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Investigation  
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MEMORANDUM TO: 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

FROM: James P. Maeder  
Senior Director  
performing the duties of Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for the Preliminary Determination in the  
Less-Than-Fair-Value Investigation of Silicon Metal from  
Australia

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## I. SUMMARY

The Department of Commerce (the Department) preliminarily determines that silicon metal from Australia 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 estimated weighted-average dumping margin is shown in the “Preliminary Determination” section of the accompanying *Federal Register* notice.

## II. BACKGROUND

On March 8, 2017, the Department received an antidumping duty (AD) petition covering imports of silicon metal from Australia,<sup>1</sup> which was filed in proper form by Globe Specialty Metals, Inc. (the petitioner). The Department initiated this investigation on March 28, 2017.<sup>2</sup>

In the *Initiation Notice*, the Department notified the public that only one company from Australia, Simcoa Operations Pty Ltd. (Simcoa), was identified in the Petition.<sup>3</sup> The petitioner provided independent third party sources as support and the Department knew of no additional

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<sup>1</sup> See Silicon Metal from Australia, Brazil, Kazakhstan, and Norway; Antidumping and Countervailing Duty Petition, dated March 8, 2017 (the Petition).

<sup>2</sup> See *Silicon Metal from Australia, Brazil, and Norway: Initiation of Less-Than-Fair-Value Investigations*, 82 FR 16352 (April 4, 2017) (*Initiation Notice*).

<sup>3</sup> See *Initiation Notice*, 82 FR at 16355.



producers/exporters of subject merchandise under consideration.<sup>4</sup> Accordingly, the Department stated that its intent was to examine the one Australian producer/exporter identified in the Petition, Simcoa. In April 2017, we issued the AD questionnaire to Simcoa.<sup>5</sup>

Also in the *Initiation Notice*, the Department notified parties of an opportunity to comment on the scope of the investigation, as well as the appropriate physical characteristics of silicon metal to be reported in response to the Department's AD questionnaire.<sup>6</sup> In April 2017, Elkem AS (Elkem), a Norwegian producer of silicon metal, submitted comments on the scope of the investigation,<sup>7</sup> and the petitioner and Rima Industrial S/A (Rima), a Brazilian producer of silicon metal, submitted rebuttal scope comments.<sup>8</sup> In the same month, these parties also submitted comments regarding the physical characteristics of the merchandise under consideration to be used for reporting purposes,<sup>9</sup> and the petitioner, Elkem, and Simcoa filed rebuttal comments.<sup>10</sup>

On April 27, 2017, 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 silicon metal from Australia.<sup>11</sup>

In May 2017, Simcoa submitted a timely response to section A of the Department's AD questionnaire, *i.e.*, the section relating to general information.<sup>12</sup> In June 2017, Simcoa responded to sections B, C, and D of the Department's AD questionnaire, *i.e.*, the sections relating to home market sales, U.S. sales, and cost of production (COP)/constructed value (CV), respectively.<sup>13</sup> From June 2017 through September 2017, we issued supplemental questionnaires to Simcoa. We received responses to these supplemental questionnaires during the same time period.<sup>14</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> See Department's Antidumping Duty Questionnaire, dated April 28, 2017 (AD Questionnaire).

<sup>6</sup> See *Initiation Notice*, 82 FR at 16352.

<sup>7</sup> See Elkem Letter re: Comments on Scope of the Investigation, dated April 17, 2017.

<sup>8</sup> See the petitioner's Letter re: Rebuttal to Elkem Comments on Scope, dated April 27, 2017 (Petitioner Rebuttal Comments), and Rima's Letter re: Rebuttal Comments on Scope, dated April 27, 2017 (Rima Rebuttal Comments).

<sup>9</sup> See the petitioner's Letter re: Comments on Product Characteristics, dated April 17, 2017; Elkem's Letter re: Comments on Product Characteristics, dated April 17, 2017; and Rima's Letter re: Comments on Product Characteristics, dated April 17, 2017.

<sup>10</sup> See the petitioner's Letter re: Rebuttal Comments on Product Characteristics, dated April 27, 2017; Elkem's Letter re: Rebuttal Comments on Product Characteristics, dated April 27, 2017; and Simcoa's Letter re: Rebuttal Comments on Product Characteristics, dated April 27, 2017.

<sup>11</sup> See *Silicon Metal from Australia, Brazil, Kazakhstan, and Norway*, 82 FR 19383 (April 27, 2017); see also Memorandum, "Placing the International Trade Commission Preliminary Report on the record for the Anti-Dumping Investigations of Silicon Metal from Australia, Brazil, and Norway and the Countervailing Duty Investigations of Silicon Metal from Australia, Brazil, and Kazakhstan," dated June 7, 2017 (ITC Preliminary Affirmative Injury Determination).

<sup>12</sup> See Simcoa's May 19, 2017, Section A Questionnaire Response (AQR).

<sup>13</sup> See Simcoa's June 22, 2017, Section B Questionnaire Response (BQR); Simcoa's June 22, 2017, Section C Questionnaire Response (CQR); and Simcoa's June 25, 2017, Section D Questionnaire Response (DQR).

<sup>14</sup> See Simcoa's June 23, 2017, Supplemental Section A Questionnaire Response (SAQR); Simcoa's July 28, 2017, Supplemental Section D Questionnaire Response (SDQR); Simcoa's August 4, 2017, Supplemental Section B and C Questionnaire Response (SBCQR); Simcoa's September 1, 2017, Second Supplemental Questionnaire Response 1-8 (2SQR-part 1); and Simcoa's September 14, 2017, Second Supplemental Questionnaire Response 9-11 (2SQR-part 2).

Also, in June 2017, the Department preliminarily found that a product produced by Elkem known as “Silgrain®” is within the scope of the investigation.<sup>15</sup> In July 2017, Elkem filed comments on the Scope Preliminary Decision Memorandum, and in August 2017, the petitioner and Rima filed rebuttal comments.<sup>16</sup>

In July 2017, the petitioner requested that the date for the issuance of the preliminary determination in this investigation be extended until 190 days after the date of initiation. Based on the request, the Department published a postponement of the preliminary determination until no later than October 4, 2017.<sup>17</sup>

In September 2017, Simcoa and the petitioner requested that the Department postpone the final determination, and that provisional measures be extended.<sup>18</sup> Also, the petitioner filed a critical circumstances allegation and we requested shipment data from Simcoa to complete our critical circumstances analysis.

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

### III. PERIOD OF INVESTIGATION

The period of investigation (POI) is January 1, 2016, through December 31, 2016. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition, which was March 2017.<sup>19</sup>

### IV. SCOPE COMMENTS

In accordance with the *Preamble* to the Department’s regulations,<sup>20</sup> the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage, *i.e.*, scope, and we stated that all such comments must be filed within 20 calendar days of publication of the *Initiation Notice*.<sup>21</sup> On April 17, 2017, the Department received scope comments from Elkem, requesting

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<sup>15</sup> See Memorandum, “Silicon Metal from Australia, Brazil, Kazakhstan, and Norway: Scope Comments Decision Memorandum for the Preliminary Determinations,” dated June 27, 2017, as corrected in Memorandum, “Clarifying the Comment Deadline and Correcting the Date for the Preliminary Scope Memorandum for the Anti-Dumping Investigations of Silicon Metal from Australia, Brazil, and Norway and the Countervailing Duty Investigations of Silicon Metal from Australia, Brazil, and Kazakhstan,” dated July 24, 2017 (Scope Preliminary Decision Memorandum).

