A-351-850
Investigation
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DATE: February 27, 2018

MEMORANDUM TO: Christian Marsh
Deputy Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
for 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 Brazil

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I. SUMMARY

The Department of Commerce (Commerce) finds that silicon metal from Brazil is being, or is 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 January 1, 2016 through December 31, 2016.

Commerce analyzed the case briefs submitted by interested parties in this LTFV investigation of silicon metal from Brazil. After analyzing the case briefs submitted, we made changes to the *Preliminary Determination*.[1] We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this LTFV investigation for which we received comments from interested parties:

Comment 1: Proper Basis for U.S. Price
Comment 2: Treatment of Non-Brazilian Silicon Metal in Calculating Further-Manufacturing Costs
Comment 3: Adjustments to Dow Corning's Further-Manufacturing Costs
Comment 4: Differential Pricing
Comment 5: Treatment of Certain Sales to an Unaffiliated Toller
Comment 6: Treatment of Downstream Sales to Affiliated Customers
Comment 7: Minor Corrections

[1] *See Silicon Metal From Brazil: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Extension of Provisional Measures*, 82 FR 47466 (October 12, 2017) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

II. BACKGROUND

On October 12, 2017, Commerce published the *Preliminary Determination*. In accordance with 19 CFR 351.309(c), we invited parties to comment on the *Preliminary Determination.*

In the *Preliminary Determination*, Commerce determined that the application of adverse facts available (AFA), pursuant to section 776(a) and (b) of the Tariff Act of 1930, as amended (the Act), was warranted with respect to respondent Ligas de Alumino S.A. – LIASA (LIASA) for its failure to participate in this investigation. As AFA, Commerce assigned LIASA the highest dumping margin alleged in the petition, which was corroborated pursuant to section 776 of the Act. No party filed comments on Commerce's *Preliminary Determination* for LIASA, and there is no new information on the record of this investigation to warrant departure from this preliminary decision in the final determination.

In the *Preliminary Determination*, Commerce also determined that the use of facts available, pursuant to section 776(a) of the Act, was warranted for the respondent Palmyra do Brasil Indústria e Comércio de Silício Metálico e Recursos Naturais Ltda. (Palmyra), a wholly-owned subsidiary of Dow Corning Corporation (collectively, Dow Corning), because of numerous critical deficiencies in Dow Corning's reported sales and further manufacturing cost data. These deficiencies concerned, for example, information with respect to Dow Corning's affiliations with certain suppliers and customers, unreported sales data, and the proper methodology for calculating the further-manufacturing costs included in the downstream products sold to unaffiliated customers in the United States.[2] We stated that we would afford Dow Corning an opportunity to remedy these deficiencies before verification. From September to October 2017, we issued additional supplemental questionnaires to Dow Corning covering several sections of its questionnaire responses.[3] Dow Corning timely responded to these supplemental questionnaires during September and November 2017.[4]

From October 2017 through January 2018, Commerce conducted verifications of Dow Corning's questionnaire responses at its facilities in Brazil and Michigan.[5] On January 29, 2017, Globe

[2] *See* Preliminary Decision Memorandum at 6-8.
[3] *See* Commerce Letter re: Supplemental Questionnaire, dated September 12, 2017 (Commerce's Sept. 12 SQ); *see also* Commerce Letter re: Supplemental Questionnaire, dated October 13, 2017 (Commerce's Oct. 13 SQ).
[4] *See* Dow Corning's November 9, 2017, Supplemental Questionnaire Response (Dow Corning's Nov. 9 SQR); *see also* Dow Corning's September 29, 2017, Supplemental Questionnaire Response (Dow Corning's Sept. 29 SQR).
[5] *See* Memorandum to the File, Verification of the Sales Response of Palmyra do Brasil Indústria e Comércio de Silício Metálico e Recursos Naturais Ltda. in the Antidumping Investigation of Silicon Metal from Brazil, dated January 19, 2018) (Palmyra Verification Report); Memorandum to the File, "Verification of the Sales Response of Dow Corning Corporation and Hemlock Semiconductors Operations LLC in the Antidumping Investigation of Silicon Metal from Brazil, dated January 17, 2018 (Dow Corning-Hemlock Verification Report); Memorandum to the File, "Verification of the Cost Response of Palmyra do Brasil Indústria e Comércio de Silício Metálico e Recursos Naturais Ltda. in the Antidumping Duty Investigation of Silicon Metal from Brazil (Palmyra Cost Verification Report), dated January 17, 2018; and Memorandum to the File, "Verification of the Cost Response of Dow Corning in the Antidumping Duty Investigation of Silicon Metal from Brazil," dated January 17, 2018 (Dow Corning Cost Verification Report).

Specialty Metals, Inc. (the petitioner) and Dow Corning filed their case briefs.[6] On February 5, 2018, the petitioner and Dow Corning filed their rebuttal briefs.[7] On February 12, 2018, Commerce held a public hearing.

Commerce has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from January 20 through January 22, 2018. The revised deadline for this investigation is now February 27, 2018.[8]

For a summary of the product coverage comments and rebuttal responses submitted to the records of all concurrent silicon metal investigations, and accompanying discussion and analysis of all comments timely received, *see* the Final Scope Decision Memorandum, which is incorporated by and hereby adopted by this final determination.[9]

III. CHANGES MADE SINCE THE PRELIMINARY DETERMINATION

We made certain changes based on the additional questionnaire responses received after our *Preliminary Determination*, verification findings, and our analysis of the comments received from interested parties. For the final determination we calculated an estimated weighted-average dumping margin for Palmyra using its verified sales, cost and further-manufacturing data as described below.

IV. 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 Palmyra's sales of subject merchandise from Brazil to the United States were made at LTFV, Commerce compared the constructed export price (CEP) 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), Commerce 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 is appropriate

[6] *See* Petitioner's Letter, "Silicon Metal from Brazil; Antidumping Investigation; Case Brief of Globe Specialty Metals, Inc.," dated November 30, 2017 (Petitioner's Case Brief); *see also* Letter from Dow "Silicon Metal from Brazil: Case Brief," dated January 29, 2018 (Dow's Case Brief).
[7] *See* Petitioner's Letter, "Silicon Metal from Brazil; Antidumping Investigation; Rebuttal Brief of Globe Specialty Metals, Inc.", dated February 5, 2018 (Petitioner's Rebuttal Brief); *see also* Dow Corning's Letter, "Silicon Metal from Brazil: Rebuttal Brief," dated February 5, 2018 (Dow Corning's Rebuttal Brief).
[8] *See* Memorandum for The Record from Christian Marsh, Deputy Assistant Secretary for Enforcement and Compliance, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, "Deadlines Affected by the Shutdown of the Federal Government," dated January 23, 2018.
[9] *See* Memorandum, "Silicon Metal from Australia, Brazil, Kazakhstan, and Norway: Final Scope Comments Decision Memorandum," dated February 27, 2018 (Final Scope Decision Memorandum).

in a particular situation. In LTFV investigations, Commerce examines whether to compare weighted-average NVs with the EPs (or CEPs) of individual sales, *i.e.*, the average-to-transaction method, as an alternative comparison method using an analysis consistent with section 777A(d)(1)(B) of the Act.

