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Investigation
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February 22, 2021

MEMORANDUM TO: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

FROM: Shawn Thompson
Director, Office V
Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative
Determination in the Less-Than-Fair-Value Investigation of
Silicon Metal from Bosnia and Herzegovina

I. SUMMARY

The Department of Commerce (Commerce) finds that imports of silicon metal from Bosnia and Herzegovina (Bosnia) are being, or are likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The period of investigation (POI) is April 1, 2019, through March 31, 2020. There is one mandatory respondent subject to this investigation, R-S Silicon D.O.O. (R-S Silicon). The dumping margins for this company and all other exporters are shown in the “Final Determination” section of the accompanying *Federal Register* notice.

After analyzing the comments submitted by interested parties, we have made no changes to the *Preliminary Determination*.¹ We recommend that you approve the position described in the “Discussion of the Issue” section of this memorandum. We received comments from the interested parties related to the following issue:

Comment: Whether Commerce Should Assign the Highest Original Petition Margin as Adverse Facts Available (AFA)

II. BACKGROUND

On December 11, 2020, Commerce published the *Preliminary Determination* in this LTFV investigation and we invited parties to comment.² On January 11, 2021, we received a case brief

¹ See *Silicon Metal from Bosnia and Herzegovina and Iceland: Preliminary Affirmative Determinations of Sales at Less Than Fair Value*, 85 FR 80009 (December 11, 2020) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

² *Id.*



from the petitioners,³ and on January 19, 2021, we received a rebuttal brief from R-S Silicon.⁴ On February 4, 2021, we held a meeting with counsel for the petitioners.⁵

Based on our analysis of the comments received, we have made no changes to the margin assigned in our *Preliminary Determination*.

III. DISCUSSION OF THE ISSUE

Comment: Whether Commerce Should Assign the Highest Original Petition Margin as AFA

In the Petition, the petitioners based normal value on constructed value (CV), which they computed, in part, using financial ratios derived from the financial statements of a company named Elkem ASA (Elkem), a Norwegian silicon metal producer. As a result, the petitioners alleged that exporters/producers in Bosnia were dumping silicon metal in the United States at a rate of 39.00 percent.

Consistent with our practice, however, we instructed the petitioners to recalculate the alleged margin using the financial statements of one of the petitioning companies because no in-country data were available. While the petitioners provided “replacement” financial statements from Ferroglobe PLC (Ferroglobe), the parent company of one of the petitioners, these statements showed a loss, and, for this reason, the petitioners did not recalculate the alleged margin. Therefore, we recomputed the petition margin using Ferroglobe’s data, without including an amount for CV profit. This calculation resulted in a revised alleged margin of 21.41 percent.⁶

Petitioners’ Case Brief

- Application of AFA to R-S Silicon is appropriate, because it failed to respond to the majority of the initial questionnaire and stopped participating in this investigation.⁷ However, for the final determination, Commerce should apply an AFA rate of 39.00 percent, instead of the 21.41 percent rate applied in the *Preliminary Determination*.
- When assigning an AFA rate, Commerce’s practice is to select the highest dumping margin alleged in the petition or the highest calculated dumping margin for any respondent in the investigation, and this practice has been affirmed by the U.S. Court of

³ See Petitioners’ Letter, “Silicon Metal from Bosnia and Herzegovina: Case Brief and Request for Hearing,” dated January 11, 2021 (Petitioners Case Brief). The petitioners are: Globe Specialty Metals, Inc. and Mississippi Silicon LLC (collectively, the petitioners).

⁴ See R-S Silicon’s Letter, “Antidumping Duty Investigation of Silicon Metal from Bosnia and Herzegovina: Rebuttal Brief of R-S Silicon d.o.o.,” dated January 19, 2021 (R-S Silicon Rebuttal Brief).

⁵ See Memorandum, “Antidumping Investigations of Silicon Metal from Bosnia and Herzegovina and Iceland: Meeting with Petitioners’ Counsel,” dated February 5, 2021.

⁶ See *Silicon Metal from Bosnia and Herzegovina, Iceland, and Malaysia: Initiation of Less-Than-Fair-Value Investigations*, 85 FR 45177, 45179 (July 27, 2020) (*Initiation Notice*).

⁷ See Petitioners Case Brief at 2 (citing *Preliminary Determination* PDM at 4-5). See also R-S Silicon’s Letter, “Antidumping Duty Investigation of Silicon Metal from Bosnia and Herzegovina: R-S Silicon Intent Not to Respond,” dated September 30, 2020.

International Trade (CIT)).⁸ The highest dumping margin alleged in the petition is 39.00 percent, and ignoring this margin in favor of the margin calculated in the Initiation Checklist is unlawful.⁹

- Commerce computed the 21.41 percent rate using data from the 2019 consolidated financial statements of Ferroglobe, a third-country producer of identical and comparable merchandise which recorded a loss in 2019.¹⁰ Commerce has an established practice of not using financial statements from companies with losses, and it is, therefore, inappropriate to rely on a margin which is based on Ferroglobe's financial statements.¹¹
- Commerce should rely on the petition margin of 39.00, computed using the stand-alone financial statements of Elkem, a Norwegian producer of silicon metal. Elkem's financial statements are contemporaneous with the POI, reflect profits, and capture the experience specific to silicon metal production; therefore, they contain the best financial data on the record.¹²
- Commerce has a preference not to use third-country financial statements as a basis for CV profit and selling expenses. However, Ferroglobe's financial statements are tantamount to third-country statements because Ferroglobe is headquartered in London with operations around the globe (but not in Bosnia).¹³ Further, Ferroglobe's financial statements show operations other than silicon metal production, such as quartz and coal mining and hydroelectric power activities.¹⁴ It is unclear why Commerce used unprofitable financial statements of a third-country producer of a variety of merchandise over profitable financial statements from a third-country producer of identical merchandise.
- Although Commerce has a preference to rely on home market sources, it has relied on third-country sources in multiple cases in recent years when home market sources are

⁸ See Petitioners Case Brief at 3 (citing *Certain Vertical Shaft Engines Between 99cc and Up to 225cc, and Parts Thereof, from the People's Republic of China: Preliminary Affirmative Determination of Critical Circumstances, in Part*, 85 FR 66932 (October 21, 2020) (*Vertical Shaft Engines from China*), and accompanying PDM at 19-20; *Forged Steel Fittings from India: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 85 FR 32007 (May 28, 2020) (*Forged Steel Fittings from India*), and accompanying PDM at 13; *Certain Uncoated Paper from Indonesia: Final Determination of Sales at Less Than Fair Value*, 81 FR 3101 (January 20, 2016) (*Uncoated Paper from Indonesia*); and *Universal Polybag Co. v. United States*, 577 F. Supp. 2d 1284, 1298-1301 (CIT 2008) (*Universal Polybag Co.*)).

⁹ *Id.* (citing Petitioners' Letter, "Silicon Metal from Bosnia and Herzegovina: Petition Supplement," dated July 8, 2020 (Petition Supplement) at Exhibit Supp-II-9).

¹⁰ *Id.* (citing *Initiation Notice* and accompanying Initiation Checklist at 7-8; and Petition Supplement at 11 and Exhibit Supp-II-5, and noting that Page 113 of Exhibit Supp-II-5 also shows a loss for the North American segment in 2019, in addition to the overall 2019 loss).

¹¹ *Id.* at 5 (citing *Notice of Final Determination of Sales at Less Than Fair Value and Termination of Critical Circumstances Investigation: Electrolytic Manganese Dioxide from Australia*, 73 FR 47586 (August 14, 2008) (*EMD from Australia*), and accompanying Issues and Decision Memorandum (IDM) at 6; and *Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from the Republic of Korea*, 68 FR 47540 (August 11, 2003) (*PVA from Korea*), and accompanying IDM at Comment 1).

¹² *Id.* at 5-6 (citing Petition Supplement at 12 and Exhibit Supp-II-9; and Petitioners' Letter, "Petitions for the Imposition of Antidumping and Countervailing Duties: Silicon Metal from Bosnia and Herzegovina, Iceland, the Republic of Kazakhstan, and Malaysia," dated June 30, 2020 (the Petition) at 10-11 and Exhibit II-24).

¹³ *Id.* at 7 (citing Petition Supplement at 5-6, 8, and 11 of Exhibit SUPP-II-5).

¹⁴ *Id.* (citing Petition Supplement at 11 of Exhibit Supp-II-5).

deficient.¹⁵ The courts have upheld this practice.¹⁶ Additionally, the legislative history recognizes the need for flexibility.¹⁷

- R-S Silicon's prior argument that relying on the margin from the petition would undermine the initiation of this investigation is false because Commerce is free to revise the margin used in the initiation at a later date when appropriate.¹⁸ For example, in *EMD from Australia*, Commerce initiated an investigation based on a CV calculation which did not include profit; however, in the final determination, Commerce determined that the decision to not include profit benefited the non-cooperating respondent, and it recalculated the petition margin using alternate financial statements, containing profit information, obtained after initiation.¹⁹ Similarly, in this case, Commerce should rely on financial statements reflecting a positive profit rate so as not to benefit the non-cooperative respondent.
- The petition rate of 39.00 percent has probative value in accordance with section 776(c) of the Act, 19 CFR 351.308(d), and the SAA. Using this rate now would be analogous to cases where Commerce has recalculated and corroborated an AFA rate following a judicial remand.²⁰

R-S Silicon's Rebuttal Brief

- Commerce should continue to use the initiation margin of 21.41 percent as AFA. Commerce is not required to use the dumping margin that appears in the petition, and Commerce acted in accordance with its past practice when it rejected a third-country source for the CV profit and selling expense ratios.²¹

¹⁵ *Id.* at 7-8 (citing *Certain Oil Country Tubular Goods from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 41983 (July 18, 2014) (*OCTG from Korea*), and accompanying IDM at Comment 1; *Certain Oil Country Tubular Goods from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances, in Part*, 79 FR 41973 (July 18, 2014) (*OCTG from Turkey*), and accompanying IDM at Comment 3; *Certain Steel Nails from the Sultanate of Oman: Final Determination of Sales at Less Than Fair Value*, 80 FR 28972 (May 20, 2015) (*Nails from Oman*), and accompanying IDM at 13-14; *Certain Steel Nails from the Sultanate of Oman: Final Results of Antidumping Duty Administrative Review; 2014-2016*, 83 FR 4030 (January 29, 2018) (*Nails from Oman AR1*), and accompanying IDM at Comment 2; *Certain Steel Nails from the Sultanate of Oman: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 83 FR 58231 (November 19, 2018) (*Nails from Oman AR2*), and accompanying IDM at Comment 6; and *Certain Steel Nails from the Sultanate of Oman: Final Results of Antidumping Duty Administrative Review; 2017-2018*, 84 FR 71372 (December 27, 2019) (*Nails from Oman AR3*), and accompanying IDM at Comment 1).

¹⁶ *Id.* at 7-8 (citing *Mid Continent Steel & Wire, Inc. v. United States*, 273 F. Supp. 3d 1348, 1351-1353 (CIT 2017), affirmed in part, 941 F.3d 530, 542-543 (Fed. Cir. 2019); and *Husteel Co., Ltd. v. United States*, 180 F. Supp. 3d 1330, 1343-1346 (CIT 2016), affirmed by, 710 Fed. Appx. 890 (Fed. Cir. 2018) (*Husteel Co., Ltd.*)).

¹⁷ Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 vol. 1 (1994) (SAA) at 840-841 (noting that "the selection of an alternative will be made on a case-by-case basis, and will depend, to an extent, on available data)).

¹⁸ *Id.* at 8 (citing R-S Silicon's Letter, "Antidumping Duty Investigation of Silicon Metal from Bosnia and Herzegovina: Reply to Petitioners' Request for Application of Total Facts Available with Adverse Inferences," dated October 9, 2020; and *EMD from Australia* IDM at 6).

¹⁹ *Id.* at 8 (citing *EMD from Australia* IDM at 5-6).

²⁰ *Id.* at 11 (citing *BMW of North America LLC v. United States*, 437 F. Supp. 3d 1336, 1344-1347 (CIT 2020) and *POSCO v. United States*, 378 F. Supp. 3d 1348, 1354 (CIT 2019)).

²¹ See R-S Silicon Rebuttal Brief at 1.

- Commerce is not required to use the “bottom line” rate from the petition, as section 776(b)(2) of the Act states that adverse inferences may rely on “information derived from” the petition or other information on the record. Accordingly, Commerce properly recalculated the financial ratios submitted by the petitioners.²²
- Commerce has great discretion in applying an AFA margin to an uncooperative respondent and frequently uses petition margins recalculated at the initiations of investigations as AFA.²³ None of the cases cited by the petitioners stand for the proposition that Commerce’s reliance on petition margins for AFA must be limited to the unadjusted margins listed in the petition.
- Commerce does not rely on financial statements from third countries if financial statements from a home market producer of the same general category of merchandise are available.²⁴ The petitioners admit that Commerce has discretion in light of the statutory language, legislative history, and administrative precedent, and they do not dispute the fact that Elkem’s financial data are not preferred by Commerce because they are from a third country.²⁵
- The petitioners ignore Commerce’s discretion when they insist that Commerce is precluded from using Ferroglobe’s financial statements.²⁶ However, they cite no case in which Commerce relied on third-country data over adequate home market financial statements which showed a loss; the cases cited by the petitioners were cases in which Commerce used third-country financial statements when there were no financial statements covering home market sales available on the record.
- While Commerce generally prefers to use financial statements showing profits, this preference does not override Commerce’s practice of not using third-country financial statements to calculate CV profit and selling expense ratios.²⁷ Commerce properly accounted for Ferroglobe’s loss by setting the profit rate to zero, and Commerce was correct to use the Ferroglobe statements rather than disfavored third-country financial statements.²⁸

²² *Id.* (citing *Initiation Notice*, 85 FR at 45179).

²³ *Id.* at 2 (citing *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009) (*PAM*); *KYD, Inc. v. United States*, 607 F. 3d 760, 765 (Fed. Cir. 2010) (*KYD*); *Certain Carbon and Alloy Steel Cut-to-Length Plate from Brazil, South Africa, and the Republic of Turkey: Affirmative Preliminary Determinations of Sales at Less Than Fair Value*, 81 FR 65337 (September 22, 2016), and accompanying PDM at 7; *Finished Carbon Steel Flanges from Spain: Preliminary Determination of Sales at Less Than Fair Value*, 82 FR 9723 (February 8, 2017), and accompanying PDM at 5; and *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Preliminary Affirmative Determination of Sales at Less-Than-Fair-Value and Preliminary Affirmative Determination of Critical Circumstances*, 85 FR 8565 (February 14, 2020), and accompanying PDM at 9).

²⁴ *Id.* at 5 (citing *Mid Continent Steel & Wire, Inc. v. United States*, 203 F. Supp. 3d 1295, 1310 (CIT 2017), affirmed in part, vacated and remanded in part on other grounds, 941 F. 3d 530 (Fed. Cir. 2019)).

²⁵ *Id.* (citing Petitioners Case Brief at 6-9).

²⁶ *Id.* at 6 (citing Petitioners’ Case Brief at 4-6 and 8).

²⁷ *Id.* at 6-7 (citing *Floral Trade Council v. United States*, 41 F. Supp. 2d 319, 329-331 (CIT 1999); and *Husteel Co., Ltd.* which upheld Commerce’s decision to reject financial statements showing a net loss but did not require Commerce to ignore such statements).

²⁸ *Id.* at 7 (citing *Initiation Checklist* at 8).

Commerce's Position

In our *Preliminary Determination*, we applied, as AFA, the margin calculated at initiation. We derived this margin from information in the petition, adjusted to rely on the financial statements of Ferroglobe for financial ratios used in the calculation of CV. We based our decision to use Ferroglobe's financial statements on the fact that Ferroglobe is the parent company of a petitioner and is itself a major producer of silicon metal.²⁹ We did not use Elkem's financial statements because, although Elkem is a producer of silicon metal, it is located in a third country, Norway. After considering the arguments made by the petitioners and R-S Silicon, we have continued to use the margin from the *Initiation Notice* as the AFA rate for R-S Silicon.

As an initial matter, we disagree with the petitioners' assertion that Commerce is *required* to select the highest dumping margin alleged in the petition when selecting an AFA rate, simply because a petitioner includes it there. The margins upon which Commerce relies when initiating an LTFV investigation must be accurate to the extent practicable and consistent with Commerce's established policies and regulations. Commerce regularly instructs petitioners to revise their margin calculations³⁰ or, when necessary, Commerce itself revises petition margins at the time of initiation for methodological reasons or to correct mathematical errors.³¹ We do not accept the contention that Commerce is required by law to use a mathematically erroneous, or otherwise flawed, margin simply because it was the number which appeared in the petition. Commerce has corrected such errors, including in recent investigations.³² Similarly, Commerce must be able to correct any discrepancies between Commerce's policy, practice, and/or regulations and the approach to a proposed margin calculation appearing in a petition. When a margin has been corrected or adjusted for initiation purposes, it would be illogical to conclude that Commerce is required to assign the uncorrected/unadjusted margin as an AFA rate subsequently during the proceeding.

As noted by R-S Silicon, section 776(b)(2)(A) of the Act and 19 CFR 351.308(c)(1)(i) only state that Commerce may rely on information derived from the petition, not that Commerce must use

²⁹ When calculating normal value based on CV, and in the absence of in-country data, we require the petitioners to rely on their own experience, adjusted for any known differences from production in the subject country. See 19 CFR 351.202(b)(7)(i)(B).

³⁰ See, e.g., *Polyester Textured Yarn from Indonesia, Malaysia, Thailand, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations*, 85 FR 74680 (November 23, 2020), and accompanying Indonesia and Malaysia Initiation Checklists; *Utility Scale Wind Towers from India, Malaysia, and Spain: Initiation of Less-Than-Fair-Value Investigations*, 85 FR 73023 (November 16, 2020), and accompanying India, Malaysia, and Spain Initiation Checklists; and *Thermal Paper from Germany, Japan, the Republic of Korea, and Spain: Initiation of Less-Than-Fair-Value Investigations*, 85 FR 69580 (November 3, 2020), and accompanying Germany, Japan, Korea, and Spain Initiation Checklists.

³¹ See, e.g., *Certain Carbon and Alloy Steel Cut-To-Length Plate from Austria, Belgium, Brazil, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, the People's Republic of China, South Africa, Taiwan, and the Republic of Turkey: Initiation of Less-Than-Fair-Value Investigations*, 81 FR 27089 (May 5, 2016), and accompanying Brazil Initiation Checklist at 11, 13, and Attachment V (recalculating the financial expense ratio used in the CV value calculation); *Fine Denier Polyester Staple Fiber from the People's Republic of China, India, the Republic of Korea, Taiwan, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations*, 82 FR 29023 (June 27, 2018) (*Fine Denier PSF*), and accompanying Korea Initiation Checklist at 12 (recalculating the petition margin due to an incorrect conversion between units of measure).

³² See, e.g., *Fine Denier PSF* Korean Initiation Checklist (showing Commerce's recalculation of a margin of 45.23 percent after correcting an error in units of measure in the original petition which led to a margin of 75.86 percent).

the highest dumping margin alleged in the petition. In fact, while the petitioners cite several cases as support for their assertion that Commerce's practice is to use "the highest dumping margin alleged in the petition,"³³ we disagree that these cases stand for the proposition for which they were cited. Significantly, we note that, in some of these cases, Commerce instructed the petitioner to revise the margins originally alleged in the Petition, and Commerce then relied on the revised margins for purposes of initiation.³⁴ Therefore, these cases do not support the argument that Commerce's practice is to use the highest alleged dumping margin where, as here, Commerce officially rejected that dumping margin for purposes of initiation.

The petitioners argue that Commerce should revise its initiation margin, which used a financial statement showing a net loss, to use a financial statement that has a profit now that the margin is being used as an AFA rate; in support of this argument, the petitioners discuss two prior cases as examples of such practice. In both *EMD from Australia* and *PVA from Korea*, Commerce initiated the investigation based on using financial statements that did not show profit but ultimately used financial statements with a profit for the final determination.

Significantly, we note that these two cases, *EMD from Australia* and *PVA from Korea*, are more than twelve and seventeen years old, respectively. Additionally, both of these cases stated in their initiation notices that we would consider alternate options for calculating profit if it became necessary to rely on the CV-based margin from the petition.³⁵ However, in this investigation, we made no such statement regarding any intention to revisit the CV ratios later in the proceeding, as our practice regarding the revision of initiation margins has changed in the intervening twelve years. Additionally, in the period after the cases cited by the petitioners, Commerce has subsequently stated that its practice is not to recalculate dumping margins used at the time of initiation, but rather to corroborate the rate when applying it as AFA.³⁶ In *Steel Grating from China*, Commerce stated that it saw "no reason to vary from its standard practice of using

³³ See Petitioners' Case Brief at 3 (citing *Vertical Shaft Engines from China*; *Forged Steel Fittings from India*; *Uncoated Paper from Indonesia*; and *Universal Polybag Co.*).

³⁴ See *Forged Steel Fittings from India* PDM at 13-14 (citing *Forged Steel Fittings from India and the Republic of Korea: Initiation of Less-Than-Fair-Value Investigations*, 84 FR 64265 (November 21, 2019), and accompanying India Initiation Checklist). We also note that, while the petitioners cite *Uncoated Paper from Indonesia* in support of this premise, this case in fact used the highest transaction-specific margin, which was lower than the petition margin, because Commerce was unable to corroborate the petition margin. See *Uncoated Paper from Indonesia* IDM at Comment 1. Additionally, although the petitioners cite *Universal Polybag Co.*, which upheld the use of a petition rate as AFA, we note that the petition rate used in the initiation of this case was revised through supplemental questionnaires issued prior to initiation. See *Initiation of Antidumping Duty Investigations: Polyethylene Retail Carrier Bags from The People's Republic of China, Malaysia, and Thailand*, 68 FR 42002 (July 16, 2003), and accompanying Initiation Checklist.

³⁵ See *Notice of Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances: Electrolytic Manganese Dioxide from Australia*, 73 FR 15982 (March 26, 2008), and accompanying PDM at 6 (noting that "in its notice of initiation of the investigation the Department did not apply an amount for profit in its constructed-value recalculation and indicated explicitly that it would correct this deficiency if it became necessary to apply adverse inferences using the petition rate"); and *PVA from Korea* IDM at Comment 1 (indicating in its initiation notice that Commerce "would revisit the rate should it be relied upon for the final determination").

³⁶ See *Certain Steel Grating from the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 75 FR 32366 (June 8, 2010) (*Steel Grating from China*), and accompanying IDM at Comment 2.

initiation rates (*i.e.*, the revised rates from the petition as specifically revised at the Department's request) as the rates for applying adverse facts available."³⁷

Commerce has, in several more recent cases, declined to reconsider initiation margins in later stages of the proceeding. In *Steel Wheels from China*, Commerce declined to evaluate whether an initiation rate was insufficiently adverse for a non-cooperating respondent and, therefore, did not recalculate a revised, higher AFA rate. Commerce instead "continue{d} to use the highest Petition rate as the AFA rate in this proceeding and {did} not amended this rate for the final determination."³⁸ In *Aluminum Wire and Cable from China*, Commerce also declined to revisit the initiation margin, stating:

In the current investigation, interested parties have not argued, nor has Commerce found, information from the Petition to be uncorroborated or otherwise proven inaccurate and unreliable in the course of the investigation. Moreover, Commerce's practice is not to update dumping margins alleged in a petition based on later-discovered surrogate value information within the context of a proceeding; rather, Commerce's practice is to evaluate and, consequently, confirm the reliability of the information presented in a Petition at the time of the initiation of an investigation. Therefore, Commerce has not used the information presented by Huatong to reconsider the dumping margins alleged in the Petition.³⁹

The above methodology is also consistent with our corroboration practice generally, whereby, if Commerce is unable to corroborate a petition margin, we do not use that margin, nor do we adjust it. Instead, we rely on an alternative source of AFA.⁴⁰ Therefore, we determined that use of the dumping margin in the *Initiation Notice* of 21.41 percent is consistent with the Act and our practice, and this margin is reliable for purposes of this investigation.

We also note that the initiation margin was determined to be reliable here. When using facts otherwise available, section 776(c) of the Act provides that, where Commerce relies on secondary information (such as the petition) rather than information obtained in the course of an investigation or review, 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, the final

³⁷ See *Steel Grating from China* IDM at Comment 2.

³⁸ *Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances*, 84 FR 32707 (July 9, 2019) (*Steel Wheels from China*), and accompanying IDM at Comment 1 (noting that "{h}ere, there are no participating respondents and no calculated rates. As the instant case is an investigation and no order is in place, we have no ability to evaluate whether the AFA rate is sufficiently adverse in the context of a producer/exporter's actions over a period of time under the discipline of an order...the record remains devoid of any evidence that the existing AFA rate is insufficiently adverse such that Zhejiang Jingu would benefit from non-cooperation").

³⁹ See *Aluminum Wire and Cable from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 84 FR 58134 (October 30, 2019) (*Aluminum Wire and Cable from China*), and accompanying IDM at Comment 1.

⁴⁰ See, e.g. *Forged Steel Fluid End Blocks from the Federal Republic of Germany: Final Determination of Sales at Less Than Fair Value*, 85 FR 80018 (December 11, 2020), and accompanying IDM at Comment 8; and *Uncoated Paper from Indonesia* IDM at Comment 1.

determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.⁴¹ The SAA clarifies that “corroborate” means that Commerce will satisfy itself that the secondary information to be used has probative value.⁴² To corroborate secondary information, Commerce will, to the extent practicable, examine the reliability and relevance of the information to be used.⁴³

In the *Initiation Notice* and *Preliminary Determination*, we examined evidence supporting the calculations in the petition to determine the probative value of the dumping margin alleged in this Petition. In our analysis, we also examined the key elements of the U.S. price and normal value calculations, and the alleged dumping margin.⁴⁴ Also, during our pre-initiation analysis, we examined information from various independent sources provided either in the petition or in the supplements to the petition that corroborate key elements of the export price and normal value calculations used in the petition to derive the dumping margin.⁴⁵ Using this method, we corroborated the selected AFA margin within the meaning of section 776(c) of the Act, and, thus, we find that it is reliable.

Although the petitioners allege that Ferroglobe’s financial statements are those of a third-country producer, we disagree. While Ferroglobe may be headquartered in a third country and have operations in multiple countries, it is the parent company of a petitioner which is a U.S. producer of silicon metal. The petitioners stated that all silicon metal producers use essentially the same inputs and production process.⁴⁶ Therefore, the petitioners calculated the cost of production based on their own experience.⁴⁷ As we are applying usage rates from a petitioner’s own experience, for petition initiation purposes, we also find it appropriate to base the CV ratios on that petitioner’s parent company. This way, the usage rates and CV ratios have a link to the same source. Although the parent company is headquartered abroad, its financial statements include the data from the petitioner itself, making Ferroglobe’s financial statements, at least in part, reflective of the financial data of that U.S. producer. Conversely, as a Norwegian silicon metal producer, Elkem’s financial statements represent entirely third-country based data with no element of cost from either the country under investigation or a U.S. producer. Therefore, consistent with the Initiation Checklist and *Preliminary Determination*, we have continued to not rely on the third-country financial statements.⁴⁸

⁴¹ See SAA at 870.

⁴² *Id.*; see also 19 CFR 351.308(d).

⁴³ 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).

⁴⁴ See Initiation Checklist and *Preliminary Determination* PDM at 8-9.

⁴⁵ *Id.*

⁴⁶ See Volume II of the Petition at 6.

⁴⁷ *Id.* at 8 and Exhibits II-15 and II-16.

⁴⁸ See Initiation Checklist at 8 and *Preliminary Determination* PDM at 6; see also, e.g., *Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations*, 84 FR 37992 (August 5, 2019), and accompanying Indonesia Initiation Checklist at 10-11 (using financial statements of a home market producer of comparable merchandise); *Melamine from the People's*

Additionally, the petitioners argue that Commerce also has a practice of preferring financial statements with a profit; in support of this position, the petitioners cite a number of cases where Commerce used third-country financial data for CV ratios.⁴⁹ While we do not dispute that the use of third-country financial statements may be appropriate in certain situations, we disagree that they are appropriate here, for the reasons discussed above, including, importantly, Commerce’s practice of relying on the petitioner’s own data for initiation purposes, in the absence of in-country information.

Our examination of the information relied on for the initiation margin is discussed in detail in the Initiation Checklist, where we considered the petitioners’ export price and normal value calculations to be reliable after recalculation.⁵⁰ We confirmed the accuracy and validity of the information underlying the derivation of the dumping margin used in the *Initiation Notice* by examining source documents and affidavits, as well as publicly available information.⁵¹ We obtained no other information that calls into question the validity of the sources of information or the validity of the information supporting the export price and normal value calculations provided in the Initiation Checklist. The use of the initiation margin is in accordance with our current preference of not recalculating an initiation margin. Therefore, we determined that the dumping margin in the *Initiation Notice* of 21.41 percent is consistent with the Act and our practice and is reliable for purposes of this investigation.

Finally, the petitioners argue that revising the margin used at the time of initiation would not undermine Commerce’s decision to initiate this case. While this argument is moot in light of our decision not to revise the margin, we agree in principle; at the time of initiation, we evaluated the information provided, found it to be reliable, and, where necessary, asked for revisions or

Republic of China and Trinidad and Tobago: Initiation of Less-Than-Fair-Value Investigations, 79 FR 73037 (December 9, 2014), and accompanying Trinidad and Tobago Initiation Checklist at 11 (using financial statements of a home market producer of comparable merchandise); *Certain Oil Country Tubular Goods from India, the Republic of Korea, the Republic of the Philippines, Saudi Arabia, Taiwan, Thailand, the Republic of Turkey, Ukraine, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations*, 78 FR 45505 (July 29, 2013), and accompanying Taiwan Initiation Checklist at 12 (using financial statements of a home market producer of comparable merchandise); *Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations*, 85 FR 23002 (April 24, 2020), and accompanying Indonesia Initiation Checklist at 9 (using a U.S. producer’s financial statements); and *Carbon and Alloy Steel Wire Rod from Belarus, Italy, the Republic of Korea, the Russian Federation, South Africa, Spain, the Republic of Turkey, Ukraine, United Arab Emirates, and United Kingdom: Initiation of Less-Than-Fair-Value Investigations*, 82 FR 19207 (April 26, 2017), and accompanying United Arab Emirates Initiation Checklist at 9-10 (using a U.S. producer’s financial statements).

⁴⁹ See Petitioners’ Case Brief at 6-8 (citing *OCTG from Korea*, *OCTG from Turkey*, *Nails from Oman*, *Nails from Oman AR1*, *Nails from Oman AR2*, and *Nails from Oman AR3*. See also *Husteel Co., Ltd. and Mid Continent Steel & Wire, Inc. v. United States*, 273 F. Supp. 3d 1348 (CIT 2017), affirmed in part, 941 F. 3d 530 (Fed. Cir. 2019))

⁵⁰ *Id.*

⁵¹ See *Grain-Oriented Electrical Steel from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 59226 (October 1, 2014), and accompanying IDM at 20 (stating that in a situation where the sole mandatory respondent received AFA, “there was no need to review any additional documentation outside of what was submitted in the Petition considering such sources of information fulfill our requirements for corroboration of secondary information”); and *KYD*, 607 F.3d at 765 (sustaining Commerce’s finding that price quotes and third-party affidavits used in the petition to calculate estimated margins were independent information not requiring additional corroboration and stating that “{t}he relevant inquiry focuses on the nature of the information, not on whether the source of the information was referenced in or included with the petition”).

additional information. Neither party argues that CV ratios based on Ferroglobe's financial data, or even CV ratios based on Elkem's financial data, would have resulted in a negative margin and, thus, led Commerce not to initiate the investigation. Accordingly, there would be no undermining of Commerce's decision to initiate the case because either source of CV ratios on the record at the time resulted in a positive margin and, thus, cause for the initiation of an investigation.

As both parties note, Commerce has considerable discretion in selecting the source for the CV ratios.⁵² As discussed above, we exercised our discretion in this case and selected the best CV ratio source based on the facts of this particular case. After corroborating the margin rate that is based on those financial statements, we have also followed our current practice of not revising the calculation of an initiation margin. For these reasons, we continue to assign the initiation rate of 21.41 percent to R-S Silicon.

IV. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above position. If this recommendation is accepted, we will publish the final determination in the investigation and the final dumping margins in the *Federal Register* and will notify the International Trade Commission of our determination.

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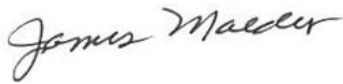
Agree

☐

Disagree

2/22/2021

X



Signed by: JAMES MAEDER

James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

⁵² See SAA at 840; see also KYD, 607 F.3d. at 765; and PAM, 582 F.3d at 1340.