO:** Jeffrey I. Kessler  
Assistant Secretary  
for Enforcement and Compliance

**FROM:** James Maeder  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**SUBJECT:** Decision Memorandum for the Preliminary Determination in the  
Less-Than-Fair-Value Investigation of Magnesium from Israel

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## I. SUMMARY

The Department of Commerce (Commerce) preliminarily determines that magnesium from Israel is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 733 of the Tariff Act of 1930, as amended (the Act). The preliminary estimated weighted-average dumping margins are shown in the “Preliminary Determination” section of the accompanying *Federal Register* notice.

## II. BACKGROUND

On October 24, 2018, the U.S. Department of Commerce (Commerce) received an antidumping duty (AD) Petition concerning imports of magnesium from Israel, filed in proper form on behalf of US Magnesium LLC (the petitioner), a domestic producer of magnesium.<sup>1</sup> The AD Petition was accompanied by a countervailing duty (CVD) Petition concerning imports of magnesium from Israel.<sup>2</sup> Commerce initiated this AD investigation on November 13, 2018.<sup>3</sup>

In the *Initiation Notice*, Commerce notified the public that, although it normally relies on import data from U.S. Customs and Border Protection (CBP) to determine whether to select a limited number of producers/exporters for individual examination in AD investigations, the petitioner identified only one company in Israel, *i.e.*, Dead Sea Magnesium, Ltd. (DSM), as a

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<sup>1</sup> See Petitioner’s Letter, “Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Magnesium from Israel,” dated October 24, 2018 (Petition).

<sup>2</sup> See Volume II of the Petitions.

<sup>3</sup> See *Magnesium from Israel: Initiation of Less-Than-Fair-Value Investigation*, 83 FR 58533 (November 20, 2019) (*Initiation Notice*).



producer/exporter of magnesium and provided independent, third-party information as support.<sup>4</sup> In addition, Commerce knows of no additional producers/exporters of magnesium from Israel. Accordingly, Commerce selected DSM as the sole mandatory respondent in this investigation and, on November 29, 2018, issued the AD questionnaire to DSM.<sup>5</sup>

Also in the *Initiation Notice*, Commerce notified parties of an opportunity to comment on the scope of the investigation, as well as on the appropriate physical characteristics of magnesium to be reported in response to Commerce's AD questionnaire.<sup>6</sup> Although no parties submitted comments on the scope of the investigation, during December, the petitioner and DSM each submitted comments<sup>7</sup> and rebuttal thereto<sup>8</sup> regarding the appropriate physical characteristics to be used for the purpose of reporting sales of the subject merchandise. After analyzing the interested parties' comments and rebuttals, Commerce determined the set of product characteristics applicable to this investigation and instructed DSM to use these product characteristics in its response to sections B, C, and D of the AD questionnaire issued in this investigation.<sup>9</sup>

On December 17, 2018, the U.S. International Trade Commission (ITC) preliminarily determined that there is reasonable indication that an industry in the United States is materially injured by reason of imports of magnesium from Israel.<sup>10</sup>

On January 28, 2019, Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018, through the resumption of operations on January 29, 2019.<sup>11</sup> On April 23, 2019, Commerce published the notice of postponement for the preliminary determination in this investigation, in accordance with section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).<sup>12</sup> As a result of the 50-day postponement, the revised deadline for the preliminary determination of this investigation is July 1, 2019.<sup>13</sup>

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<sup>4</sup> See *Initiation Notice*, 83 FR at 58536.

<sup>5</sup> See Commerce's Antidumping Duty Questionnaire," dated November 29, 2018.

<sup>6</sup> See *Initiation Notice*, 83 FR at 58534.

<sup>7</sup> See Petitioner's Letter, "Magnesium from Israel: Petitioner's Comments On Product Characteristics," dated December 3, 2018; and DSM's Letter, "Magnesium from Israel: Comments on Product Characteristics," dated December 3, 2018.

<sup>8</sup> See Petitioner's Letter, "Magnesium from Israel: Petitioner's Rebuttal Comments On Product Characteristics," dated December 13, 2018; and DSM's Letter "Magnesium from Israel: Rebuttal Comments on Product Characteristics," dated December 13, 2108.

<sup>9</sup> See Commerce's Letter, "Product Characteristics for the Less-Than-Fair-Value Antidumping Duty Investigation of Magnesium from Israel," dated December 21, 2018 (Product Characteristics Letter).

<sup>10</sup> See *Magnesium from Israel*, 83 FR 64598 (December 17, 2018); see also *Magnesium from Israel*, Inv. Nos. 701-TA-614 and 731-TA-1431 (Preliminary), USITC Publication 4860, December 2018.

<sup>11</sup> See Memorandum to the Record from Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, "Deadlines Affected by the Partial Shutdown of the Federal Government," dated January 28, 2019. All deadlines in this segment of the proceeding affected by the partial federal government closure have been extended by 40 days.

<sup>12</sup> See *Magnesium from Israel: Postponement of Preliminary Determination in the Less-Than-Fair-Value Investigation*, 84 FR 16845 (April 23, 2019).