In recent investigations, Commerce 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.[10] Commerce finds that the differential pricing analysis used in recent investigations may be instructive for purposes of examining whether to apply an alternative comparison method in this investigation. Commerce will continue to develop its approach in this area based on comments received in this and other proceedings, and on Commerce's additional experience with addressing the potential masking of dumping that can occur when Commerce uses the average-to-average method in calculating a respondent's weighted-average dumping margin.

The differential pricing analysis used in this final determination examines whether there exists a pattern of 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 Commerce uses in making comparisons between EP or CEP and NV for the individual dumping margins.

In the first stage of the differential pricing analysis used here, the "Cohen's *d* test" is applied. The Cohen's *d* coefficient is a generally recognized statistical measure of the extent of the difference between the mean, *i.e.*, weighted-average price, of a test group and the mean, *i.e.*, weighted-average price, of a comparison group. First, for comparable merchandise, the Cohen's *d* coefficient is calculated when the test and comparison groups of data for a particular purchaser, region, or time period each have at least two observations, and when the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise. Then, the Cohen's *d* coefficient is used to evaluate the extent to which the prices to the particular purchaser, region, or time period differ significantly from the prices of all other

[10] *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); 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 Commerce's differential pricing methodology.

sales of comparable merchandise. The extent of these differences can be quantified by one of three fixed thresholds defined by the Cohen's *d* test: small, medium or large (0.2, 0.5 and 0.8, respectively). Of these thresholds, the large threshold provides the strongest indication that there is a significant difference between the mean of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists. For this analysis, the difference is considered significant, and the sales in the test group are found to pass the Cohen's *d* test, if the calculated Cohen's *d* coefficient is equal to or exceeds the large, *i.e.*, 0.8, threshold.

Next, the "ratio test" assesses the extent of the significant price differences for all sales as measured by the Cohen's *d* test. If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test account for 66 percent or more of the value of total sales, then the identified pattern of prices that differ significantly supports the consideration of the application of the 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, Commerce examines whether using only the average-to-average method can appropriately account for such differences. In considering this question, Commerce tests whether using an alternative comparison method, based on the results of the Cohen's *d* and ratio tests described above, yields a meaningful difference in the weighted-average dumping margin as compared to that resulting from the use of the 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.

B) *Results of the Differential Pricing Analysis*

For Palmyra, based on the results of the differential pricing analysis, Commerce finds that 83.58 percent of the value of its U.S. sales pass the Cohen's *d* test,[11] which confirms the existence of a

[11] *See* Memorandum to the File, "Final Determination Margin Calculation for Dow Corning Corporation, Hemlock Semiconductor Operations LLC (Hemlock), and Palmyra do Brasil Indústria e Comércio de Silício Metálico e Recursos Naturais Ltda." (Dow Corning Final Calculation Memo), dated concurrently with this memorandum.

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. Further, Commerce determines that there is a 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, Commerce determines that price differences cannot be taken into account when using the average-to-average method to calculate the weighted-average dumping margin and will apply the average-to-transaction method for all U.S. sales to calculate the weighted-average dumping margin for Palmyra, in accordance with 19 CFR 351.414(c)(1) and (d).

V. DATE OF SALE

Section 351.401(i) of Commerce's regulations states that, in identifying the date of sale of the merchandise under consideration or foreign like product, Commerce normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. Additionally, Commerce may use a date other than the date of invoice if it is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.[12] Furthermore, Commerce has a long-standing practice of finding that, where the shipment date precedes the invoice date, the shipment date better reflects the date on which the material terms of sale are established.[13]

Palmyra reported the invoice date as the date of sale for its home market sales and U.S. sales.[14] However, for certain U.S. sales, the shipment date preceded the invoice date.[15] Therefore, we 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 and based on our verification findings.[16]

VI. PRODUCT COMPARISONS

In accordance with section 771(16) of the Act, we considered all products produced and sold by the respondent, Palmyra, in Brazil during the POI that fit the description in the "Scope of Investigation" section of the accompanying *Federal Register* notice to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We compared U.S. sales to sales made in the home market, where appropriate. Where there were no sales of identical merchandise in the home market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade, as appropriate.

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[12] *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)).

[13] *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.

[14] *See* Palmyra Verification Report at 7, and Dow Corning-Hemlock Verification Report at 11.

[15] *See* Dow Corning-Hemlock Verification Report at 11.

[16] *Id*.

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

VII. CONSTRUCTED EXPORT PRICE

We based U.S. price on Dow Corning's U.S. sales reported in its U.S. sales databases submitted on January 26, 2018.[17] We excluded from our analysis Dow Corning's reported sales involving a tolling arrangement (*see* Comment 5 below for further discussion). For Dow Corning's U.S. sales included in our analysis, we defined U.S. price based on the CEP, in accordance with section 772(b) of the Act, because the subject merchandise was sold in the United States after importation by a U.S. seller affiliated with the producer and EP was not otherwise warranted.

All of Dow Corning's CEP sales were further manufactured in the United States. We calculated CEP based on the packed prices of the further-manufactured product to unaffiliated purchasers in the United States. We made deductions, where appropriate, from the starting price for billing adjustments, discounts, rebates, movement expenses, *i.e.*, foreign inland freight, international freight, 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, including direct selling expenses (imputed credit expenses and warranty expenses) and indirect selling expenses (inventory carrying costs and other indirect selling expenses). We also made an adjustment to CEP for the cost of further manufacturing, in accordance with section 772(d)(2) of the Act. 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 Palmyra sales in the home market of the foreign like product and Dow Corning's sales in the U.S. market of downstream products which have been manufactured from subject merchandise in the United States. The amount of CEP profit was calculated by applying this CEP profit rate to the expenses incurred in the United States, including the further manufacturing costs of the Brazilian silicon metal.[18]

VIII. 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.*, whether the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales,

[17] These U.S. sales databases incorporated the verification corrections requested in Commerce's letter to Dow Corning, dated January 23, 2018.
[18] *See* Dow Corning Final Calculation Memo for further discussion.

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 sale prices of the foreign like product to a third-country market as the basis for normal value, 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 Palmyra 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 Palmyra, in accordance with section 773(a)(1)(B) of the Act.