<sup>16</sup> See Elkem’s July 28, 2017 Comments on the Department’s Preliminary Scope Memorandum and Elkem’s August 4, 2017 Resubmission of Public Version of Comments on the Department’s Preliminary Scope Memorandum (Elkem Scope Preliminary Memorandum Comments). See also the petitioner’s August 9, 2017 Rebuttal Comments on the Preliminary Scope Determination (Petitioner Scope Preliminary Memorandum Rebuttal Comments), and Rima’s August 9, 2017 Rebuttal Comments on Scope (Rima Scope Preliminary Memorandum Rebuttal Comments).

<sup>17</sup> See *Silicon Metal from Australia, Brazil, and Norway: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations*, 82 FR 35753 (August 1, 2017).

<sup>18</sup> See Letter from Simcoa, “Silicon Metal from Australia: Request for Postponement of Final Determination,” dated September 13, 2017, and Letter from petitioner, “Silicon Metal from Australia, Brazil, and Norway; Antidumping Investigations; Request for Postponement of Final Determinations,” dated September 12, 2017.

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

<sup>20</sup> See *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997) (*Preamble*).

<sup>21</sup> See *Initiation Notice*, 82 FR at 16352.

an exclusion for a patented product known as “Silgrain®.”<sup>22</sup> On April 27, 2017, the petitioner and Rima submitted rebuttal comments arguing that all silicon metal, including Silgrain®, is covered by the plain language of the scope and that the exclusion request should be denied.<sup>23</sup>

After analyzing these comments, on June 27, 2017, we preliminarily found no basis for determining that Silgrain® is a separate class or kind of merchandise, and we preliminarily found this product within the scope of the investigation.<sup>24</sup> Elkem, the petitioner, and Rima subsequently commented on the Department’s preliminary finding.<sup>25</sup> The Department is currently evaluating these comments and we intend to issue a final ruling prior to the final determination.

In addition to its general comments on Silgrain®, on August 21, 2017, and September 20, 2017, Elkem requested that the Department find certain high-purity silicon metal, sold in both the home and U.S. markets during the POI, outside the scope because the silicon content exceeds the technical definition of covered products, *i.e.*, whether the products have a silicon metal content of at least 99.99 percent.<sup>26</sup> On September 25, 2017, the petitioner objected to this request.<sup>27</sup> We invite interested parties to submit comments on the appropriate calculation methodology for determining the silicon content of out-of-scope products, and, specifically, which impurities should be taken into account in that calculation. Parties wishing to comment on this issue must do so no later than November 6, 2017. Rebuttal comments will be due no later than November 13, 2017.

## **V. 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), in order to determine whether Simcoa’s sales of subject merchandise from Australia to the United States were made at LTFV, the Department compared the constructed export price (CEP), as appropriate, to the normal value (NV), as described in the “Constructed Export Price,” and “Normal Value” sections of this memorandum.

#### *A) Determination of 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 export prices (EPs) (or CEPs), *i.e.*, the average-to-average method, unless the Secretary determines that another method

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<sup>22</sup> See Elkem Letter re: Comments on Scope of the Investigation, dated April 17, 2017 (Elkem Scope Comments).

<sup>23</sup> See Petitioner Rebuttal Comments and Rima Rebuttal Comments.

<sup>24</sup> See Scope Preliminary Decision Memorandum.

<sup>25</sup> See Elkem Scope Preliminary Memorandum Comments, Petitioner Scope Preliminary Memorandum Rebuttal Comments, and Rima Scope Preliminary Memorandum Rebuttal Comments.

<sup>26</sup> See Memorandum, “Placing the Public Versions of Submissions on High-Purity Silicon Metal on the Records of the Less-Than-Fair-Value Investigations of Silicon Metal from Australia, and Brazil and the Countervailing Duty Investigations of Silicon Metal from Australia, Brazil, and Kazakhstan,” dated concurrently with, and hereby adopted by, this notice (Scope Comments Submission).

<sup>27</sup> See Scope Comments Submission.

is appropriate in a particular situation. In LTFV investigations, the Department examines whether to compare 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>28</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 export prices 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>28</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 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 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.<sup>29</sup>

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<sup>29</sup> The Court of Appeals for the Federal Circuit (CAFC) in *Apex Frozen Foods v. United States*, 16-1789 (Fed. Cir. July 12, 2017) recently affirmed much of the Department's differential pricing methodology. We ask interested parties present only arguments on issues which have not already been decided by the CAFC.

## B) Results of the Differential Pricing Analysis

For Simcoa, based on the results of the differential pricing analysis, the Department preliminarily finds that 74.98 percent of the value of its U.S. sales pass the Cohen's *d* test,<sup>30</sup> which confirms the existence of a pattern of prices for comparable merchandise that differ significantly among purchasers, regions or time periods, and supports the consideration of an alternative to the average-to-average method for all sales. Further, the Department preliminarily determines that there is no meaningful difference between the weighted-average dumping margin calculated using the average-to-average method and the weighted-average dumping margin calculated using an alternative comparison method based on applying the average-to-transaction method to all U.S. sales. Accordingly, the Department preliminarily determines that price differences can be taken into account when using the average-to-average method to calculate the weighted-average dumping margin and will preliminarily apply the average-to-average method for all U.S. sales to calculate the weighted-average dumping margin for Simcoa, in accordance with 19 CFR 351.414(c)(1) and (d).

## 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>31</sup>

Simcoa reported the invoice date as the date of sale for all its home market and U.S. sales.<sup>32</sup> However, for certain U.S. sales, the shipment date preceded the invoice date.<sup>33</sup> The Department 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>34</sup> Therefore, we preliminarily used the earlier of the invoice date or the shipment date as the date of sale for those U.S. sales at issue, in accordance with our practice.<sup>35</sup>

## VII. PRODUCT COMPARISONS

In accordance with section 771(16) of the Act, we considered all products produced and sold by the respondent, Simcoa, in Australia during the POI that fit the description in the "Scope of

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<sup>30</sup> See Memorandum to the File, "Preliminary Determination Margin Calculation for Simcoa Operations Pty Ltd." (Simcoa Preliminary Calculation Memo), dated concurrently with this memorandum.

<sup>31</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>32</sup> See Simcoa's BQR, at B-16, Simcoa's CQR, at C-14; and Simcoa's AQR, at 17.

<sup>33</sup> See Simcoa's AQR, at 17.

<sup>34</sup> See, e.g., *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 52065 (September 12, 2007), and accompanying Issues and Decision Memorandum at Comment 11; see also *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Germany*, 67 FR 35497 (May 20, 2002), and accompanying Issues and Decision Memorandum at Comment 2.

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

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, as appropriate.

In making product comparisons, we matched foreign like products based on the physical characteristics reported by Simcoa in the following order of importance: silicon content, iron content, and size.

## VIII. CONSTRUCTED EXPORT PRICE

For all of Simcoa’s U.S. sales, we used CEP methodology, in accordance with section 772(b) of the Act, because the subject merchandise was sold in the United States by a U.S. seller affiliated with the producer and EP methodology was not otherwise warranted.

We calculated CEP based on packed prices to unaffiliated purchasers in the United States. We made deductions, where appropriate, from the starting price for billing adjustments. We also made deductions from the starting price, where appropriate, for movement expenses, *i.e.*, foreign inland freight, international freight, inland insurance, marine insurance, U.S. brokerage and handling expenses, U.S. customs duties (including merchandise processing and harbor maintenance fees), U.S. inland freight to the U.S. warehouse, U.S. warehousing expenses, and U.S. inland freight to the unaffiliated U.S. customer, in accordance with section 772(c)(2)(A) of the Act.

In accordance with section 772(d)(1) of the Act, we calculated CEP by deducting selling expenses associated with economic activities occurring in the United States, which include direct selling expenses (imputed credit expenses, bank charges, and repacking expenses) and indirect selling expenses (inventory carrying costs and other indirect selling expenses). Finally, we made an adjustment for profit allocated to these expenses, 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 Simcoa and its U.S. affiliate, Shintech Inc. (Shintech), on their sales of the subject merchandise in the United States and the profit associated with those sales.

Simcoa requested a duty drawback adjustment.<sup>36</sup> Section 772(c)(1)(B) of the Act states that CEP shall be increased by “the amount of any import duties imposed by the country of exportation...which have not been collected, by reason of the exportation of the subject merchandise to the United States.” In determining whether an adjustment for duty drawback should be made, we look for a reasonable link between the duties imposed and those rebated or exempted. We do not require that the imported material be traced directly from importation through exportation. We do require, however, that the company meet our “two-prong” test in order for this adjustment to be made to CEP.<sup>37</sup> The first element is that the import duty and its rebate or exemption be directly linked to, and dependent upon, one another; the second element

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<sup>36</sup> See Simcoa’s CQR, at C-34 and Exhibit C-12.

<sup>37</sup> See *Saha Thai Steel Pipe (Public) Co. v. United States*, 635 F.3d 1335, 1340-41 (Fed. Cir. 2011) (*Saha Thai*).



is that the company must demonstrate that there were sufficient imports of the imported material to account for the duty drawback or exemption granted for the export of the manufactured product.<sup>38</sup>

In this investigation, Simcoa provided timely responses and supporting documentation regarding its duty drawback claims, including the regulation governing duty drawback in Australia and a detailed list of the duty drawback refunds that it received for all of its U.S. sales during the POI.<sup>39</sup> Simcoa also identified the raw materials on which it paid an import duty and provided worksheets which (1) detailed how it calculated the duty drawback on a transaction-specific basis; (2) linked the raw materials to the production of the merchandise under consideration; and (3) demonstrated that it imported sufficient volumes of raw materials to account for the duty drawback received on the U.S. sales.<sup>40</sup> Based on these supporting documents, we preliminarily determine that Simcoa's duty drawback claim meets the two-prong test, and we preliminarily determine to make a duty drawback adjustment to U.S. price, pursuant to section 772(c)(1)(B) of the Act. Consistent with our practice, we considered the import duty cost embedded in the material costs of producing the merchandise under consideration in determining the appropriate duty drawback adjustment, so as not to introduce distortion into our calculation, and to ensure a balanced comparison between U.S. price and NV.<sup>41</sup> We adjusted CEP for the entire per-unit amount of duty drawback reported in the U.S. sales database.<sup>42</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

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<sup>38</sup> *Id.*; see also *Notice of Final Results of the Eleventh Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 71 FR 7513 (February 13, 2006), and accompanying Issues and Decision Memorandum at Comment 2.

<sup>39</sup> See Simcoa's SCQR, at 15-18 and Exhibits SC-11A, 11B, 12A, 12B, and 13.

<sup>40</sup> *Id.*

<sup>41</sup> See *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 81 FR 47355 (July 21, 2016), and accompanying Issues and Decision Memorandum at Comment 2; and *Certain Cold-Rolled Steel Flat Products from India: Final Determination of Sales at Less Than Fair Value*, 81 FR 49938 (July 29, 2016), and accompanying Issues and Decision Memorandum at Comment 1 ("applying a duty drawback adjustment based solely on respondent's claimed adjustment, without consideration of import duties included in the respondent's cost of materials, may result in an imbalance in the comparison of EP and NV.").

<sup>42</sup> See *Diethyl Terephthalate from the Republic of Korea: Affirmative Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination*, 82 FR 9195 (February 3, 2017), and accompanying Preliminary Determination Memorandum at 14-15; unchanged in *Diethyl Terephthalate from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 82 FR 28824 (June 26, 2017), and accompanying Issues and Decision Memorandum at Comment 7; and *Ferrovanadium from the Republic of Korea: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination and Extension of Provisional Measures*, 81 FR 75806 (November 1, 2016), and accompanying Preliminary Determination Memorandum at 12-13; changed in *Ferrovanadium from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 82 FR 14874 (March 23, 2017), and accompanying Issues and Decision Memorandum at Comment 2.

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 Simcoa was greater than five percent of the aggregate volume of its U.S. sales of the subject merchandise. Therefore, we used home market sales as the basis for NV for Simcoa, 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>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 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>45</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>46</sup>

When the Department is unable to match 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 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, *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>47</sup>

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<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 at Comment 7.

<sup>45</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>46</sup> See *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1314-16 (Fed. Cir. 2001).

<sup>47</sup> See, *e.g.*, *OJ from Brazil* Issues and Decision Memorandum at Comment 7.

In this investigation, we obtained information from Simcoa regarding the marketing stages involved in making the reported home market and U.S. sales, including a description of the selling activities performed for each channel of distribution.<sup>48</sup> Our LOT findings are summarized below.

In the home market, Simcoa reported that it made sales through one channel of distribution, *i.e.*, direct sales to home market customers.<sup>49</sup> According to Simcoa, it performed the following selling functions for sales to all home market customers: sales promotion, order input/processing, employment of direct sales personnel, packing, and freight and delivery.<sup>50</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 Simcoa performed sales and marketing and freight and delivery services for its home market sales. Because we find that there were no differences in selling activities performed by Simcoa to sell to its home market customers, we determine that there is one LOT in the home market for Simcoa.

With respect to the U.S. market, Simcoa reported that it made CEP sales through its U.S. affiliate, Shintech, through two channels of distribution, *i.e.*, direct shipments to Shintech's U.S. customers (U.S. channel 1) and sales made by Shintech from a U.S. warehouse (U.S. channel 2).<sup>51</sup> Simcoa reported that it performed the following selling functions in Australia for U.S. channel 1 sales: sales promotion, order input/processing, employment of direct sales personnel, packing, and freight and delivery.<sup>52</sup> For U.S. channel 2 sales, Simcoa reported that it performed the same functions as it did for channel 1 sales, except for order input/processing, and it performed packing activities at a higher level of intensity for U.S. channel 2 sales than it did for U.S. channel 1 sales.<sup>53</sup>

Based on the selling function categories noted above, we find that Simcoa performed sales and marketing and freight and delivery services for both CEP U.S. sales channels. According to 19 CFR 351.412(c)(2), the Department will determine that sales are made at different LOTs if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing. Although there were minor differences in selling functions between the two U.S. sales channels as noted above, we do not find that these differences are significant enough to warrant finding that the two U.S. sales channels constitute different LOTs. Because we determine that substantial differences in Simcoa's selling activities do not exist between the two CEP U.S. sales channels, we determine that Simcoa's CEP sales to the U.S. market during the POI were made at the same LOT.

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<sup>48</sup> See Simcoa's AQR, at 15-16 and Exhibit A-7; and Simcoa's SAQR at 3-15 and Exhibit SA-1.

<sup>49</sup> See Simcoa's AQR, at 14 and Simcoa's BQR at B-15.

<sup>50</sup> See Simcoa's SAQR, at Exhibit SA-1.

<sup>51</sup> *Id.* at 4-7.

<sup>52</sup> *Id.* at Exhibit SA-1.

<sup>53</sup> *Id.*

Finally, we compared the U.S. LOT to the home market LOT, and found that the selling functions Simcoa performed for its U.S. and home market customers do not differ significantly.<sup>54</sup> Specifically, Simcoa performed the same two selling functions (*i.e.*, sales and marketing, and freight and delivery) in the home market, which are grouped in one LOT, as it performed in the U.S. market, which are also grouped in one LOT, and the differences in intensities are insignificant and minimal.<sup>55</sup> Therefore, we preliminarily determine that sales to the United States and home market during the POI were made at the same LOT and, as a result, no LOT adjustment or CEP offset is warranted.

### C) *Cost of Production Analysis*

In accordance with section 773(b)(2)(A)(ii) of the Act,<sup>56</sup> the Department requested CV and COP information from Simcoa. We examined Simcoa's cost data and determined that our quarterly cost methodology is not warranted, and therefore, we are applying our standard methodology of using annual costs based on Simcoa's reported data.

#### 1. Calculation of COP

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

We relied on the COP data submitted by Simcoa, except as follows:<sup>57</sup>

- We included import duties paid on imported raw materials in the total cost of manufacture (COM).
- We revised Simcoa's G&A and financial expense rates by using the cost of sales rather than the COM in the denominator of the ratios.

#### 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.

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> The Trade Preferences Extension Act amended section 773(b)(2)(A) of the Act. *See Trade Preferences Extension Act of 2015*, Pub. L. No.

114-27, 129 Stat. 362 (2015) found at <https://www.congress.gov/bill/114th-congress/house-bill/1295/text/pl>) (TPEA). *See also Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015).

<sup>57</sup> *See* Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination – Simcoa" (Simcoa Preliminary Cost Calculation Memorandum), dated October 4, 2017.

### 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 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, for certain products, more than 20 percent of Simcoa'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*

We calculated NV based on delivered or ex-factory prices to unaffiliated customers. We made deductions, where appropriate, from the starting price for billing adjustments, in accordance with 19 CFR 351.401(c). We also made a deduction from the starting price for inland freight under section 773(a)(6)(B)(ii) of the Act.

We deducted home market packing costs and added U.S. packing costs, in accordance with section 773(a)(6)(A) and (B) of the Act, and we deducted home market credit expenses pursuant to 773(a)(6)(C) of the Act.

When comparing U.S. sales with home market sales of similar merchandise, we also made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We based this adjustment on the difference in the variable cost of manufacturing for the foreign like product and subject merchandise.<sup>58</sup>

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<sup>58</sup> See *Stainless Steel Bar from France: Final Results of Antidumping Duty Administrative Review*, 70 FR 46482 (August 10, 2005), and accompanying Issues and Decision Memorandum at Comment 8.

## **X. 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.

## **XI. PRELIMINARY AFFIRMATIVE DETERMINATION OF CRITICAL CIRCUMSTANCES**

On September 11, 2017, the petitioner 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>59</sup> On September 12, 2017, the Department requested shipment data for subject merchandise shipped to the United States from July 2016 through August 2017, and Simcoa submitted its response on September 19, 2017.<sup>60</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.

### *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 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 were massive imports of the subject merchandise over a relatively short period.

Further, 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, “in 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>61</sup> This section of the regulations further

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<sup>59</sup> See the petitioner’s letter, “Silicon Metal from Australia; Antidumping Investigation; Globe Specialty Metals Critical Circumstances Allegation,” dated September 11, 2017 (Critical Circumstance Allegation).

<sup>60</sup> See the Department’s letter, “Antidumping Duty Investigation of Silicon Metal from Australia-Request for Shipment Data,” dated September 12, 2017; and Simcoa’s letter, “Silicon Metal from Australia: Quantity and Value Shipment Data for July 2016 through August 2017,” dated September 19, 2017.

<sup>61</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

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>62</sup>

### B) *Critical Circumstances Allegation*

The petitioner contends that, because the Department has not yet made its preliminary determination in this investigation, the Department may rely on the margins alleged in the Petition to decide whether importers knew, or should have known, that dumping was occurring.<sup>63</sup> The estimated dumping margins for silicon metal from Australia alleged in the Petition were up to 52.81 percent, significantly exceeding the 15 percent threshold used by the Department to impute knowledge of dumping in CEP transactions.<sup>64</sup> The petitioner further argues that importers of Australian silicon metal have been on notice that dumped imports are likely to cause injury since the ITC’s April 27, 2017, preliminary affirmative injury finding.<sup>65</sup>

Considering the date on which the petition was filed (March 8, 2017), the petitioner argues that, to establish whether there have been “massive imports of the subject merchandise over a relatively short period” pursuant to section 733(e)(1)(B) of the Act, the Department should compare Simcoa’s import volumes for the base period of December 2016-February 2017 to its import volumes for the comparison period of March 2017-May 2017, as provided under 19 CFR 351.206(i).<sup>66</sup> The petitioner alleges that import statistics released by the ITC indicate that shipments of the merchandise under consideration during the comparison period increased significantly in terms of volume (*i.e.*, 78.90 percent) between the base period and the comparison period, and as a result, exceeded the threshold for “massive” imports of silicon metal from Australia, as provided under 19 FR 351.206(h) and (i).<sup>67</sup> The petitioner asserts further that the ITC import statistics indicate that shipments of the merchandise under consideration continued to increase in months subsequent to the above-specified comparison period.<sup>68</sup> Simcoa did not submit any comments to rebut the petitioner’s 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 the petitioner’s 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>69</sup>

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determine whether there has been at least a 15 percent increase in imports of the subject merchandise”).

<sup>62</sup> See 19 CFR 351.206(i).

<sup>63</sup> See Critical Circumstances Allegation at 3.

<sup>64</sup> *Id.* at 4.

<sup>65</sup> *Id.* citing ITC Preliminary Affirmative Injury Determination.

<sup>66</sup> See Critical Circumstances Allegation at 6.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 6-7.

<sup>69</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); 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).

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>70</sup> The petitioner identifies no such proceeding with respect to Australian-origin silicon metal, nor are we aware of an AD order in any country on silicon metal from Australia. Thus, we preliminarily find that there is no history of injurious dumping of silicon metal from Australia; thus, this criterion is not met.

Because there is no prior history of injurious dumping, we next examined 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>71</sup> For purposes of this investigation, the Department preliminarily determines that the knowledge standard is met because Simcoa's preliminary margin is greater than 15 percent for CEP sales.<sup>72</sup>

Accordingly, because the statutory criteria of section 733(e)(1)(A) of the Act has been satisfied, we examined whether imports from Simcoa were massive over a relatively short period, pursuant to section 733(e)(1)(B) of the Act and 19 CFR 351.206(c)(2)(i). Using six-month base and comparison periods, consistent with 19 CFR 351.206(h)(2), we preliminarily find that imports based on Simcoa's reported shipments of merchandise under consideration during the comparison period increased by more than 15 percent over its respective imports in the base period.<sup>73</sup> Therefore, we preliminarily find there to be massive imports for Simcoa, pursuant to section 773e(1)(B) of the Act, 19 CFR 351.206(c)(2)(i) and 19 CFR 351.206(h)(2).

For the companies subject to the "all others" rate, the rate for all other producers and exporters is the rate for Simcoa, which exceeds the threshold to impute knowledge to the customers or importers that the subject merchandise was being sold at LTFV. However, because Simcoa represents all imports of subject merchandise during the POI, imports from all other producers and exporters did not amount to a surge exceeding 15 percent between the base and comparison periods. Accordingly, the Department preliminarily determines that there are no critical circumstances for all other Australian producers and exporters of subject merchandise.

We will make a final determination concerning critical circumstance when we issue our final determination of sales at LTFV for this investigation.

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<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., *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 17416 (March 26, 2012).

<sup>72</sup> See "Preliminary Determination" section of the accompanying *Federal Register* notice.

<sup>73</sup> See Memorandum to the File from Brian Smith, Senior Analyst, entitled "Antidumping Duty Investigation of Silicon Metal from Australia: Critical Circumstances Analysis," dated currently with this memorandum.



## XII. CONCLUSION

We recommend applying the above methodology for this preliminary determination.



\_\_\_\_\_  
Agree



\_\_\_\_\_  
Disagree

10/4/2017

X

*Gary Taverman*

Signed by: GARY TAVERMAN

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