<sup>13</sup> *Id.*

In February 2019, DSM submitted timely responses to Commerce’s AD questionnaire for section A<sup>14</sup> (*i.e.*, the section relating to general information) and sections B,<sup>15</sup> C<sup>16</sup> and D<sup>17</sup> (*i.e.*, the sections relating to comparison market and U.S. sales, and the cost of production).

From February through May 2019, we issued supplemental questionnaires to DSM,<sup>18</sup> and received responses to these supplemental questionnaires during the same period.<sup>19</sup> The petitioner timely submitted comments with respect to the responses submitted by DSM.<sup>20</sup>

On May 20, 2019, DSM requested that, in the event of an affirmative preliminary determination in this investigation, Commerce postpone its final determination until not later than 135 days after the date of publication of Commerce’s preliminary determination, in accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), and extend the application of the provisional measures prescribed under 19 CFR 351.210(e)(2) from four months to a period not to exceed six months.<sup>21</sup>

On June 12, 2019, the petitioner requested that, pursuant to 19 CFR 351.210(e)(1), in the event of a negative preliminary determination, Commerce postpone its final determination in accordance with section 735(a)(2)(B) of the Act and 19 CFR 351.210(b)(2)(i) until not later than 135 days after the date of publication of Commerce’s preliminary determination.<sup>22</sup> Also on June 12, 2019, the petitioner filed comments concerning the preliminary determination.<sup>23</sup>

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<sup>14</sup> See DSM’s Letter, “Magnesium from Israel: Dead Sea Magnesium’s Section A Response,” dated February 12, 2019 (AQR).

<sup>15</sup> See DSM’s Letter, “Magnesium from Israel: Dead Sea Magnesium’s Section B Response,” dated February 27, 2019 (BQR).

<sup>16</sup> See DSM’s Letter, “Magnesium from Israel: Dead Sea Magnesium’s Section C Response,” dated February 26, 2019 (CQR).

<sup>17</sup> See DSM’s Letter, “Magnesium from Israel: Dead Sea Magnesium’s Section D Response,” dated February 26, 2019.

<sup>18</sup> See Commerce Letters, “Section A Supplemental Questionnaire,” dated February 15, 2019; “Second Supplemental Questionnaire,” dated April 2, 2019; “1<sup>st</sup> Section D Supplemental Questionnaire,” dated April 3, 2019; “Third Sections A-C Supplemental Questionnaire,” dated May 13, 2019; and “2<sup>nd</sup> Section D Supplemental Questionnaire,” dated May 20, 2019.

<sup>19</sup> See DSM’s Letters, “Magnesium from Israel: Dead Sea Magnesium’s Section A Supplemental Questionnaire Response; “Magnesium from Israel: Dead Sea Magnesium’s Sections A-C Supplemental Questionnaire Response,” dated April 29, 2019 (2SQR); “Magnesium from Israel: Dead Sea Magnesium’s Section D Supplemental Questionnaire Response,” dated April 30, 2019; “Magnesium from Israel: Dead Sea Magnesium’s Third Sections A-C Supplemental Questionnaire Response,” dated May 22, 2019 (3SQR); “Magnesium from Israel: Dead Sea Magnesium’s Second Section D Supplemental Questionnaire Response,” dated June 10, 2019; and “Magnesium from Israel a Magnesium’s Second Section D Supplemental Questionnaire Response – Questions 14, 15, and 16,” dated June 11, 2019.

<sup>20</sup> See Petitioner’s Letters, “Petitioner’s Deficiency Comments Regarding DSM’s Initial Questionnaire Responses,” dated March 12, 2019; and “Magnesium from Israel: Petitioner’s Deficiency Comments Regarding DSM’s Supplemental Questionnaire Responses,” dated May 6, 2019.

<sup>21</sup> See DSM’s Letter, “Magnesium from Israel: Request for Postponement of Final Determination,” dated May 20, 2019.

<sup>22</sup> See Petitioner’s Letter, “Magnesium from Israel: Petitioner’s Request For Postponement Of The Final Determination,” dated June 12, 2019.

<sup>23</sup> See Petitioner’s Letter, “Magnesium from Israel: Petitioner’s Pre-Preliminary Comments,” dated June 12, 2019.

We are conducting this investigation in accordance with section 733(b) of the Act.

### III. PERIOD OF INVESTIGATION

The period of investigation (POI) is October 1, 2017 through September 30, 2018. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition, which was October 2018.<sup>24</sup>

### IV. POSTPONEMENT OF FINAL DETERMINATION AND EXTENSION OF PROVISIONAL MEASURES

Section 735(a)(2)(A) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by the exporters who account for a significant proportion of exports of the subject merchandise. On May 20, 2019, DSM requested that Commerce postpone the final determination in the event of an affirmative finding of sales at LTFV.<sup>25</sup> Further, pursuant to section 733(d) of the Act and 19 CFR 351.210(e), DSM requested that provisional measures be extended from four months to a period not to exceed six months if Commerce's preliminary determination is affirmative.<sup>26</sup> In accordance with section 735(a)(2)(A) of the Act, because the preliminary determination is affirmative, and the exporter who accounts for a significant proportion of exports of the subject merchandise has requested the postponement of the final determination, Commerce is postponing the final determination. Accordingly, we will make our final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2)(A) of the Act.

### V. SCOPE OF THE INVESTIGATION

The product covered by this investigation is magnesium from Israel. For a full description of the scope of the investigation, *see* the accompanying preliminary determination *Federal Register* notice at Appendix I.

### VI. SCOPE COMMENTS

In accordance with the *Preamble* to Commerce's regulations,<sup>27</sup> we set aside a period of time, as stated in the *Initiation Notice*, for parties to raise issues regarding product coverage (*i.e.*, scope) and encouraged all parties to submit comments within 20 calendar days of publication of that notice.<sup>28</sup> During this period, no interested party commented on the scope of the AD investigation

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<sup>24</sup> See 19 CFR 351.204(b)(1).

<sup>25</sup> See DSM's Letter, "Magnesium from Israel: Request for Postponement of Final Determination," dated May 20, 2019

<sup>26</sup> *Id.*

<sup>27</sup> See *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997) (*Preamble*).

<sup>28</sup> See *Initiation Notice*, 83 FR at 52196.

of magnesium from Israel. Therefore, we are preliminarily not modifying the scope as it appeared in the *Initiation Notice*.

## VII. PRODUCT CHARACTERISTICS

In the *Initiation Notice*, we set aside a period of time for parties to raise issues regarding product characteristics.<sup>29</sup> The petitioner and other interested parties provided comments which we took into consideration in determining the physical characteristics described in the Product Characteristics Letter.<sup>30</sup>

## VIII. DISCUSSION OF THE METHODOLOGY

### Comparisons to Fair Value

Pursuant to section 773(a) of the Act and 19 CFR 351.414(c)(1) and (d), and in order to determine whether DSM's sales of the subject merchandise from Israel to the United States were made at less than normal value (NV), Commerce compared the export price (EP) and constructed export price (CEP) to the NV as described in the "Export Price and Constructed Export Price" and "Normal Value" sections of this memorandum.

#### A) *Determination of the Comparison Method*

Pursuant to 19 CFR 351.414(c)(1), Commerce calculates weighted-average dumping margins by comparing weighted-average NVs to weighted-average EPs (or CEPs), *i.e.*, the average-to-average (A-A) method, unless the Secretary determines that another method is appropriate in a particular situation. In LTFV investigations, Commerce examines whether to compare weighted-average NVs with the EPs (or CEPs) of individual sales, *i.e.*, the average-to-transaction (A-T) method, as an alternative comparison method using an analysis consistent with section 777A(d)(1)(B) of the Act.

In recent investigations, Commerce applied a "differential pricing" analysis for determining whether application of the A-T method is appropriate in a particular situation pursuant to section 777A(d)(1)(B) of the Act and 19 CFR 351.414(c)(1).<sup>31</sup> Commerce finds that the differential pricing analysis used in recent investigations may be instructive for purposes of examining whether to apply an alternative comparison method in this investigation. Commerce will continue to develop its approach in this area based on comments received in this and other

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<sup>29</sup> *Id.* at 58534.

<sup>30</sup> See Product Characteristics Letter.

<sup>31</sup> See, e.g., *Truck and Bus Tires from the People's Republic of China: Preliminary Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances, and Postponement of Final Determination*, 81 FR 61186 (September 6, 2016), and accompanying Preliminary Decision Memorandum (PDM) at 22, unchanged in *Truck and Bus Tires from the People's Republic of China: Final Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances*, 82 FR 8599 (January 27, 2017); and *Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2015-2016*, 82 FR 12431 (March 3, 2017) (2015-16 Prelim), and accompanying PDM at 5-7, unchanged in *Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 82 FR 42075 (September 6, 2017) (2015-16 Final).

proceedings, and on Commerce's additional experience with addressing the potential masking of dumping that can occur when Commerce uses the A-A method in calculating a respondent's weighted-average dumping margin.

The differential pricing analysis used in this preliminary determination examines whether there exists a pattern of EPs (or CEPs) for comparable merchandise that differ significantly among purchasers, regions, or time periods. The analysis evaluates all export sales by purchasers, regions, and time periods to determine whether a pattern of prices that differ significantly exists. If such a pattern is found, then the differential pricing analysis evaluates whether such differences can be taken into account when using the A-A method to calculate the weighted-average dumping margin. The analysis incorporates default group definitions for purchasers, regions, time periods, and comparable merchandise. Purchasers are based on the consolidated customer codes reported by DSM in its sales databases.<sup>32</sup> Regions are defined using the reported destination code, *i.e.*, zip code, and are grouped into regions based upon standard definitions published by the U.S. Census Bureau. Time periods are defined by the quarter within the POI based upon the reported date of sale. For purposes of analyzing sales transactions by purchaser, region, and time period, comparable merchandise is defined using the product control number and all characteristics of the U.S. sales, other than purchaser, region, and time period, that Commerce uses in making comparisons between EP (or CEP) and NV for the individual dumping margins.