We based NV on Palmyra's home market sales reported in its home market sales data submitted on January 26, 2018.[19]

B) *Level of Trade*

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, Commerce will calculate NV based on sales at the same level of trade (LOT) as the U.S. sales. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent).[20] Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing.[21] 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,[22] 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.[23]

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

[19] This home market sales database incorporated the verification corrections requested in Commerce's letter to Dow Corning, dated January 23, 2018.
[20] *See* 19 CFR 351.412(c)(2).
[21] *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.
[22] Where NV is based on constructed value (CV), we determine the NV LOT based on the LOT of the sales from which we derive selling, general and administrative expenses, and profit for CV, where possible. *See* 19 CFR 351.412(c)(1).
[23] *See Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1314-16 (Fed. Cir. 2001).

whether the difference in LOTs between NV and CEP affects price comparability, *i.e.*, no LOT adjustment is possible, Commerce will grant a CEP offset, as provided in section 773(a)(7)(B) of the Act.[24]

In this investigation, we examined information provided by Palmyra in its questionnaire responses 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.[25] Our LOT findings are summarized below.

In the home market, Palmyra reported that it made sales through one channel of distribution, *i.e.*, direct sales to home market customers.[26] The company performed the following selling functions for sales to all home market customers: sales forecasting, strategic/economic planning, price negotiation, order input/processing, employment of direct sales personnel, packing, freight and delivery, inventory maintenance, and warranty services.[27] Our verification findings confirmed that Palmyra performed these above-listed selling functions for its home market sales.[28] Therefore, we determine that all of Palmyra's home market sales were made at the same LOT.

With respect to the U.S. market, Palmyra sold subject merchandise to its U.S. affiliate, Dow Corning, which further manufactured the subject merchandise and either sold the downstream product to unaffiliated U.S. customers (U.S. channel 1) or to another affiliate, Hemlock Semiconductor Operations LLC (Hemlock), which in turn further manufactured the downstream product and sold it to its unaffiliated U.S. customers (U.S. channel 2).[29] Palmyra reported that it performed the following selling functions for U.S. channel 1 sales: freight and delivery, packing, and inventory maintenance.[30] For U.S. channel 2 sales to its U.S. affiliate, Palmyra reported that it performed no selling functions.[31] For U.S. channel 2 sales to its U.S. affiliate, Palmyra reported that it performed no selling functions.[32]

Based on the selling function categories noted above, we find that Palmyra performed only a limited number of services for channel 1 sales and no services for channel 2 sales. According to 19 CFR 351.412(c)(2), Commerce will determine that sales are made at different LOTs if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing. Palmyra provided only freight and delivery, packing, and inventory maintenance services for its sales through channel 1. We find these activities are not significant enough to warrant finding that the two U.S. sales channels constitute different LOTs. Because

[24] *See, e.g., OJ from Brazil*, Issues and Decision Memorandum at Comment 7.
[25] *See* Dow Corning's May 30, 2017 Section A Questionnaire Response (Dow Corning's AQR), at 16-18.
[26] *Id.* at 15.
[27] *Id.* at 17.
[28] *See* Palmyra Verification Report, at 7.
[29] *See* Dow Corning's Sept.12 SQR at C-5; and the Dow Corning-Hemlock Verification Report, at page 10, and Exhibit VE-DOW-6A.
[30] *See* Dow Corning's AQR, at 17.
[31] *See* Palmyra Verification Report at VE-PDB-6.
[32] *Id.*

we determine that substantial differences in Palmyra's selling activities do not exist between the two U.S. sales channels, we determine that Palmyra's CEP sales to the U.S. market during the POI were made at the same LOT.

Finally, we compared the U.S. LOT to the home market LOT, and found that the selling functions Palmyra performed for its home market customers were either not performed for its U.S. sales, or were performed at a significantly higher degree of intensity compared to the selling functions performed for its U.S. sales.[33] Specifically, we find that Palmyra performed substantially more selling activities, and at a higher degree of intensity, in the home market than in the U.S. market. Therefore, we determine that the home market LOT is at a more advanced stage of distribution than the U.S. LOT and that no LOT adjustment is possible. Accordingly, we have granted a CEP offset pursuant to section 773(a)(7)(B) of the Act.

C) *Cost of Production Analysis*

In accordance with the Trade Preferences Extension Act of 2015 (TPEA),[34] Commerce requested CV and cost of production (COP) information from Dow Corning. We examined Dow Corning'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 the respondent'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 financial expenses.

Based on our verification findings, we replaced the reported costs for all products with the average cost of Dow Corning's two production facilities in the United States.[35]

We also made adjustments to the further manufacturing data submitted by Dow Corning as follows: [36]

- We relied on the revised cost of each product code without Brazilian silicon costs included (*i.e.*, "FURCOM_BrSil").
- We used Hemlock's revised G&A expense ratio.

[33] *See* Palmyra Verification Report at VE-PDB-6; Dow Corning's Sept.12 SQR, at C-5; and the Dow Corning-Hemlock Verification Report, at page 10, and Exhibit VE-DOW-6A.
[34] The TPEA 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). *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).
[35] *See* Palmyra Cost Verification Report at 2-3 and 16-18; and Dow Corning Final Cost Calculation Memorandum dated February 27, 2018.
[36] *See* Dow Corning Further Manufacturing Cost Verification Report at 2; and Dow Corning Final Cost Calculation Memorandum.

- We revised Dow Corning's G&A expense ratio to exclude the gains on the sale of investments.
- We recalculated G&A and financial expenses for the further manufactured products by applying the ratios to the full cost of each product including all silicon costs, rather than to only the further manufacturing costs.

2. Test of Comparison Market Sales Prices

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

3. Results of the COP Test

In determining whether to disregard home market sales made at prices below the COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether: 1) within an extended period of time, such sales were made in substantial quantities; and 2) such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. In accordance with sections 773(b)(2)(B) and (C) of the Act, where less than 20 percent of the respondent's comparison market sales of a given product are at prices less than the COP, we do not disregard any below-cost sales of that product because we determine that in such instances the below-cost sales were not made within an extended period of time and in "substantial quantities." Where 20 percent or more of a respondent's sales of a given product are at prices less than the COP, we disregard the below-cost sales 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 Palmyra'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 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, where applicable, 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.[37]

IX. 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.

X. ADJUSTMENT FOR COUNTERVAILABLE EXPORT SUBSIDIES

In an LTFV investigation where there is a countervailing duty (CVD) investigation, it is Commerce's normal practice to calculate the cash deposit rate for each respondent by adjusting the respondent's estimated weighted-average dumping margin to account for export subsidies found for each respective respondent in the concurrent CVD investigation. Doing so is in accordance with section 772(c)(1)(C) of the Act, which states that U.S. price "shall be increased by the amount of any countervailing duty imposed on the subject merchandise . . . to offset an export subsidy."[38]

Commerce determined in the final determination of the companion CVD investigation that Palmyra and LIASA benefitted from export subsidies. For Palmyra, we find that an export subsidy adjustment of 0.1 percent to the estimated weighted-average dumping margin is warranted to establish Palmyra's cash deposit rate. For LIASA, we find that an export subsidy adjustment of 1.43 percent to the estimated weighted-average dumping margin is warranted to establish LIASA's cash deposit rate. For all other exporters and producers, the final rate of which is based on Palmyra's final rate, we find that an export subsidy adjustment of 0.1 percent to the estimated weighted-average dumping margin is warranted to establish the "all others" cash deposit rate.[39]

[37] *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.
[38] *See Carbazole Violet Pigment 23 from India: Final Results of Antidumping Duty Administrative Review*, 75 FR 38076, 38077 (July 1, 2010), and accompanying Issues and Decision Memorandum at Comment 1.
[39] *See* the unpublished *Silicon Metal from Brazil: Affirmative Final Determination of Sales at Less Than Fair Value;* and *Silicon Metal from Brazil: Final Affirmative Countervailing Duty Determination and accompanying Issues and Decision Memorandum* dated February 27, 2018.

XI. DISCUSSION OF ISSUES

Comment 1: Proper Basis for U.S. Price

Petitioner's Case Brief

- All of Palmyra's sales of subject merchandise during the POI were made to its parent company in the United States, Dow Corning.
- Dow Corning did not sell the subject merchandise to unaffiliated parties but, rather, further manufactured the silicon metal into non-subject, downstream products, which it then sold to unaffiliated customers.
- As a concession to Dow Corning, Commerce limited its sales reporting to the top ten products, as measured by the quantity of silicon metal in the finished, downstream product.[40]
- In the *Preliminary Determination*, Commerce based Palmyra's estimated weighted-average dumping margin on non-adverse facts available, citing "numerous critical deficiencies" that could not be rectified in time for the *Preliminary Determination*.[41] Commerce subsequently verified Dow Corning's data.
- Because Commerce found no fatal flaws in Dow Corning's downstream sales data that would preclude use of those data, Commerce should rely upon these data for purposes of the final determination.

Dow Corning's Case Brief

- Commerce erred in categorically foreclosing the use of transfer prices as the basis for U.S. price, both in this investigation and in *Aluminum Extrusions from China*.[42] The conclusion in the *Preliminary Determination*, as in *Aluminum Extrusions*, "is simply incorrect."[43]
- The statute includes the special rule for merchandise with value added in the United States; given the absence of *any* sales to unaffiliated parties, and the extent of the value added in the United States, the statute authorizes Commerce to use "any other reasonable basis" in establishing U.S. price.[44]
- This is further supported by the SAA.[45] The SAA explains that Commerce may base prices "upon the price paid to the exporter or producer by the affiliated person for the subject merchandise, if Commerce determines that such a price is appropriate."[46] Thus, Commerce has the discretion to use affiliated party prices.
- Commerce used Dow Corning's transfer prices in a prior order on silicon metal from Brazil under circumstances "nearly identical to those presented in this investigation."[47]

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[40] *See* Petitioner's Case Brief at 1, citing Commerce's questionnaire, dated August 25, 2017.
[41] *Id.* at 2, citing Commerce's Preliminary Decision Memorandum at 6-7.
[42] *See* Dow Corning's Case Brief at 5, citing *Aluminum Extrusions from the People's Republic of China*, 82 FR 26055 (May 31, 2017) (*Aluminum Extrusions*).
[43] *Id.* at 6.
[44] *Id.*
[45] *Id.*, citing Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-3 16 (1994) (SAA) at 826.
[46] *Id.*
[47] *Id.*, at 7, citing *Silicon Metal From Brazil*, 68 FR 44285, 44288 (July 28, 2003), *and Silicon Metal From Brazil,*

- The decision taken in *Aluminum Extrusions* is not instructive. In that administrative review, where Commerce determined not to use transfer prices, no party seriously proposed that Commerce rely on transfer prices.
- Nearly all of the value of Dow Corning's downstream products, (*i.e.*, approximately 95 percent), represents value added in the United States, making the use of transfer prices for subject silicon metal especially appropriate.
- The record shows that Palmyra's prices to Dow Corning reflect arm's-length transaction prices.[48]
- An independent audit by the accounting firm Ernst & Young LLP confirmed that Palmyra's prices were set using the "comparable uncontrolled price" (CUP) method, in accordance with Internal Revenue Service regulations.[49]
- Dow Corning supplied monthly data on its purchases of silicon metal from both affiliated and unaffiliated parties; these data demonstrate the arm's-length nature of transfer prices in this POI.
- The petitioner provided no pricing data to demonstrate that the Palmyra-to-Dow Corning prices were not at arm's length.
- The use of downstream sale prices is not tenable given the complexities of Dow Corning's further processing. The commingling of silicon metal from multiple sources, the thousands of resultant downstream products, and additional further processing at other plants all complicate the use of using downstream sale prices.
- Commerce's "sampling" is not statistically valid and violates section 777A of the Act. By focusing on the top products by silicon metal content, the limited reporting was skewed towards "byproducts." In contrast, Dow Corning produces products with much more value added; these should have been considered.
- Commerce should have consulted with Dow Corning before selecting its limited universe of sales to be reported. Commerce's failure to do so resulted in a "highly prejudicial" universe of sales data.[50]

Petitioner's Rebuttal Brief

- Dow Corning misrepresents Commerce's position as to the use of transfer prices; in actuality, Commerce said it "does not base U.S. prices on transactions between affiliated parties."[51]
- Dow Corning itself concedes that U.S. price is to be based on sales to unaffiliated parties. The statute requires that U.S. price be based on arm's-length prices to unaffiliated parties.
- Sales prices to affiliated parties do not constitute any "other reasonable basis" for valuing U.S. price under section 772(a) and (b). Also, Commerce precedent does not allow using transfer prices under these circumstances.[52]
- In the earlier precedents cited by Dow Corning involving the prior order on silicon metal from Brazil, Commerce relied on prices between Dow Corning affiliates; however, the

67 FR 77225 (December 17, 2002) at Comments 8a and 8b.
[48] *Id.* at 10.
[49] *Id.* at 11 (citations omitted).
[50] *Id.* at 28.
[51] *See* Petitioner's Rebuttal Brief at 1.
[52] *Id.* at 3.

parties to those contracts were not affiliated at the time the sales contracts were executed. Hence, the transaction prices subject to those contracts represented arm's-length transactions between unaffiliated parties.[53] Such is not the situation in this investigation.

- Dow Corning cannot claim that its U.S. prices between affiliated parties were at arm's length. Market prices of silicon metal declined steeply during the POI.[54] Thus, the Palmyra-Dow Corning prices do not reflect the then-extant market conditions for silicon metal in the United States.
- While Dow Corning's transfer prices may comply with Treasury Department regulations (the CUP method) for tax purposes, these prices do not constitute a proper basis for calculating Dow Corning's margin.[55]
- Dow Corning has great control of its own purchases from unaffiliated parties, determining the volume, timing and pricing of such purchases. Thus, these prices are not a proper measure of the arm's-length nature of Dow Corning's transfer prices.[56]
- The CUP method is based on pricing data from prior years, and these data are neither contemporaneous nor reliable. This is further evidence that Palmyra-Dow Corning prices are not at arm's length and cannot be used as the basis for calculating U.S. prices in this investigation.[57]
- The use of downstream sale prices in this investigation is entirely reasonable. The statute calls specifically for the use of downstream sale prices, with appropriate adjustments, to account for further-manufacturing costs and profit.[58]
- That Dow Corning may have added substantial value in the United States does not preclude use of these downstream sale prices. Commerce verified there were no significant distortions or discrepancies in Dow Corning's data; thus, Commerce should rely upon these data.[59]
- That all adjustments may result in negative net U.S. prices is no reason to disregard these transaction prices. In *Wire Rod from Canada*, Commerce did not deem aberrational negative prices arising from adjustments for further manufacturing costs.[60] In that administrative review, Commerce specifically stated that negative-priced sales would be treated no differently than positive-priced sales.
- Commerce properly exercised its discretion in limiting the reporting of Dow Corning's sales in this investigation. This limited reporting is not properly characterized as "sampling;" thus, the statutory requirement for a statistically valid sample does not come into play. Commerce's desire to balance the burden on itself and on respondents has been upheld by the courts.[61]

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[53] *Id.*
[54] *Id.* at 5, citing the Petitions for the Imposition of Antidumping and Countervailing Duties: Silicon Metal from Australia, Brazil, Kazakhstan, and Norway, dated March 8, 2017 (the Petition) at Volume I, Exhibit I-41.
[55] *Id.* at 8.
[56] *Id.* at 8 and n33.
[57] *Id.* at 10-11.
[58] *Id.* at 12.
[59] *Id.* at 13.
[60] *Id.*, citing *Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 FR 3822 (January 24, 2006) (*Wire Rode from Canada)*, and accompanying Issues and Decision Memorandum at 22.
[61] *Id.* at 15, citing, *inter alia*, *GMN Georg Mueller Nuernberg AG v. United States*, 763 F. Supp. 607, 610 (Ct. Int'l Trade 1991) and *Koyo Seiko Co., Ltd. v. United States*, 768 F. Supp. 832, 837 (Ct. Int'l Trade 1991).

- The limited sales reporting, about which Dow Corning now complains, was instituted at Dow Corning's own request, with the company citing the monumental burden of reporting downstream sales and cost data for thousands of products.

Dow Corning's Rebuttal Brief

- Dow Corning's U.S. price should be based upon the transfer prices paid between Palmyra and Dow Corning U.S.

Commerce's Position:

The statute defines EP as the price at which the producer or exporter sells merchandise prior to importation to an unaffiliated U.S. customer, and CEP as the price at which subject merchandise is sold before or after importation, by or for the producer or exporter, or by an affiliate, to an unaffiliated U.S. customer.[62] The law thus establishes a standard under which Commerce must utilize the price of the first sale to an *unaffiliated* U.S. customer in determining U.S. price.

The statute's preference for use of prices to unaffiliated U.S. customers is again evident in section 772(e) of the Act, which established a special rule for merchandise with significant value added after importation, applies. Section 772(e) of the Act states:

> (e) Special Rule for Merchandise with Value Added After Importation.
>
> > Where the subject merchandise is imported by a person affiliated with the exporter or producer, and the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise, the administering authority shall determine the constructed export price for such merchandise by using one of the following prices if there is a sufficient quantity of sales to provide a reasonable basis for comparison and the administering authority determines that the use of such sales is appropriate:
> >
> > (1) The price of identical subject merchandise sold by the exporter or producer *to an unaffiliated person*.
> >
> > (2) The price of other subject merchandise sold by the exporter or producer *to an unaffiliated person*.
> >
> > If there is not a sufficient quantity of sales to provide a reasonable basis for comparison under paragraph (1) or (2), or the administering authority determines that neither of the prices described in such paragraphs is appropriate, then the constructed export price may be determined on any other reasonable basis. {*Emphasis added*.}

[62] *See* sections 772(a) and (b) of the Act.

Thus, in situations in which the special rule applies, the statute specifies alternative methods for calculating CEP, which, consistent with the general rule that U.S. price must be based on sales to unaffiliated U.S. customers,[63] contemplate the use of prices to *unaffiliated* persons. The statute anticipates that there might be limited circumstances in which there is an insufficient quantity of such sales to provide a reasonable basis for U.S. price, and so states that Commerce "may" calculate CEP using any other reasonable basis. The statute does not provide guidance as to what "any other reasonable basis" is, and thus Congress left it to the discretion of Commerce to select the method for determining CEP. This discretion is recognized in the SAA, which states that "such a basis *may* be based" upon the price between affiliated parties "if Commerce determines that such a price is appropriate."[64]

The Federal Circuit has recognized Commerce's discretion, stating that "Congress has directly expressed the intent to allow Commerce to determine, when the triggering circumstances of section {772(e) of the Act} are present, whether application of the special rule is appropriate."[65] The Federal Circuit further stated, citing the SAA, that "Congress did not intend for the special rule to dictate to Commerce a particular method for calculating constructed export price."[66] Similarly, the U.S. Court of International Trade has recognized that even where the value-added threshold in section 772(e) of the Act is met, "application of the 'special rule' is left to Commerce's reasonable exercise of discretion."[67]

In this situation, there are no sales to unaffiliated U.S. customers to use as an alternative basis under the special rule.[68] Dow Corning has cited to no case precedent in which Commerce relied on prices established between affiliated parties as the basis for U.S. price, other than two administrative reviews in the prior antidumping duty proceeding covering silicon metal from Brazil.[69] However, we find that the situation in these two administrative reviews are distinguishable and thus are not relevant precedent for the facts present in this investigation. Specifically, in these prior administrative reviews, Commerce found that it was reasonable to base the respondent's (Companhia Brasileira Carbureto de Calcio) CEP on the price at which it sold subject merchandise to its U.S. affiliate (Dow Corning Corporation, Inc.) because the two

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[63] *Id.*
[64] *See* SAA at 826.
[65] *See* RHP *Bearings Ltd. v. United States*, 288 F.3d 1334, 1345 (Fed. Cir. 2002).
[66] *Id.*
[67] *See* Hyundai Steel Co. v. United States, Ct. No. 16-161, Slip. Op. 18-2 (CIT January 10, 2018) (citing *RHP Bearings*, 288 F.3d at 1344-46).
[68] *See Antidumping Duties; Countervailing Duties; Final rule*, 62 FR 27296, 27353 (May 19, 1997) (*Preamble*) ("{Commerce} retains the discretion to refrain from applying the special rule in situations where there are an insufficient number of sales to unaffiliated customers to use as an alternative basis for determining the dumping margin on value added sales."); *see also* RHP Bearings v. United States, 288 F.3d 1334 (Fed. Cir. 2002) at 1344.
[69] Dow Corning cites to *Silicon Metal From Brazil: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review and Notice of Intent To Revoke Order in Part*, 68 FR 44285, 44288 (July 28, 2003), unchanged in *Silicon Metal From Brazil: Final Results of Antidumping Duty Administrative Review and Revocation of Order in Part*, 68 FR 57670 (October 6, 2003), and *Silicon Metal From Brazil; Final Results of Antidumping Duty Administrative Review and Revocation of Order in Part*, 67 FR 77225 (December 17, 2002) at Comments 8a and 8b.

parties had entered into the contract governing the sales of subject merchandise during both periods of review *before the parties were affiliated*.[70] As such, the prices that formed the basis of CEP in those reviews were not actually transfer prices; rather, they were determined to be arm's-length prices between a foreign producer/exporter and an unaffiliated U.S. customer. Here, in contrast, Palmyra and Dow Corning were affiliated during the entirety of the POI and the prices for sales between these two companies were not governed by contract pre-dating their affiliation. In light of the statute's preference that U.S. price be based on the first sale to an unaffiliated U.S. customer, and the potential, generally, that prices between affiliated parties may be manipulated to mask any dumping activities of the respondent, we have determined that it is inappropriate to calculate CEP by using Palmyra's transfer prices as "any other reasonable method" rather than the method preferred by the statute.

Moreover, although Dow Corning argues that the use of downstream sales is not tenable due to the complexities of its further processing (such as the commingling of silicon metal from multiple sources, its production of thousands of downstream products, and further processing at other plants), we find that there are no significant data issues that would prevent us from calculating an estimated weighted-average dumping margin based on Dow Corning's sales and costs of downstream products.[71] Although Dow Corning commingles silicon metal from multiple sources, Dow Corning is able to determine how much Brazilian silicon metal each product contains based on the processing facility of the Brazilian silicon metal, and tracks the associated costs.[72] We verified Dow Corning's methodology for reporting the further manufacturing costs for Brazilian silicon metal, which we incorporated into the final margin calculation with only minor adjustments.[73]

Further, Dow Corning has overstated the complexity of the scenario currently before us because the reported downstream product sales data do not concern "thousands" of downstream products and multiple processing plants. Rather, the data set is more limited, representing the downstream product sales and costs for the ten products which consumed the largest quantity of silicon metal during the period of investigation. This limited reporting of its sales and cost data is a result of Dow Corning's own request that it be excused from reporting all of its sales and costs for all of its downstream products.[74] Commerce consented to Dow Corning's request, based on Dow

[70] *See* Dow Corning's AQR, Exhibit App-2 at 7.
[71] *See Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (granting Commerce significant deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature").
[72] *See* Dow Corning Cost Verification Report.
[73] *See* Palmyra Cost Verification Report; Dow Corning Cost Verification Report; and Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Palmyra do Brasil Indústria e Comércio de Silício Metálico e Recursos Naturais Ltda. and Dow Silicones Corporation.
[74] *See* Memorandum to the File, "Antidumping Duty Investigation of Silicon Metal from Brazil: *Ex-Parte* Meeting with Representatives of Dow Corning Corporation," dated July 19, 2017; *see also* Dow Corning's Letter "Silicon Metal From Brazil / Request for Extension and Clarification of Supplemental Section A Questionnaire," dated July 19, 2017 (requesting Commerce to consider reducing Dow Corning's reporting requirements to "the 200 largest revenue products sold to unaffiliated customers" because complying with Commerce's request would be "an extremely time consuming process" and "take up to two months to complete, and such a request "would capture a

Corning's representations about the silicon content of its downstream products and what it could feasibly report, and limited Dow Corning's reporting requirements.[75] Dow Corning argues that Commerce should use transfer prices because the available data on its downstream product sales are not a statistically valid "sample" and this is inconsistent with section 777A of the Act. We disagree. Commerce did not limit Dow Corning's reporting of downstream sales and cost data pursuant to section 777A of the Act, and so the requirements of that provision do not apply. Rather, Commerce limited Dow Corning's reporting based on Dow Corning's own concerns regarding the burden of reporting its full universe of downstream product sales and further manufacturing costs.[76]

We also disagree with Dow Corning's argument that transfer prices would be an appropriate basis for determining CEP under the "any other reasonable basis" approach, because those prices were determined by an auditor to comply with Treasury Department regulations and accounting requirements. Even if its pricing complies with Treasury Department regulations governing the determination of taxable income, compliance with those regulations is not relevant here. The regulations cited by Dow Corning, 26 CFR 1.482, *et seq.*, are provisions intended to serve another agency's administrative purposes. Commerce is obligated to conduct its proceedings and evaluate the information we deem relevant to our proceedings in accordance with the language and purpose of the antidumping duty law and regulations. As such, we find that the Treasury Department regulations, and any compliance with such regulations, are not dispositive as to whether it is appropriate for Commerce to exercise its discretion and employ "any other reasonable method" in determining CEP, or whether Dow Corning's reported transfer prices are an appropriate basis for CEP.

Dow Corning argues that its transfer prices were made at arm's length because they fell within the range of prices it paid to unaffiliated suppliers of silicon metal during the POI. Dow Corning further argues that its weighted-average POI transfer price differed by less than one percent from the weighted-average POI price paid to unaffiliated suppliers, which is within the two percent range that establishes an arm's-length transaction in Commerce's standard arm's-length test for comparison market sales. We agree that as a general matter, if record information were to

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significant portion of all sales").

[75] *Id.; see also* Dow Corning's Letter "Silicon Metal From Brazil / Request for Extension," dated July 20, 2017; *see also* Commerce Letter "Antidumping Duty Investigation of Silicon Metal from Brazil: Extension for Supplemental Section A Questionnaire," dated July 21, 2017 (excusing Dow Corning from answering Question 1 and 19 in response to Dow Corning's claims of the significant burden in reporting all downstream products; *see also* Commerce Letter "Silicon Metal from Brazil: Supplemental Section B and C Questionnaire," dated July 27, 2017 (requesting Dow Corning to report "the largest 200 products by 2016 sales revenue to unaffiliated customers and the 20 products with the least further manufacturing sold to unaffiliated customers").

[76] Where appropriate, Commerce may limit the respondent's reporting requirements. *See e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products from Canada*, 66 FR 56062 (November 1, 2001) ("In view of the large number of transactions involved, the Department instructed respondents to limit the reporting of U.S. and home market sales to identical products sold in both markets, provided that such products accounted for at least 33 percent of all merchandise sold to the United States during the period of investigation."), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002).

establish that transfer prices were made on an arm's-length basis, those prices may be a reasonable basis on which to calculate CEP under the special rule. However, in this investigation, we disagree with Dow Corning's claim that the record establishes its transfer prices were made at arm's length. First, the unaffiliated supplier prices Dow Corning reported (which are designated business proprietary information) are not informative as to prices of silicon metal produced in Brazil and sold in the United States, or for use in determining whether Palmyra's transfer prices were in line with prices to unaffiliated U.S. customers.[77] Second, as Dow Corning notes, the arm's-length test it references is used to evaluate whether affiliated party sales in the home market are in the ordinary course of trade and, therefore, usable as NV in Commerce's margin calculation.[78] That this test allows Commerce to include, where appropriate, affiliated party sales in the home market as part of its NV calculation is not probative as to whether it is appropriate to include sales to affiliates in calculating U.S. price. As discussed above, the statute's preference is for U.S. price to be based on sales to unaffiliated parties.

Finally, the transfer prices Dow Corning reports do not accurately reflect the U.S. market realities during the POI.[79] Dow Corning reports the same price per kilogram for nearly all of its affiliated party purchases of silicon metal from Brazil throughout the POI, [80] yet record evidence demonstrates that U.S. market prices of silicon metal during the POI were much more volatile than the reported affiliated party purchase prices.[81] Such differences between the reported transfer prices and the market prices of silicon metal demonstrate that the reported transfer prices are not a reasonable basis on which to calculate CEP.

Based on the above, we find that it is reasonable not to apply the special rule in section 772(e) of the Act to calculate Palmyra's weighted-average dumping margin as there are no sales of identical or similar merchandise to unaffiliated U.S. customers on which to base the U.S. prices of subject merchandise which is further manufactured by Dow Corning in the United States before it is sold to the first U.S. unaffiliated customer. Further, we find that it is not appropriate to base U.S. price on Palmyra's transfer prices of subject merchandise to Dow Corning in the United States. As a result, we find it reasonable to base Palmyra's U.S. sale prices on its verified downstream sales, COP, and further manufacturing cost data.

Comment 2: Treatment of Non-Brazilian Silicon Metal in Calculating Further-Manufacturing Costs

Petitioner's Case Brief

- Palmyra's CEP sales involved further-manufactured merchandise. Commerce must

[77] *See* Dow Corning's July 31, 2017 Section A Supplemental Questionnaire Response (Dow Corning's July 31 SAQR) at 10-11 and Exhibit SA-4.
[78] *See* 19 CFR 351.403(c).
[79] *See* the Petition at Volume 1 at 34 and Exhibit I-41.
[80] *See* Dow Corning's July 31 SAQR at Exhibit SA-4.
[81] *See* the Petition at Volume 1 at 34 and Exhibit I-41.

include the costs of non-Brazilian silicon metal used in its further manufacturing processes.

- Commerce erroneously directed Dow Corning to submit an additional further-manufacturing cost database excluding the costs of non-Brazilian silicon metal from its further-manufacturing costs; Commerce should instead adjust Dow Corning's costs to account for "any additional material" consumed in manufacturing the final product.[82]
- Dow Corning's production materials, particularly its bills of materials (BOMs), differentiate by source the silicon metal consumed in the downstream product.[83]
- These various sources of silicon metal have different chemical properties; Dow Corning has asserted that these various inputs are blended "by necessity, in order to achieve required impurity levels."[84]
- By Dow Corning's own admission, "non-Brazilian silicon metal 'should therefore be considered valued added in the United States (just as would any other direct materials incorporated into the downstream product)."[85] This non-Brazilian silicon metal constitutes an "additional material"; the cost of this non-Brazilian silicon metal must be deducted from CEP.[86]
- Failure to include the non-Brazilian silicon metal inputs would overstate Palmyra's CEP, thus artificially reducing its estimated weighted-average dumping margin. Deducting the cost of non-Brazilian silicon metal is essential to establishing the CEP of the Brazilian silicon metal, as required by the statute.[87]
- At verification, Commerce noted discrepancies between the standard costs included in the BOMs at both of Dow Corning's Carrolton, Kentucky and Midland, Michigan plants and the actual experience at both plants.[88]
- Commerce must also adjust Dow Corning's CEP to account for these findings.[89]

Dow Corning's Rebuttal Brief

- If Commerce opts to base U.S. price on downstream product sales, Dow Corning's further-manufacturing costs must exclude the costs of silicon metal from all sources, not just silicon metal from Brazil.[90]
- There are differences between the silicon metal content of specific products as specified in Dow Corning's BOMs and its actual usage rates, as recorded in its inventory records.
- The "all silicon metal" methodology is not contrary to the statute, as it still results in the deduction of all further-manufacturing costs, irrespective of the origin of the silicon metal input.
- The petitioner insisted that all silicon metal inputs were fungible, going so far as to say, "domestic and imported silicon metal of the same 'grade' are completely interchangeable,

[82] *See* Petitioner's Case Brief at 4, citing 19 U.S.C. 1677a(d)(2).
[83] *Id.* at 5.
[84] *Id.*, quoting Dow Corning's Sept. 29 SQR.
[85] *Id*., quoting Dow Corning's AQR at Appendix 2.
[86] *Id.* at 6.
[87] *Id.* at 7.
[88] *Id.* at 8. This argument is largely business proprietary information, and can be found in Petitioner's Case Brief.
[89] *Id.* at 10.
[90] *See* Dow Corning's Rebuttal Brief at 2.

regardless of source."[91] The petitioner's reversal on this issue, first stated in its case brief, should be rejected.

- The International Trade Commission was persuaded by the petitioner's representations that silicon metal from various sources is fungible, and so concluded in its preliminary determination.[92]
- That the BOMs change over time for the same product is further evidence of the interchangeability of silicon metal from various sources.[93]
- The use of silicon metal from various sources in the manufacture of trichlorosilane, an intermediate product in the production of polysilicon, demonstrates that Brazilian and non-Brazilian silicon metal are fungible. Dow Corning's actual usage rates often differed radically over time, as demonstrated at Commerce's verification, providing further evidence of the fungibility of these products.[94] The divergence between the BOM standards, used to prepare Dow Corning's further manufacturing costs, and its actual experience, render the use of BOMs distortive.[95]
- The use of an "all silicon" approach simplifies Commerce's analysis, as it will not need to make adjustments for non-Brazilian silicon metal.[96] Further, Dow Corning's silicon metal transfer prices are essentially identical to the prices it pays to unaffiliated suppliers.[97]
- The substantial differences in Dow Corning's books in the costs for silicon metal from Brazilian and non-Brazilian sources merely reflect an accounting method in the establishment of Dow Corning's standard costs.[98] They do not accurately reflect differences in the prices of Dow Corning's acquisition costs.

Commerce's Position:

We agree with the petitioner that the further manufacturing costs should include the costs of non-Brazilian silicon metal. As noted above, Dow Corning reported that its U.S. manufacturing plants obtain silicon metal from non-Brazilian sources and co-mingle it with the silicon metal from Brazil. Dow Corning initially reported the non-Brazilian silicon metal in the further manufacturing (FURMANU) costs. At our request, Dow Corning provided an alternative FURMANU wherein the non-Brazilian silicon metal was excluded from the FURMANU costs, leaving only conversion costs and other materials as the basis of FURMANU.

As a general observation, we note that treating the non-Brazilian silicon metal as a further manufacturing cost results in a larger FURMANU adjustment than excluding the non-Brazilian silicon metal from FURMANU. This, in turn, results in a correspondingly lower U.S. price. However, because the remaining portion of the U.S. price (*i.e.*, a "net price"), represents the portion of the price attributable to the Brazilian silicon metal, not the portion of the price

[91] *Id.* at 4 (added emphasis omitted).
[92] *Id.*, citing *Silicon Metal from Australia, Brazil, Kazakhstan, and Norway*, (Preliminary) USITC Pub. 4685 (May 2017) at 14, n. 70
[93] *Id.* at 5.
[94] *Id.* at 6, citing Dow Corning Cost Verification Report.
[95] *Id.* at 7.
[96] *Id.* at 8.
[97] *Id.*, citing Dow Corning's July 31 SQA at Exhibit SA-4.
[98] *Id.* at 10.

attributable to total silicon metal, the conversion factor required to restate the resulting net price into terms of 1.0 kilogram of silicon metal is also changed. That is, it is changed to reflect only the percentage of Brazilian silicon metal in the product sold in the United States. As a result, the net price attributable to Brazilian silicon metal is divided by a smaller percentage, which necessarily increases the net price by a larger proportional amount. Conversely, if the non-Brazilian silicon metal is not treated as FURMANU, the further manufacturing cost adjustment is smaller; however, the conversion factor likewise changes, which necessarily increases the net price by a smaller proportional amount.

The use of those further manufacturing costs under the "Brazil-only silicon" methodology, which includes the cost of the non-Brazilian silicon metal in the total further manufacturing costs, is more consistent with section 772(d)(2) of the Act, where Commerce is required to deduct the cost of all further manufacture or assembly that occurs in the United States (including additional material and labor) from the price used to establish CEP. This methodology removes all costs except for the cost of Brazilian silicon metal from the starting gross U.S. price of the downstream product.

For both alternatives, the further manufacturing cost of each product is calculated based on the product-specific BOMs, which include values, adjusted by variances. The record shows that the BOMs separately identify the Brazilian and non-Brazilian silicon metal for each product. The statute provides that the price used to establish CEP shall be reduced by the cost of any further manufacture or assembly (including additional material and labor).[99] Notably, the statute does not appear to make an exception for additional material that would be considered subject merchandise but for its country of origin. Here, the subject merchandise is silicon metal from Brazil. Therefore, we find it is appropriate for silicon metal from other sources that is added to silicon metal from Brazil in the production of downstream products to be considered additional material and, thus, be included in further manufacturing costs.

Moreover, we find that including the non-Brazilian silicon metal in FURMANU is more accurate because the purpose of the FURMANU adjustment is to adjust the U.S. price of the downstream product into the CEP which reflects the subject merchandise that entered the United States. As noted above, the reported U.S. price of the downstream product includes the CEP of the subject merchandise plus conversion costs and the costs of other materials (including, in this situation, non-Brazilian silicon metal). Thus, by including the costs of the non-Brazilian silicon metal, Commerce is relying on Dow Corning's books and records for this material in calculating CEP of the subject merchandise.

Furthermore, because the U.S. price of the downstream product is reported on a different per-unit basis from the CEP of the subject merchandise (*i.e.*, a price per kilogram of Brazilian silicon metal), a conversion factor must be used to restate the U.S. price and associated expenses of the downstream product into the equivalent per-kilogram CEP of Brazilian silicon metal in order to use the adjusted CEP price in a comparison with NV. In making this conversion, the proportions of Brazilian and non-Brazilian silicon metal must be considered, as noted above.

Based on the above analysis, we find that it is correct to include the non-Brazilian silicon metal costs in the further manufacturing cost calculation. Therefore, for the final determination, we have used Dow Corning's further manufacturing cost data, which includes its costs of non-Brazilian silicon metal as part of the further manufacturing costs.

Comment 3: Adjustments to Dow Corning's Further-Manufacturing Costs

Petitioner's Case Brief

- Commerce must exclude investment income from the calculation of further manufacturing G&A expenses. Dow Corning erroneously included gains on the sale of other assets and investments in calculating its G&A ratio.[100]
- Commerce's practice is to exclude gains and losses from investment activities from the calculation of a respondent's G&A ratio.[101]
- Dow Corning also understated its reported further manufacturing G&A and financial expenses by multiplying the corresponding expense ratios by U.S. further-manufacturing costs only, rather than *total* costs of manufacturing.[102]

Dow Corning's Case Brief

- In its cost verification report, Commerce suggested recalculating G&A and financial expenses to correct a disconnect between the calculation of the ratios (based on the cost of goods sold) and the way those ratios were applied to further manufacturing costs, which do not include all silicon metal costs.[103]
- Commerce should apply the G&A ratio to the cost reported for each CONNUM, rather than to the product code within the CONNUM with the highest packing costs.[104]

Dow Corning's Rebuttal Brief

- Dow Corning made clear that the gain at issue resulted from the sale of a certain business unit. Neither the petitioner nor Commerce challenged this reported item or sought further clarification of its nature. Further, