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Investigation  
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February 16, 2017

MEMORANDUM TO: Ronald K. Lorentzen  
Acting Assistant Secretary  
for Enforcement and Compliance

FROM: Gary Taverman  
Associate Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for the Preliminary Determination and  
Affirmative Determination of Critical Circumstances, in Part, in  
the Less Than Fair Value Investigation of Emulsion Styrene-  
Butadiene Rubber from Korea

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## I. SUMMARY

The Department of Commerce (the Department) preliminarily determines that emulsion styrene-butadiene rubber (ESB rubber) from the Republic of Korea (Korea) is, 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 Department also preliminarily determines that critical circumstances exist for Daewoo International Corporation (Daewoo) and Kumho Petrochemical Co, Ltd (Kumho)). The Department preliminarily determined that critical circumstances do not exist for LG Chem, Ltd. (LG Chem) and all-other exporters/producers of ESB rubber. The estimated weighted-average dumping margins are shown in the “Preliminary Determination” section of the accompanying *Federal Register* notice.

## II. BACKGROUND

On July 21, 2016, the Department received an antidumping duty (AD) petition covering imports of emulsion styrene-butadiene rubber products from Korea,<sup>1</sup> which was filed in proper form by Lion Elastomers LLC and East West Copolymers (collectively “Petitioners”). The Department initiated this investigation on August 10, 2015.<sup>2</sup>

In the *Initiation Notice*, the Department stated that it intended to select respondents based on U.S. Customs and Border Protection (CBP) data for certain of the Harmonized Tariff Schedule

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<sup>1</sup> See the Petitions for the Imposition of Antidumping Duties on Emulsion Styrene Butadiene Rubber from Brazil, the Republic of Korea, Mexico, and Poland, dated July 21, 2016 (the Petition).

<sup>2</sup> See *Emulsion Styrene-Butadiene Rubber from Brazil, the Republic of Korea, Mexico and Poland: Initiation of Less Than Fair Value Investigations*, 81 FR 55438 (August 19, 2016) (*Initiation Notice*).

of the United States (HTSUS) subheadings listed in the scope of the investigation.<sup>3</sup> Accordingly, on August 10, 2016, the Department released the CBP entry data to all interested parties under an administrative protective order, and requested comments regarding the data and respondent selection.<sup>4</sup> On August 17, 2016, we received comments on behalf of Petitioners regarding the respondent selection process.<sup>5</sup> On September 7, 2016, the Department limited the number of respondents selected for individual examination to the two largest publicly identifiable producers/exporters of the merchandise under consideration by volume, Daewoo and LG Chem.<sup>6</sup>

Also in the *Initiation Notice*, the Department notified parties of an opportunity to comment on the appropriate physical characteristics of ESB rubber to be reported in response to the Department's AD questionnaire.<sup>7</sup> On August 30, 2016, Petitioners and various other interested parties in this, and the companion AD investigations for Brazil, Mexico, and Poland, submitted comments to the Department regarding the physical characteristics of the merchandise under consideration to be used for reporting purposes. Between September 9 and 12, 2016, Petitioners and various other interested parties filed rebuttal comments. Based on the comments received, the Department issued a memorandum to interested parties which contained the product characteristics for this and the companion AD investigations.<sup>8</sup>

On September 12, 2016, the U.S. International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of ESB rubber from Korea.<sup>9</sup>

The Department issued its AD questionnaire to Daewoo and LG Chem on September 7, 2016.<sup>10</sup> Daewoo failed to meet the Department's deadline for submission of its Section A response on September 28, 2016, and did not request an extension of the deadline. Between October 2016 and January 2017, LG Chem timely responded to the Department's original and supplemental questionnaires.

On October 5, 2016, the Department selected the next largest publicly identifiable producer/exporter of the subject merchandise, Kumho, as a mandatory respondent.<sup>11</sup>

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<sup>3</sup> See *Initiation Notice*, 81 FR at 55442.

<sup>4</sup> See Memorandum to The File, entitled "U.S. Customs Data for Respondent Selection," dated August 10, 2016 (Customs Data).

<sup>5</sup> See Letter to the Secretary of Commerce from Petitioners, entitled, "Comments on Mandatory Respondent Selection," dated August 17, 2016.

<sup>6</sup> See Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, entitled, "Antidumping Duty Investigation of Emulsion Styrene-Butadiene Rubber from the Republic of Korea: Respondent Selection," dated September 7, 2016.

<sup>7</sup> See *Initiation Notice*, 81 FR at 55439, 55440.

<sup>8</sup> See Memorandum to the File, entitled, "Antidumping Duty Investigations of Emulsion Styrene-Butadiene Rubber from Mexico, Brazil, Poland and the Republic of Korea: Product Characteristics for Sections B-D Questionnaire," dated September 27, 2016.

<sup>9</sup> See *Emulsion Styrene-Butadiene Rubber from Brazil, Korea, Mexico, and Poland*, 81 FR 62762 (September 12, 2016) (ITC Preliminary Affirmative Injury Determination).

<sup>10</sup> See Letters to Daewoo and LGC from Catherine Bertrand, Program Manager, Office V, regarding the AD questionnaire, dated September 7, 2016.

<sup>11</sup> See Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, entitled, "Antidumping Duty Investigation of Emulsion Styrene-Butadiene Rubber from the Republic of Korea: Selection of Additional Mandatory Respondent," dated September 7, 2016.

Accordingly, on October 5, 2016, we issued the AD questionnaire to Kumho.<sup>12</sup> Kumho failed to meet the Department's deadline for submission of its Section A response on October 26, 2016, and did not request an extension of the deadline.

In November 2016, and pursuant to section 733(c)(1)(B) of the Act, and 19 CFR 351.205(f)(1), the Department published in the *Federal Register* a postponement of the preliminary determination until no later than February 16, 2017.<sup>13</sup>

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

### III. PERIOD OF INVESTIGATION

The period of investigation (POI) is July 1, 2015, through June 30, 2016. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition, which was July 2016.<sup>14</sup>

### IV. SCOPE COMMENTS

In accordance with the preamble to the Department's regulations,<sup>15</sup> the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.*, "scope").<sup>16</sup> No interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice*. Therefore, the Department is preliminarily not modifying the scope language as it appeared in the *Initiation Notice*.

### V. DISCUSSION OF THE METHODOLOGY

#### Comparisons to Normal Value

Pursuant to section 773(a) of the Act and 19 CFR 351.414(c)(1) and (d), in order to determine whether LG Chem's sales of subject merchandise were made in the United States at LTFV, the Department compared the export price (EP) and constructed export price (CEP), as appropriate, to the normal value (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), the Department calculates weighted-average dumping margins by comparing weighted-average NVs to weighted-average EPs (or CEPs), *i.e.*, the average-to-average method, unless the Secretary determines that another method is appropriate in a particular situation. In LTFV investigations, the Department examines whether to compare

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<sup>12</sup> See Letter to Kumho from Catherine Bertrand, Program Manager, Office V, regarding the AD questionnaire, dated October 5, 2016.

<sup>13</sup> See *Emulsion Styrene-Butadiene Rubber from Brazil, the Republic of Korea, Mexico, and Poland: Postponement of Preliminary Determination of Sales at Less Than Fair Value Investigations*, 81 FR 85208 (November 25, 2016); see also Letter to the Secretary of Commerce from LG Chem, entitled, "Emulsion Styrene-Butadiene Rubber from Brazil, South Korea, Mexico, and Poland: Request to Extend the Preliminary Determination," dated November 7, 2016.

<sup>14</sup> See 19 CFR 351.204(b)(1).

<sup>15</sup> See *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27323 (May 19, 1997).

<sup>16</sup> See *Initiation Notice*, 81 FR at 55439.

weighted-average NVs with the EPs (or CEPs) of individual sales, *i.e.*, the average-to-transaction method, as an alternative comparison method using an analysis consistent with section 777A(d)(1)(B) of the Act.

In recent investigations, the Department has applied a “differential pricing” analysis for determining whether application of the average-to-transaction method is appropriate in a particular situation pursuant to 19 CFR 351.414(c)(1) and section 777A(d)(1)(B) of the Act.<sup>17</sup> The Department 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. The Department will continue to develop its approach in this area based on comments received in this and other proceedings, and on the Department’s additional experience with addressing the potential masking of dumping that can occur when the Department uses the average-to-average 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 average-to-average 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 reported consolidated customer codes. 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 the Department 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,

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<sup>17</sup> See, e.g., *Xanthan Gum from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013); *Steel Concrete Reinforcing Bar from Mexico: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 79 FR 54967 (September 15, 2014); and *Welded Line Pipe from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 80 FR 61362 (October 13, 2015).

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 accounts 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 average-to-transaction method to all sales as an alternative to the average-to-average 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 of the application of an average-to-transaction method to those sales identified as passing the Cohen's *d* test as an alternative to the average-to-average method, and application of the average-to-average 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 average-to-average 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, the Department examines whether using only the average-to-average method can appropriately account for such differences. In considering this question, the Department 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 average-to-average method only. If the difference between the two calculations is meaningful, then this demonstrates that the average-to-average 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 average-to-average 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 average-to-average 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.

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

For LG Chem, based on the results of the differential pricing analysis, the Department preliminarily finds that 93.48 percent of the value of U.S. sales pass the Cohen's *d* test,<sup>18</sup> and confirms the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods. Further, the Department preliminarily determines that the average-to-average method cannot account for such differences because there is a 25 percent relative change between the weighted-average dumping margin calculated using the average-to-average method and the weighted-average dumping calculated using an alternative comparison method based on applying the average-to-transaction method to all U.S. sales. Thus, for this preliminary determination, the Department is applying the average-to-transaction method to all U.S. sales to calculate the weighted-average dumping margin for LG Chem.

## **VI. DATE OF SALE**

Section 351.401(i) of the Department's regulations states that, in identifying the date of sale of the merchandise under consideration or foreign like product, the Department normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. Additionally, the Department 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>19</sup>

LG Chem reported the date of invoice as the date of sale for all home market sales.<sup>20</sup> LG Chem reported the date of shipment as the date of sale for all U.S. sales.<sup>21</sup> For its home market and U.S. sales, LG Chem reported that material terms of sale can change up to the point of invoice date.<sup>22</sup> Accordingly, we used the date of invoice as the date of sale for purposes of this preliminary determination.

## **VII. PRODUCT COMPARISONS**

In accordance with section 771(16) of the Act, we considered all products produced and sold by LG Chem in Korea during the POI that fit the description in the "Scope of Investigation" section of the accompanying *Federal Register* notice to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We compared U.S. sales to sales made in the home market, where appropriate. Where there were no sales of identical merchandise in the home 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 prime versus non-prime merchandise and the physical characteristic reported by LG Chem: IISRP Grade. For LG

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<sup>18</sup> See the Memorandum to the File, entitled, "Analysis for the Preliminary Determination of the Less Than Fair Value Investigation of Emulsion Styrene-Butadiene Rubber from Korea," dated concurrently with this memorandum (LG Chem Preliminary Analysis Memorandum) at 2-3.

<sup>19</sup> *Id.*

<sup>20</sup> Letter to the Secretary of Commerce from LG Chem, entitled, "LG Chem's Supplemental Section B Response," dated December 1, 2016 (LG Chem's Supp. SBQR) at 12-14.

<sup>21</sup> See Letter to the Secretary of Commerce from LG Chem, entitled, "LG Chem's Supplemental Section C Response," dated December 15, 2016 (LG Chem's Supp. SCQR) at 4-7.

<sup>22</sup> *Id.*; LG Chem's Supp. SBQR at 12-14.

Chem's sales of ESB rubber in the United States, the reported control number (CONNUM) identifies the characteristics of ESB rubber, as exported by LG Chem.

## **VIII. EXPORT PRICE AND CONSTRUCTED EXPORT PRICE**

In accordance with section 772(a) of the Act, we calculated EP for certain of LG Chem's U.S. sales where the subject merchandise was first sold to an unaffiliated purchaser in the United States prior to importation, and CEP methodology was not otherwise warranted based on the facts of the record. In accordance with section 772(b) of the Act, for the remainder of LG Chem's U.S. sales, we used CEP because the merchandise under consideration was sold in the United States by U.S. sellers affiliated with LG Chem, and EP, as defined by section 772(a) of the Act, was not otherwise warranted.

For LG Chem's EP sales, the Department calculated EP based on a packed price to the first unaffiliated purchaser in the United States. The Department made adjustments for credit expenses, other direct selling expenses, indirect selling expenses incurred in the country of manufacture, and inventory carrying costs in the country of manufacture, as appropriate. The Department also made deductions for movement expenses, in accordance with section 772(c)(2)(A) of the Act; these expenses included, where appropriate, foreign inland freight, foreign brokerage and handling, U.S. brokerage and handling, international freight, marine insurance, and U.S. inland freight.<sup>23</sup>

In accordance with section 772(b) of the Act, CEP is the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter. For purposes of this investigation, LG Chem classified some of its sales of ESB rubber to the United States as CEP sales. LG Chem reported that it sold the merchandise under consideration to its affiliated U.S. importer, LG Chem America, Inc. (LGCAI).<sup>24</sup> Further, the Department concluded that for these sales, EP was not otherwise warranted. The Department calculated CEP based on packed, delivered prices to unaffiliated purchasers in the United States.

The Department adjusted these prices for movement expenses, including foreign inland freight, foreign brokerage and handling, U.S. brokerage and handling, international freight, marine insurance, warehousing, and U.S. inland freight, in accordance with section 772(c)(2)(A) of the Act. In accordance with section 772(d)(1) of the Act, the Department also deducted selling expenses associated with economic activities occurring in the United States, which includes direct selling expenses (credit expenses, advertising expenses, and other direct selling expenses) and indirect selling expenses (inventory carrying costs and other indirect selling expenses). In accordance with section 772(f) of the Act, we calculated the CEP profit rate using the expenses

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<sup>23</sup> See LG Chem Preliminary Analysis Memorandum; We note that the Department did not make a duty drawback adjustment for LG Chem under section 772(c)(1)(B) of the Act for this preliminary determination because the record lacked the information necessary to analyze LG Chem's eligibility for such an adjustment. However, we have requested additional information from LG Chem that we intend to consider for the final determination.

<sup>24</sup> See Letter to the Secretary of Commerce from LG Chem, entitled, "LG Chem's Section A Response," dated October 6, 2016 (LG Chem's SAQR) at 6.

incurred by LG Chem on its sales of subject merchandise in the United States and the profit associated with those sales.<sup>25</sup>

## IX. NORMAL VALUE

### A) *Home Market Viability*

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, we normally compare 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.

In this investigation, we determined that the aggregate volume of home market sales of the foreign like product for LG Chem was greater than five percent of the aggregate volume of its U.S. sales of merchandise under consideration. Therefore, we used home market sales as the basis for NV for LG Chem, in accordance with section 773(a)(1)(B) of the Act.

### B) *Level of Trade*

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, the Department 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>26</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>27</sup> In order to determine whether the comparison market sales are at different stages in the marketing process than the U.S. sales, we examine 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 773(a)(1)(B)(i) of the Act, in identifying LOTs for EP and comparison market sales (*i.e.*, NV based on either home market or third country prices),<sup>28</sup> 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>29</sup>

When the Department 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, the Department may compare the U.S. sale to sales at

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<sup>25</sup> See LG Chem Preliminary Analysis Memorandum.

<sup>26</sup> See 19 CFR 351.412(c)(2).

<sup>27</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) and accompanying Issues and Decision Memorandum at Comment 7 (*OJ from Brazil*).

<sup>28</sup> Where NV is based on CV, we determine the NV LOT based on the LOT of the sales from which we derive selling, general and administrative expenses, and profit for CV, where possible. See 19 CFR 351.412(c)(1).

<sup>29</sup> See *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1314-16 (Fed. Cir. 2001).

a different LOT in the comparison market. In comparing EP or CEP 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 (*i.e.*, no LOT adjustment is possible), the Department will grant a CEP offset, as provided in section 773(a)(7)(B) of the Act.<sup>30</sup>

In this investigation, we obtained information from LG Chem regarding the marketing stages involved in making reported home market and U.S. sales, including a description of the selling activities performed for each channel of distribution.<sup>31</sup> Our LOT findings are summarized below.

In the home market, LG Chem reported that all of its sales were through two channels of distribution (*i.e.*, to unaffiliated end users or to unaffiliated retailers).<sup>32</sup> According to LG Chem, there was no difference in either the sales process or its selling functions for sales made through either channel.<sup>33</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. Based on these selling function categories, we find that LG Chem performed sales and marketing and freight and delivery services for its home market sales, but did not perform inventory maintenance and warehousing or warranty and technical support services. Because we find that there were no significant differences in selling activities performed by LG Chem to sell to its home market customers, we preliminarily determine that there is one LOT in the home market for LG Chem.<sup>34</sup>

With respect to the U.S. market, LG Chem made EP and CEP sales. For EP sales, LG Chem sold merchandise through one channel of distribution, sales directly to unaffiliated U.S. distributors and end-users.<sup>35</sup> For CEP sales, LG Chem sold the merchandise through two channels of distribution: 1) LG Chem sold merchandise to its U.S. affiliate, LGCAI, who then warehoused the merchandise before selling it to unaffiliated end users; 2) LG Chem shipped merchandise directly from Korea to unaffiliated U.S. customers and LGCAI paid entry fees and brokerage and handling associated with the sale and issued the accompanying invoices to unaffiliated end users or distributors.<sup>36</sup>

For its EP sales, LG Chem reported that it performed the following selling functions: strategic/economic planning, sales forecasting, marketing, packing, inventory maintenance, order input/processing, sales services, and freight and delivery.<sup>37</sup> For both channels of its CEP sales,

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<sup>30</sup> See, *e.g.*, *OJ from Brazil* at Comment 7.

<sup>31</sup> See LG Chem's SAQR at 11-23 and Exhibits A-12, A-13, and A-14; Letter to the Secretary of Commerce from LG Chem, entitled, "LG Chem's Supplemental Section A Response," dated November 17, 2016 (LG Chem's Supp. SAQR) at 26-28.

<sup>32</sup> See LG Chem's SAQR at 12.

<sup>33</sup> *Id.* at Exhibit A-14.

<sup>34</sup> See, *e.g.*, LG Chem's SAQR at 12 and Exhibit A-14.

<sup>35</sup> *Id.* at 12

<sup>36</sup> *Id.*

<sup>37</sup> See LG Chem's Supp. SAQR at Exhibit SA-13.

LG Chem reported that it performed the same selling functions as its EP sales, but at the same or a lower level of intensity in comparison to its EP sales.<sup>38</sup> Because the only difference in LG Chem's selling functions exists between EP and CEP sales and there is no difference in LG Chem's selling functions between the two CEP channels of distribution, the Department preliminarily finds that there is a single LOT for EP sales and a single LOT for CEP sales in the U.S. market.

The Department considers the role played by LG Chem's affiliate, LGCAI, to be relevant in its decision concerning LOT. In prior cases, the Department found that evidence showing that the U.S. affiliate performs significant selling activities in the U.S. market supports the conclusion that the foreign producer's sales in the comparison market are made at a more advanced LOT than CEP sales.<sup>39</sup> The Department's reasoning, as explained in past cases, is that if the U.S. affiliate performs significant selling activities in the U.S. market that are handled by the foreign producer in the comparison market, then the home market LOT is necessarily more advanced than the CEP LOT, which excludes the activities performed by the U.S. affiliate from the price, pursuant to section 772(d) of the Act.<sup>40</sup>

The Department compared the U.S. LOTs to the home market LOT, and we preliminarily find that the selling functions performed for the U.S. and home market customers differ significantly. The Department preliminarily finds that sales to the home market during the POI were made at a more advanced LOT than sales in the U.S. LOT. We did not make a LOT adjustment under 19 CFR 351.412(e), because LG Chem did not sell the merchandise under consideration at a common LOT in the home market and U.S. markets and, thus, we were unable to identify a pattern of consistent price differences attributable to differences in LOTs.

With respect to the CEP LOT, the selling functions LG Chem performed for its home market customers are at a more advanced stage of distribution than those performed for its U.S. customers. Specifically, LG Chem reported that LGCAI performs significant selling activities in the U.S. market for its CEP sales that LG Chem handles in the home market.<sup>41</sup> Therefore, based on the totality of the facts and circumstances, we preliminarily determine that home market sales during the POI were made at a different LOT than CEP sales. Because LG Chem's home market LOT is at a more advanced stage of distribution than its CEP LOT, and no LOT adjustment is possible, a CEP offset is warranted. Accordingly, we granted a CEP offset, pursuant to section 773(a)(7)(B) of the Act and 19 CFR 351.412(f).

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<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., *Certain Corrosion-Resistant Steel Flat Products from Italy*, 81 FR 69 (January 4, 2016) and accompanying Preliminary Decision Memorandum at 16-17 (unchanged in *Certain Corrosion-Resistant Steel Flat Products from Italy; Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 FR 35320 (June 2, 2016)); *Stainless Steel Sheet and Strip in Coils from Germany; Notice of Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 45024, 45029 (August 6, 2006) (finding that in the home market the respondent made sales "further down the chain of distribution by providing certain downstream selling functions that are normally performed by the affiliated resellers in the U.S. market") (unchanged in *Stainless Steel Sheet and Strip in Coils from Germany; Notice of Final Results of Antidumping Duty Administrative Review*, 71 FR 74897 (December 13, 2006)).

<sup>40</sup> See *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 47551 (September 16, 2009) and accompanying Issues and Decision Memorandum at Comment 8.

<sup>41</sup> *Id.*

### C) *Cost of Production (COP) Analysis*

Section 773(b)(2)(A)(ii) of the Act controls all determinations in which the complete initial questionnaire has not been issued as of August 6, 2015. It requires the Department to request CV and COP information from respondent companies in all AD proceedings.<sup>42</sup> Accordingly, the Department requested this information from LG Chem in this investigation. We examined their cost data and determined that our quarterly cost methodology is 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, we calculated COP based on the sum of costs of materials and fabrication for the foreign like product, plus amounts for general and administrative expenses and interest expenses.

We relied on the COP data submitted by LG Chem except as follows:

- We adjusted LG Chem's reported general and administrative expense rate so as to include the following non-operational expenses: 1) losses on the impairment of tangible assets, 2) losses on impairment of intangible assets, 3) losses on impairment of assets under construction, 4) losses on disaster, and 5) other non-operating losses.<sup>43</sup>

#### 2. Test of Comparison Market Sales Prices

On a product-specific basis, pursuant to section 773(b) of the Act, we compared the adjusted weighted-average COPs to the home 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, discounts and rebates, where applicable, movement charges, actual direct and indirect selling expenses, and packing expenses.

#### 3. Results of the COP Test

In determining whether to disregard home 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 because: 1) they were made

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<sup>42</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, 46794-95 (August 6, 2015) (*Applicability Notice*).

<sup>43</sup> See Memorandum to Neal M. Halper, Director, Office of Accounting, from Laurens van Houten, Senior Accountant, entitled, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination – LG Chem, Ltd.," dated February 16, 2016.

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, for certain products, more than 20 percent of LG Chem’s home 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, excluded these sales and used the remaining sales, if any, as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

#### *D) Calculation of NV Based on Comparison-Market Prices*

For those comparison products for which there were an appropriate number of sales at prices above the COP for LG Chem, we based NV on comparison market prices. We calculated NV based on delivered prices to unaffiliated customers. We also made deduction from the starting price for movement expenses, including inland freight under section 773(a)(6)(B)(ii) of the Act.

We deducted comparison-market packing costs and added U.S. packing costs, in accordance with section 773(a)(6)(A) and (B) of the Act. For comparisons to EP sales, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale. Specifically, we deducted direct selling expenses incurred for home market sales, *i.e.*, credit expenses and other direct selling expenses, and added U.S. direct selling expenses, *i.e.*, credit expenses and other direct selling expenses.<sup>44</sup>

When comparing U.S. sales with comparison-market sales of similar, but not identical, merchandise, the Department also made adjustments for differences in merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. The Department based this adjustment on the difference in the variable cost of manufacturing for the foreign like products and merchandise under consideration.<sup>45</sup>

### **X. APPLICATION OF FACTS AVAILABLE AND USE OF ADVERSE INFERENCE**

As noted above, Daewoo and Kumho were selected as mandatory respondents. Both companies received the Department’s questionnaire and informed the Department that they would not participate in this investigation. For the reasons stated below, we determine that the use of facts otherwise available with an adverse inference is appropriate for the preliminary determination with respect to Daewoo and Kumho.

#### *A) Application of Facts Available*

Sections 776(a)(1) and 776(a)(2)(A)-(D) of the Act provide that, if necessary information is not available on the record, or if an interested party: (1) withholds information requested by the Department; (2) fails to provide such information by the deadlines for submission of the information, or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act; (3) significantly impedes a proceeding; or (4) provides such information but the

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<sup>44</sup> See LG Chem Preliminary Analysis Memorandum at 6-7.

<sup>45</sup> See 19 CFR 351.411(b).

information cannot be verified as provided in section 782(i) of the Act, the Department shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 782(c)(1) of the Act states that the Department shall consider the ability of an interested party to provide information upon a prompt notification by that party that it is unable to submit the information in the form and manner required, and that party also provides a full explanation for the difficulty and suggests an alternative form in which the party is able to provide the information. Section 782(e) of the Act states further that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Daewoo and Kumho did not respond to our original questionnaire or otherwise participate in this investigation. As a result, we preliminarily find that the necessary information is not available on the record of this investigation, that Daewoo and Kumho withheld information the Department requested, that they failed to provide information by the specified deadlines, and that they significantly impeded the proceeding. Moreover, because Daewoo and Kumho failed to provide any information, section 782(e) of the Act is not applicable. Accordingly, pursuant to sections 776(a)(1) and 776(a)(2)(A), (B), and (C) of the Act, we are relying upon facts otherwise available to determine Daewoo's and Kumho's preliminary dumping margins.

#### B) *Use of Adverse Inference*

Section 776(b) of the Act provides that, if the Department finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference adverse to the interests of that party in selecting the facts otherwise available.<sup>46</sup> In doing so, and under the TPEA,<sup>47</sup> the Department is not required to determine, or make any adjustments to, a weighted-average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.<sup>48</sup> In addition, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act (SAA) explains that the Department may employ an adverse inference “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”<sup>49</sup> Furthermore, affirmative evidence of bad faith on the part of a respondent is not required before the Department may

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<sup>46</sup> See 19 CFR 351.308(a); see also *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 70 FR 54023, 54025-26 (September 13, 2005); and *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794-96 (August 30, 2002).

<sup>47</sup> As noted above, on June 29, 2015, the President of the United States signed into law the TPEA, which made numerous amendments to the AD and CVD law, including amendments to sections 776(b) and 776(c) of the Act and the addition of section 776(d) of the Act, as summarized below. See TPEA. The amendments to section 776 of the Act are applicable to all determinations made on or after August 6, 2015. See *Applicability Notice*, 80 FR at 46794-95. Therefore, the amendments apply to this investigation.

<sup>48</sup> See section 776(b)(1)(B) of the Act.

<sup>49</sup> See, SAA, H.R. Doc. 103-316, Vol. 1 (1994) at 870; *Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663, 69664 (December 10, 2007).

make an adverse inference.<sup>50</sup> It is the Department's practice to consider, in employing adverse inferences, the extent to which a party may benefit from its own lack of cooperation.<sup>51</sup>

We preliminarily find that Daewoo and Kumho have not acted to the best of their ability to comply with the Department's request for information. Both companies failed to respond to the Department's questionnaire. The failure of Daewoo and Kumho to participate in this investigation and respond to the Department's questionnaire has precluded the Department from performing the necessary analysis to calculate weighted-average dumping margins for them based on their own data. Accordingly, the Department concludes that Daewoo and Kumho failed to cooperate to the best of their ability to comply with a request for information by the Department. Based on the above, in accordance with section 776(b) of the Act and 19 CFR 351.308(a), the Department preliminarily determines to use an adverse inference when selecting from among the facts otherwise available.<sup>52</sup>

### C) *Selection and Corroboration of the AFA Rate*

Section 776(b) of the Act states that the Department, when employing an adverse inference, may rely upon information derived from the petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record.<sup>53</sup> In selecting a rate based on adverse facts available (AFA), the Department selects a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.<sup>54</sup> The Department's practice is to select, as an AFA rate, the higher of: (1) the highest dumping margin alleged in the petition, or (2) the highest calculated rate of any respondent in the investigation.<sup>55</sup>

When using facts otherwise available, section 776(c) of the Act provides that, where the Department relies on secondary information (such as the petition) rather than information obtained in the course of an investigation, it must corroborate, to the extent practicable, information from independent sources that are reasonably at its disposal. Secondary information is defined as information derived from the petition that gave rise to the investigation or review,

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<sup>50</sup> See, e.g., *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003); *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); *Preamble*, 62 FR at 27340.

<sup>51</sup> See, e.g., *Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances*, 78 FR 79670 (December 31, 2013), and accompanying Issues and Decision Memorandum at 4, unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 79 FR 14476 (March 14, 2014).

<sup>52</sup> See, e.g., *Non-Oriented Electrical Steel from Germany, Japan, and Sweden: Preliminary Determinations of Sales at Less Than Fair Value, and Preliminary Affirmative Determinations of Critical Circumstances, in Part*, 79 FR 29423 (May 22, 2014), and accompanying Preliminary Decision Memorandum at 7-11, unchanged in *Non-Oriented Electrical Steel from Germany, Japan, the People's Republic of China, and Sweden: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determinations of Critical Circumstances, in Part*, 79 FR 61609 (October 14, 2014); see also *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR at 42985, 42986 (July 12, 2000) (where the Department applied total AFA when the respondent failed to respond to the antidumping questionnaire).

<sup>53</sup> See also 19 CFR 351.308(c).

<sup>54</sup> See SAA, at 870.

<sup>55</sup> See *Welded Stainless Pressure Pipe from Thailand: Final Determination of Sales at Less Than Fair Value*, 79 FR 31093 (May 30, 2014) and accompanying Issues and Decision Memorandum at Comment 3.

the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.<sup>56</sup> The SAA clarifies that “corroborate” means that the Department will satisfy itself that the secondary information to be used has probative value.<sup>57</sup> To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used.<sup>58</sup> Further, under the TPEA, the Department is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the dumping margin reflects an “alleged commercial reality” of the interested party.<sup>59</sup>

With respect to the investigation covering ESB rubber from Korea, the highest dumping margin calculated for merchandise under consideration from Korea in the petition is 44.30 percent.<sup>60</sup> In order to determine the probative value of the dumping margin alleged in the petition for assigning an AFA rate, we examined the information on the record. When we compared the petition dumping margin of 44.30 percent to the transaction-specific dumping margins for the mandatory respondent, LG Chem, we found product-specific margins at or above the petition rate<sup>61</sup> and, as a consequence, we find that the rate alleged in the petition, as noted in the *Initiation Notice*, is within the range of transaction-specific margins computed for this preliminary determination.

In sum, the Department corroborated the AFA rate of 44.30 percent to the extent practicable within the meaning of section 776(c) of the Act, because the rate is relevant to the uncooperative respondents. As the 44.30 percent rate is both reliable and relevant, we determine that it has probative value, and thus, it has been corroborated to the extent practicable, pursuant to section 776(c) of the Act. Thus, we preliminarily assigned this AFA rate to the subject merchandise from Daewoo and Kumho.

## **XI. PRELIMINARY AFFIRMATIVE DETERMINATION OF CRITICAL CIRCUMSTANCES, IN PART**

On January 25, 2017, Petitioners alleged that critical circumstances exist with respect to imports of the subject merchandise, pursuant to section 733(e)(1) of the Act and 19 CFR 351.206(c)(1).<sup>62</sup> In accordance with 19 CFR 351.206(c)(2)(i), when a critical circumstances allegation is submitted more than 20 days before the scheduled date of the preliminary determination, the Department must issue a preliminary finding of whether there is a reasonable basis to believe or suspect that critical circumstances exist no later than the date of the preliminary determination.

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<sup>56</sup> See SAA, at 870.

<sup>57</sup> *Id.*; see also 19 CFR 351.308(d).

<sup>58</sup> See, e.g., *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part*, 62 FR 11825 (March 13, 1997).

<sup>59</sup> See sections 776(d)(3)(A) and (B) of the Act.

<sup>60</sup> See *Initiation Notice*, 81 FR at 27094; see also AD Investigation Initiation Checklist: Certain Carbon and Alloy Steel Cut-Length Plate from Japan (April 28, 2016).

<sup>61</sup> See LG Chem Preliminary Analysis Memorandum at Attachment 2.

<sup>62</sup> See Critical Circumstances Allegation.

## A) *Legal Framework*

Section 733(e)(1) of the Act provides that the Department, upon receipt of a timely allegation of critical circumstances, will determine whether critical circumstances exist in a LTFV investigation if there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales; and (B) there have been “massive imports” of the subject merchandise over a relatively short period. Further, 19 CFR 351.206(h)(1) provides that, in determining whether imports of the subject merchandise have been “massive,” the Department normally will examine: (i) the volume and value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports.

In addition, 19 CFR 351.206(h)(2) provides that, in determining whether imports of the subject merchandise have been “massive,” the Department normally will examine: (i) the volume and value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports. In addition, 19 CFR 351.206(h)(2) provides that, “{i}n general, unless the imports during the ‘relatively short period’ have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration, the Secretary will not consider the imports “massive.” Under 19 CFR 351.206(i), the Department defines “relatively short period” generally as the period starting on the date the proceeding begins (*i.e.*, the date the petition is filed) and ending at least three months later.<sup>63</sup> This section of the regulations further provides that, if the Department “finds that importers, or exporters or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely,” then the Department may consider a period of not less than three months from that earlier time.<sup>64</sup>

## B) *Critical Circumstances Allegation*

Petitioners allege that section 733(e)(1)(A) of the Act is met by virtue of the dumping margins alleged in the Petition, which could be as high as 44.30 percent on a transaction-specific basis.<sup>65</sup> Thus, Petitioners assert that certain dumping margins alleged in the Petition, which were up to 44.30 percent, exceed the 15 percent threshold used by the Department to impute knowledge of dumping in CEP transactions and the 25 percent threshold in EP transactions.<sup>66</sup> Petitioners further argue that importers of Korean ESB rubber have been on notice that dumped imports are likely to cause injury since the ITC’s September 12, 2016, preliminary affirmative injury finding.<sup>67</sup>

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<sup>63</sup> See 19 CFR 351.206(i); see also *Change in Policy Regarding Timing of Issuance of Critical Circumstances Determinations*, Policy Bulletin 98.4, 63 FR 55364 (Oct. 15, 1998) (“Commerce has traditionally compared the three-month period immediately after initiation with the three-month period immediately preceding initiation to determine whether there has been at least a 15 percent increase in imports of-the subject merchandise”).

<sup>64</sup> See 19 CFR 351.206(i).

<sup>65</sup> See Critical Circumstances Allegation at 3.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* citing ITC Preliminary Affirmative Injury Determination.

Petitioners argue that, regarding section 733(e)(1)(B), which examines whether there have been “massive imports of the subject merchandise over a relatively short period,” the Department should use the minimum three-month base and comparison periods for shipment data of a base period from May 2016-July 2016 and a comparison period from August 2016-October 2016, as provided under 19 CFR 351.206(i) when considering the date on which the petition was filed, July 21, 2016.<sup>68</sup> Petitioners allege that import statistics released by the ITC indicate shipments of merchandise under consideration during the comparison period increased significantly in terms of volume (40 percent) between the base period and the comparison period, and as a result, exceeded the threshold for “massive” imports from Korea of ESB rubber, as provided under 19 FR 351.206(h) and (i).<sup>69</sup>

LG Chem did not submit any rebuttal comments to Petitioners’ critical circumstances allegation.

### C) *Analysis*

The Department’s normal practice in determining whether critical circumstances exist pursuant to the statutory criteria under section 733(e) of the Act has been to examine evidence available to the Department, such as: (1) the evidence presented in Petitioners’ critical circumstances allegation; (2) import statistics released by the ITC; and (3) shipment information submitted to the Department by the respondents selected for individual examination.<sup>70</sup>

In determining whether a history of dumping and material injury exists, the Department generally considers current and previous AD orders on subject merchandise from the country in question in the United States and current orders in any other country on imports of subject merchandise.<sup>71</sup> Petitioners identify no such proceeding with respect to Korean-origin ESB rubber, nor are we aware of an AD order in any country on ESB rubber from Korea. Thus, we preliminarily find that there is not a history of injurious dumping of ESB rubber from Korea and the criteria are not met.

We must next determine whether the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at LTFV, and that there was likely to be material injury by reason of such sales. When evaluating whether such imputed knowledge exists, the Department normally considers margins of 25 percent or more for EP sales or 15 percent or more for CEP sales sufficient to meet the quantitative threshold to impute knowledge of dumping.<sup>72</sup> For purposes of this investigation, the Department preliminarily determines that the knowledge standard is not met because preliminary

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<sup>68</sup> *Id.*, at 5.

<sup>69</sup> *Id.*

<sup>70</sup> See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China*, 73 FR 31970, 31972-73 (June 5, 2008) (*Carbon Steel Pipe Final Determination*); see also *Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances: Small Diameter Graphite Electrodes from the People’s Republic of China*, 74 FR 2049, 2052-53 (January 14, 2009) (*SDGE Final Determination*).

<sup>71</sup> *Id.*

<sup>72</sup> See, e.g., *Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 FR 17416 (March 26, 2012).

margins are less than 25 percent for EP sales and less than 15 percent for CEP sales.<sup>73</sup> Accordingly, for LG Chem, because the statutory criteria of section 733(e)(1)(A) of the Act has not been satisfied, we did not examine whether imports from LG Chem were massive over a relatively short period, pursuant to section 733(e)(1)(B) of the Act.

For the companies subject to the “all others” rate, it is the Department’s normal practice to conduct its critical circumstances analysis for these companies based on the experience of investigated companies.<sup>74</sup> Accordingly, we find that the critical circumstances determination for LG Chem should also be applied to all others, given that LG Chem is the only mandatory respondent for this investigation not subject to an AFA rate. Because we have preliminarily determined that there are no critical circumstances for LG Chem we are also preliminarily determining that there are no critical circumstances for the companies subject to the “all others” rate.

Because the two other mandatory respondents in this investigation, Daewoo and Kumho, were uncooperative, we are assigning, as AFA, a rate of 44.30 percent, the highest margin in the Petition and corroborated to the extent practicable, as noted above. Because the preliminary dumping margins exceed the threshold sufficient to impute knowledge of dumping, these margins provide a sufficient basis for imputing knowledge of sales of subject merchandise at LTFV to the importers.

In determining whether an importer knew or should have known that there was likely to be material injury caused by reason of such imports, the Department normally will look to the preliminary injury determination of the ITC.<sup>75</sup> If the ITC finds a reasonable indication of material injury to the relevant U.S. industry, the Department will determine that a reasonable basis exists to impute importer knowledge that material injury is likely by reason of such imports. Here, the ITC found that there is a “reasonable indication” of material injury to the domestic industry by reason of the imported merchandise under consideration.<sup>76</sup> Therefore, the ITC’s preliminary injury determination in this investigation is sufficient to impute knowledge.

In determining whether imports of the subject merchandise were “massive,” the Department normally will examine the volume and value of the imports, seasonal trends, and the share of domestic consumption accounted for by the imports.<sup>77</sup> In determining whether there are “massive imports” over a “relatively short period,” pursuant to section 733(e)(1)(B) of the Act, the Department normally compares the import volumes of the subject merchandise for at least three

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<sup>73</sup> See “Preliminary Determination” section of the accompanying Federal Register notice.

<sup>74</sup> See, e.g., *Sodium Metal from France: Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances*, 73 FR 62252, 62254 (October 20, 2008); *Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 FR 17413, 17415-416 (March 26, 2012).

<sup>75</sup> See, e.g., *Carbon and Alloy Steel Wire Rod From Germany, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Preliminary Determination of Critical Circumstances*, 67 FR 6224, 6225 (February 11, 2002), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Moldova*, 67 FR 55790; *Affirmative Preliminary Determination of Critical Circumstances: Magnesium Metal from the People's Republic of China*, 70 FR 5606, 5607 (February 3, 2005), unchanged in *Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Magnesium Metal From the People's Republic of China*, 70 FR 9037.

<sup>76</sup> See ITC Preliminary Affirmative Injury Determination at 62763.

<sup>77</sup> See 19 CFR 351.206(h)(1).

months immediately preceding the filing of the Petition (*i.e.*, the “base period”) to a comparable period of at least three months following the filing of the Petition (*i.e.*, the “comparison period”). If the Department finds that importers, or exporters or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, the Department may consider a period of not less than three months from that earlier time.<sup>78</sup> Imports normally will be considered massive when imports during the comparison period have increased by 15 percent or more compared to imports during the base period.<sup>79</sup>

It is the Department’s practice to conduct its massive imports analysis based on the experience of investigated companies, using the reported monthly shipment data for the base and comparison periods.<sup>80</sup> However, as noted above, Daewoo and Kumho did not respond to any of our requests for information.<sup>81</sup> Therefore, the Department preliminarily determines that the use of facts otherwise available with an adverse inference is warranted. Accordingly, we preliminarily find that there were massive imports of merchandise from Daewoo and Kumho, pursuant to our practice. As such, we have determined that critical circumstances exist for Daewoo and Kumho. We will make a final determination concerning critical circumstance for ESB rubber from Korea when we issue our final determination of sales at LTFV for this investigation.

## **XII. CURRENCY CONVERSION**

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

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<sup>78</sup> See 19 CFR 351.206(i).

<sup>79</sup> *Id.*

<sup>80</sup> See, *e.g.*, *Carbon Steel Pipe Final Determination*, 73 FR at 31972-73; *SDGE Final Determination*, 74 FR at 2052-53.

<sup>81</sup> See the “Application of Facts Available and Adverse Facts Available” section of this memorandum.

### **XIII. CONCLUSION**

We recommend applying the above methodology for this preliminary determination.



\_\_\_\_\_  
Agree

\_\_\_\_\_  
Disagree

2/16/2017

**X** *Ronald K. Lorentzen*

Signed by: RONALD LORENTZEN

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Ronald K. Lorentzen  
Acting Assistant Secretary  
for Enforcement and Compliance