In the first stage of the differential pricing analysis used here, the "Cohen's *d* test" is applied. The Cohen's *d* coefficient is a generally recognized statistical measure of the extent of the difference between the mean, *i.e.*, weighted-average price, of a test group and the mean, *i.e.*, weighted-average price, of a comparison group. First, for comparable merchandise, the Cohen's *d* coefficient is calculated when the test and comparison groups of data for a particular purchaser, region or time period each have at least two observations, and when the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise. Then, the Cohen's *d* coefficient is used to evaluate the extent to which the prices to the particular purchaser, region or time period differ significantly from the prices of all other sales of comparable merchandise. The extent of these differences can be quantified by one of three fixed thresholds defined by the Cohen's *d* test: small, medium, or large (0.2, 0.5, and 0.8, respectively). Of these thresholds, the large threshold provides the strongest indication that there is a significant difference between the mean of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists. For this analysis, the difference is considered significant, and the sales in the test group are found to pass the Cohen's *d* test, if the calculated Cohen's *d* coefficient is equal to or exceeds the large, *i.e.*, 0.8, threshold.

Next, the "ratio test" assesses the extent of the significant price differences for all sales as measured by the Cohen's *d* test. If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test account for 66 percent or more of the value of total sales, then the identified pattern of prices that differ significantly supports the consideration of the application of the A-T method to all sales as an alternative to the A-A method. If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the results support consideration

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<sup>32</sup> See, *e.g.*, BQR at 13.

of the application of an A-T method to those sales identified as passing the Cohen's *d* test as an alternative to the A-A method, and application of the A-A method to those sales identified as not passing the Cohen's *d* test. If 33 percent or less of the value of total sales passes the Cohen's *d* test, then the results of the Cohen's *d* test do not support consideration of an alternative to the A-A method.

If both tests in the first stage, *i.e.*, the Cohen's *d* test and the ratio test, demonstrate the existence of a pattern of prices that differ significantly such that an alternative comparison method should be considered, then in the second stage of the differential pricing analysis, Commerce examines whether using only the A-A method can appropriately account for such differences. In considering this question, Commerce tests whether using an alternative comparison method, based on the results of the Cohen's *d* and ratio tests described above, yields a meaningful difference in the weighted-average dumping margin as compared to that resulting from the use of the A-A method only. If the difference between the two calculations is meaningful, then this demonstrates that the A-A method cannot account for differences such as those observed in this analysis, and, therefore, an alternative comparison method would be appropriate. A difference in the weighted-average dumping margins is considered meaningful if: (1) there is a 25 percent relative change in the weighted-average dumping margins between the A-A method and the appropriate alternative method where both rates are above the *de minimis* threshold, or (2) the resulting weighted-average dumping margins between the A-A method and the appropriate alternative method move across the *de minimis* threshold.

Interested parties may present arguments and justifications in relation to the above-described differential pricing approach used in this preliminary determination, including arguments for modifying the group definitions used in this proceeding.<sup>33</sup>

#### B) *Results of the Differential Pricing Analysis*

Based on the results of the differential pricing analysis, Commerce preliminarily finds that 70.34 percent of the value of DSM's U.S. sales pass the Cohen's *d* test,<sup>34</sup> and confirms the existence of a pattern of prices for comparable merchandise that differ significantly among purchasers, regions, or time periods. This result supports consideration of an alternative to the average-to-average method based on applying the average-to-transaction method to all U.S. sales. Further, Commerce preliminarily determines that there is no meaningful difference between the weighted-average dumping margin calculated using the A-A method and the weighted-average dumping margin calculated using the alternative comparison method based on applying the A-T method to all U.S. sales because both rates are above the *de minimis* threshold and there is not a 25 percent relative change in the weighted-average dumping margin.<sup>35</sup> Thus, for the preliminary determination, Commerce applied the A-A method for all U.S. sales to calculate the weighted-average dumping margin for DSM.

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<sup>33</sup> The Court of Appeals for the Federal Circuit (CAFC) in *Apex Frozen Foods v. United States*, 16-1789 (Fed. Cir. July 12, 2017) affirmed much of Commerce's differential pricing methodology. We ask that interested parties present only arguments on issues which have not already been decided by the CAFC.

<sup>34</sup> See Memorandum, "Less-Than-Fair-Value Investigation of Magnesium from Israel: Preliminary Determination Analysis Memorandum for DSM," dated concurrently with this memorandum (DSM Preliminary Analysis Memorandum).

<sup>35</sup> *Id.*

## **IX. DATE OF SALE**

Section 351.401(i) of Commerce's regulations states that, in identifying the date of sale of the subject merchandise or foreign like product, Commerce normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. Additionally, Commerce may use a date other than the date of invoice if it is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.<sup>36</sup> Finally, Commerce has a long-standing practice of finding that, where the shipment date precedes the invoice date, the shipment date better reflects the date on which the material terms of sale are established.<sup>37</sup>

DSM reported that the invoice date is the date at which the price and quantity are set with its customer.<sup>38</sup> However, because certain DSM comparison-market and U.S. sales had shipment dates that preceded the date of invoice, DSM reported the earlier of the invoice date and shipment date as the date of sale, consistent with Commerce's practice.<sup>39</sup> Therefore, we preliminarily used the earlier of the invoice date or the shipment date as the date of sale, in accordance with our regulations and practice.

## **X. PRODUCT COMPARISONS**

In accordance with section 771(16) of the Act, Commerce considered all products produced and sold by the respondent, DSM, in the comparison market during the POI that fit the description in the "Scope of Investigation" section of this memorandum to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. As discussed in the "Normal Value" section below, we compared U.S. sales to sales made in the third-country market, Canada, where appropriate. Where there were no sales of identical merchandise in the third-country market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. In making product comparisons, we matched foreign like products based on the physical characteristics reported by DSM in the following order of importance: magnesium type (ultra-pure, pure, non-ASTM<sup>40</sup> alloy or ASTM alloy), grade (ASTM ultra-pure or non-ASTM ultra-pure, ASTM pure or non-ASTM pure, ASTM alloy or non-ASTM alloy), form (ingot, granular, or other) and size.

## **XI. EXPORT PRICE AND CONSTRUCTED EXPORT PRICE**

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<sup>36</sup> See 19 CFR 351.401(i); see also *Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090 (CIT 2001) (quoting 19 CFR 351.401(i)).

<sup>37</sup> See, e.g., *Certain Polyester Staple Fiber from the Republic of Korea: Preliminary Results of the 2007/2008 Antidumping Duty Administrative Review*, 74 FR 27281, 27283 (June 9, 2009), unchanged in *Certain Polyester Staple Fiber from the Republic of Korea: Final Results of the 2007-2008 Antidumping Duty Administrative Review*, 74 FR 65517 (December 10, 2009).

<sup>38</sup> See AQR at 19-21.

<sup>39</sup> See 2SQR at 20.

<sup>40</sup> American Society for Testing and Materials (ASTM) is an international standards organization that develops and publishes voluntary consensus technical standards for a wide range of materials, products, systems, and services.

In accordance with section 772(a) of the Act, for certain U.S. sales made by DSM, Commerce used the EP methodology because the subject merchandise was sold directly to the first unaffiliated purchaser in the United States before the date of importation by the producer or exporter of the subject merchandise outside the United States, and the CEP methodology, as defined by section 772(b) of the Act, was not otherwise warranted based on the facts on the record.

We calculated EP based on packed prices to unaffiliated purchasers in the United States. We made adjustments for early payments, as appropriate. We made deductions for movement expenses, which included, where appropriate, foreign inland freight, foreign brokerage and handling, insurance, international freight, U.S. customs duties, U.S. inland freight, and commissions, in accordance with section 772(c)(2)(A) of the Act.

In accordance with section 772(b) of the Act, we used the CEP methodology for the remainder of DSM's U.S. sales because the subject merchandise was sold in the United States by DSM after the date of importation, and EP, as defined by section 772(a) of the Act, was not otherwise warranted.

For DSM's CEP sales, which were invoiced and sold by DSM with the assistance of its U.S. affiliate, we calculated CEP based on the packed, delivered prices to unaffiliated purchasers in the United States. We made adjustments for early payments, as appropriate. We made deductions for movement expenses, which included, where appropriate, foreign inland freight, foreign brokerage and handling, insurance, international freight, U.S. customs duties, U.S. inland freight, and warehousing expenses, in accordance with section 772(c)(2)(A) of the Act. In accordance with section 772(d)(1) of the Act, we calculated the CEP by deducting selling expenses associated with economic activities occurring in the United States, which included, where appropriate, direct selling expenses including imputed credit expenses and commissions, and indirect selling expenses including inventory carrying costs. Finally, we further reduced the starting price by an amount for profit to arrive at CEP, in accordance with section 772(d)(3) of the Act. In accordance with section 772(f) of the Act, we calculated the CEP profit rate using the expenses incurred by DSM on its sales of the subject merchandise in the United States and the profit associated with those sales.

## **XII. NORMAL VALUE**

### **A. *Home Market Viability and Comparison Market Selection***

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, *i.e.*, the aggregate volume of home-market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales, Commerce normally compares the respondent's volume of home-market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with sections 773(a)(1)(A) and (B) of the Act. If we determine that no viable home market exists, we may, if appropriate, use a respondent's sales of the foreign like product to a third-country market as the basis for comparison-market sales, in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404(c)(1)(ii).

In this investigation, Commerce determined that the aggregate volume of home-market sales of the foreign like product for DSM was less than five percent of the aggregate volume of its U.S. sales of the subject merchandise.<sup>41</sup> Therefore, DSM's home market, Israel, is not viable as a comparison market. DSM sold comparable merchandise to more than one third-country market at volumes greater than five percent of the aggregate U.S. sales during the POI. Of these viable third-country markets, we chose Canada as the comparison market because, of all the viable third-country markets, DSM sold the highest volume of comparable merchandise during the POI to customers in Canada.<sup>42</sup> Accordingly, we used DSM's sales to a third country, Canada, as the basis for NV, in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404(c)(1)(ii).

## B. *Level of Trade*

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, Commerce will calculate NV based on sales at the same level of trade (LOT) as the U.S. sales. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent).<sup>43</sup> Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing.<sup>44</sup> In order to determine whether the comparison-market sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.*, the chain of distribution), including selling functions and class of customer (customer category), and the level of selling expenses for each type of sale.

Pursuant to section 19 CFR 351.412(c)(1), in identifying LOTs for EP and comparison-market sales (*i.e.*, NV based on either home-market or third-country prices), we consider the starting prices before any adjustments. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act.<sup>45</sup> Where NV is based on constructed value (CV), we determine the NV LOT based on the LOT of the sales from which we derive selling, general, and administrative (SG&A) expenses, and profit for CV, where possible.<sup>46</sup>

When Commerce is unable to match U.S. sales of the foreign like product in the comparison market at the same LOT as the EP or CEP, Commerce may compare the U.S. sale to sales at a different LOT in the comparison market. In comparing EP or CEP sales to sales at a different LOT in the comparison market, where available data make it possible, we make a LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales only, if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability,

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<sup>41</sup> See AQR at 3 and Exhibit A-1; *see also* 2SQR at 2 and Exhibit 2SA-2.

<sup>42</sup> See AQR at 3 and Exhibit A-1; *see also* 2SQR at 2 and Exhibit 2SA-2.

<sup>43</sup> See 19 CFR 351.412(c)(2).

<sup>44</sup> *Id.*; *see also* *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Antidumping Duty Order in Part*, 75 FR 50999 (August 18, 2010) (*OJ from Brazil*) and accompanying Issues and Decision Memorandum (IDM) at Comment 7.

<sup>45</sup> See *Micron Technology, Inc. v. United States*, 243 F.3d 1301, 1314-16 (Fed. Cir. 2001).

<sup>46</sup> See 19 CFR 351.412(c)(1).

*i.e.*, no LOT adjustment is possible, Commerce shall grant a CEP offset, as provided in section 773(a)(7)(B) of the Act.<sup>47</sup>

In this investigation, we obtained information from DSM regarding the marketing stages involved in making the reported third-country and U.S. sales, including a description of the selling activities performed for each channel of distribution.<sup>48</sup>

With respect to the third-country market, Canada, DSM reported that it made sales to only unaffiliated end users and that, although it made sales through two channels of distribution to end users, *i.e.*, sales made to Canada directly from Israel (TC channel 1) and sales made to Canada out of warehouses located in the United States (TC channel 2),<sup>49</sup> all sales to Canada are nearly identical in regards to LOT and sales process, with the exception of certain warehouse-related activities (performed by its U.S. affiliate) for TC channel 2.<sup>50</sup> According to DSM, for sales to all of its customers in the two third-country sales channels, it performed the following sales-related activities at a low-to-medium level of intensity: sales forecasting, strategic/economic planning, advertising and sales promotion, sales/marketing support, market research, and order/input processing. It provided the following technical support at a low level of intensity: engineering services and technical assistance. Further, it provided the following logistical services at a low level of intensity: repacking and freight and delivery.<sup>51</sup> Therefore, we preliminarily determine that there is one LOT in the third-country market for DSM.

With respect to the U.S. market, DSM reported that it made sales only to unaffiliated end users through two channels of distribution, *i.e.*, EP sales directly from Israel (US channel 1) and CEP sales made out of U.S. warehouses (US channel 2).<sup>52</sup> DSM reported that, in regards to LOT and sales process, the channel of distribution for EP sales is nearly identical to both channels of distribution for sales made to Canada, *i.e.*, TC channel 1 and TC channel 2, the only significant difference being the country in which the customer is located.<sup>53</sup> According to DSM, for sales made to the United States directly from Israel, it performed the following sales-related activities at a low level of intensity: sales forecasting, strategic/economic planning, advertising and sales promotion, sales/marketing support, market research, and order/input processing. It provided the following technical support at a low level of intensity: engineering services and technical assistance. Further, it provided the following logistical services at a low level of intensity: repacking and freight/delivery.<sup>54</sup>

DSM reported that, although the selling functions DSM performed for CEP sales were similar to the selling functions it performed for EP sales, with the exception of certain warehouse-related activities (performed by its U.S. affiliate), it performed these functions for CEP sales at an

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<sup>47</sup> See, e.g., *OJ from Brazil* and accompanying IDM at Comment 7.

<sup>48</sup> See AQR at 13-18 and Exhibits A-11 and A-18; see also 2SQR at 10-12.

<sup>49</sup> See BQR at 23.

<sup>50</sup> See AQR at 13-18 and Exhibit A-11.

<sup>51</sup> See AQR at Exhibits A-11 and A-18.

<sup>52</sup> See CQR at 22.

<sup>53</sup> See AQR at 13-18.

<sup>54</sup> See AQR at Exhibits A-11 and A-18.

overall higher intensity.<sup>55</sup> According to DSM, for sales made to the United States out of U.S. warehouses, it performed the following sales-related activities at a medium-to-high level of intensity: sales forecasting, strategic/economic planning, advertising and sales promotion, sales/marketing support, market research, and order/input processing. It provided the following technical support at a low-to-medium level of intensity: engineering services and technical assistance. Further, it provided the following logistical services at a medium level of intensity: repacking and freight/delivery.<sup>56</sup> In addition, DSM reported that, while it performed similar warehouse-related activities for sales made to the United States out of U.S. warehouses as it did for sales made to Canada out of U.S. warehouses, it performed these activities for CEP sales at a higher level of intensity.<sup>57</sup>

Selling activities can be generally grouped into four selling function categories for analysis: (1) sales and marketing; (2) freight and delivery; (3) inventory maintenance and warehousing; and (4) warranty and technical support.<sup>58</sup> Based on these selling function categories, we find that DSM performed sales and marketing, packing and freight, and technical services for both third-country sales channels and both U.S. channels, and the only significant difference between the two U.S. channels is the degree of intensity at which DSM performed these services.

According to 19 CFR 351.412(c)(2), Commerce will determine that sales are made at different LOTs if they are made at different marketing stages (or their equivalent). In this case, although the degree of intensity in the performance of selling functions differs among the two U.S. sales channels, we do not find that this difference is significant enough to warrant finding that the two U.S. sales channels constitute different LOTs. Therefore, we determine that substantial differences in DSM's selling activities do not exist between the two U.S. sales channels, we preliminarily find that DSM's EP and CEP sales to the U.S. market during the POI were made at the same LOT.

We compared the U.S. LOT with the NV LOT and found that the selling functions DSM performed for its U.S. and TC market customers do not differ. Specifically, with respect to all the selling functions, DSM performed the same activities in the TC market, which are grouped in one LOT, as it performed in the U.S. market, which are also grouped in one LOT. Although there are no differences in type of selling functions performed overall by DSM in both markets, there is a difference in the level of intensity at which sales and marketing, freight and delivery, inventory maintenance and warehousing, and technical support were performed in the U.S. market for CEP sales. Because we find this difference is not significant enough to warrant finding different LOTs, we preliminarily determine that sales to the United States and Canada during the POI were made at the same LOT.

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<sup>55</sup>*Id.*; see also 2SQR at 10.

<sup>56</sup> See AQR at Exhibits A-11 and A-18.

<sup>57</sup> See AQR at Exhibit A-18; BQR at 35; CQR at 28, 40-41; 2SQR at Exhibit 2SB-1; and 3SQR at Exhibit 3SC-1.

<sup>58</sup> See *OJ from Brazil* and accompanying IDM at Comment 7; and *Certain Frozen Warmwater Shrimp from India: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 9991, 9996 (March 9, 2009), unchanged in *Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 33409 (July 13, 2009); see also *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Determination of Less Than Fair Value*, 81 FR 49953 (July 29, 2016) and accompanying IDM at Comments 9 and 18.

Finally, in response to our request to provide a quantitative analysis showing how the expenses assigned to POI sales made at different claimed LOTs impact price comparability, DSM reported that there is no way to quantify a LOT adjustment and did not provide any quantification of expenses assigned to the POI sales at different LOTs.<sup>59</sup> Thus, we preliminarily find that there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability. Moreover, as discussed above, because the selling functions DSM performed for its U.S. and comparison-market customers do not differ significantly, we therefore find that DSM's sales to the United States and comparison market were made at the same LOT, *i.e.*, the NV LOT is not at a more advanced stage of distribution than the LOT of the CEP. Accordingly, we preliminarily determine that no LOT adjustment or CEP offset is warranted.<sup>60</sup>

### C. *Cost of Production Analysis*

In accordance with section 773(b)(2)(A)(ii) of the Act,<sup>61</sup> Commerce requested CV and cost of production (COP) information from DSM. We examined DSM's cost data and determined that our quarterly cost methodology was not warranted, and therefore, we applied our standard methodology of using annual costs based on the reported data.

#### 1. Calculation of COP

In accordance with section 773(b)(3) of the Act, Commerce calculated COP based on the sum of costs of materials and fabrication for the foreign like product, plus amounts for general and administrative expenses (G&A) and interest expenses.<sup>62</sup>

We relied on the COP database submitted by DSM where chlorine and sylvanite are treated as byproducts of the production of magnesium. Due to the proprietary nature of DSM's cost data, the analysis and discussion of the proper cost treatment for chlorine and sylvanite are addressed in a separate memorandum.<sup>63</sup> We adjusted DSM's COP as follows:<sup>64</sup>

- we revised the reported transfer prices of inputs obtained from affiliated suppliers to reflect the higher market price in accordance with section 773(f)(3) of the Act;
- we revised the transfer prices of certain inputs to reflect the higher market prices in accordance with section 773(f)(2) of the Act; and
- we increased DSM's reported costs to account for the post-split off costs of chlorine and sylvanite.

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<sup>59</sup> See AQR at 14.

<sup>60</sup> For more details on our LOT analysis, see DSM Preliminary Analysis Memorandum.

<sup>61</sup> See *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793, 46794 (August 6, 2015) (explaining the amendments to section 773(b)(2) of the Act made by section 504 of the Trade Preferences Extension Act of 2015).

<sup>62</sup> See "Test of Comparison Market Sales Prices" *infra*, for treatment of third-country market selling expenses.

<sup>63</sup> See Memorandum, "Team Recommendation Regarding the Cost Accounting Treatment of Chlorine and Sylvanite," dated concurrently with this memorandum.

<sup>64</sup> See Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination – DSM Ltd." dated concurrently with this memorandum (DSM Prelim COP Memorandum).

## 2. Test of Comparison-Market Prices and COP

On a product-specific basis, pursuant to section 773(b) of the Act, we compared the adjusted weighted-average COPs to the comparison-market sales prices of the foreign like product, in order to determine whether the sales prices were below the COPs. For purposes of this comparison, we used COPs exclusive of selling and packing expenses. The prices were exclusive of any applicable billing adjustments, where applicable, movement charges, actual direct and indirect selling expenses, and packing expenses.

## 3. Results of the COP Test

In determining whether to disregard comparison-market sales made at prices below the COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether: (1) within an extended period of time, such sales were made in substantial quantities; and (2) such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. In accordance with sections 773(b)(2)(B) and (C) of the Act, where less than 20 percent of the respondent's comparison-market sales of a given product are at prices less than the COP, we do not disregard any below-cost sales of that product because we determine that in such instances the below-cost sales were not made within an extended period of time and in "substantial quantities." Where 20 percent or more of a respondent's sales of a given product are at prices less than the COP, we disregard the below-cost sales when: (1) they were made within an extended period of time in "substantial quantities," in accordance with sections 773(b)(2)(B) and (C) of the Act; and, (2) based on our comparison of prices to the weighted-average COPs for the POI, they were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

We found that all of DSM's comparison-market sales during the POI were at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time. We, therefore, based DSM's NV on CV, in accordance with section 773(a)(4) of the Act.

### D. *Calculation of Normal Value Based on Constructed Value*

In accordance with section 773(a)(4) of the Act, we used CV as the basis for NV because there were no above-cost sales of the foreign like product in the comparison market. Therefore, we are comparing EP and CEP sales in the United States to CV, as described under section 773(e) of the Act, for margin calculation purposes. In accordance with section 773(e) of the Act, we calculated CV based on the sum of DSM's cost of materials and fabrication employed in producing the subject merchandise, plus amounts for SG&A expenses, profit, and U.S. packing costs. We calculated the cost of materials and fabrication, G&A and interest expenses based on information submitted by DSM in its original and supplemental questionnaire responses, except in instances where we determined that the information was not valued properly.<sup>65</sup>

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<sup>65</sup> See DSM Prelim COP Memorandum.

In the absence of comparison-market sales made in the ordinary course of trade to serve as a basis for CV profit and selling expenses, we are unable to use our “preferred method” to calculate these amounts and must instead rely on one of the three alternatives outlined in sections 773(e)(2)(B)(i) through (iii) of the Act. Those alternatives are: (i) the use of the actual amounts incurred and realized by the specific exporter or producer in connection with the production and sale of merchandise that is in the same general category of products as the subject merchandise; (ii) the use of the weighted-average of the actual amounts incurred and realized by exporters or producers (other than the respondent) that are subject to the investigation or review; or (iii) based on any other reasonable method, except that the amount for profit may not exceed the amount realized by exporters or producers (other than the respondent) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise (*i.e.*, the “profit cap”).

The first statutory alternative provided in section 773(e)(2)(B) is not possible because we do not have information on the record to permit a calculation of these amounts specific to products in the “same general category” as the subject merchandise sold by DSM. The second alternative for determining CV profit is not available to us in this case because there are no other exporters or producers subject to review. Therefore, for this preliminary determination, we determined CV profit in accordance with section 773(e)(2)(B)(iii) of the Act (*i.e.*, based on “any other reasonable method”), using the CV profit ratio and selling expenses we relied on in the initiation of this investigation that were based on the publicly available financial statements of Israel Chemicals Ltd. (ICL), DSM’s parent company, for the fiscal year ending December 31, 2017.<sup>66</sup> Further, we are unable to calculate the amount realized by exporters or producers in connection with the sale, for consumption in the foreign country, of the merchandise in the same general category of products as the subject merchandise (*i.e.*, the “profit cap”), in accordance with section 773(e)(2)(B)(iii) of the Act, because the record does not contain any information for making such a calculation. However, the SAA makes clear that Commerce might have to apply alternative (iii).<sup>67</sup> We conclude that ICL’s profit information serves as a reasonable profit cap for this preliminary determination. However, Commerce intends to solicit additional profit and selling expense information from interested parties, after the preliminary determination, to further consider the calculation of NV based on CV for the final determination.

### **XIII. CURRENCY CONVERSION**

We made currency conversions into U.S. dollars in accordance with section 773A of the Act and 19 CFR 351.415, based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

### **XIV. VERIFICATION**

As provided in section 782(i) of the Act and 19 CFR 351.307, we intend to verify information relied upon in making our final determination.

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<sup>66</sup> See *Initiation Notice*.

<sup>67</sup> See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, Vol 1 (1994) (SAA) at 840.

**XV. CONCLUSION**

We recommend applying the above methodology for this preliminary determination.

\_\_\_\_\_  
Agree

\_\_\_\_\_  
Disagree

7/1/2019

**X** 

Signed by: JEFFREY KESSLER

\_\_\_\_\_  
Jeffrey I. Kessler  
Assistant Secretary  
for Enforcement and Compliance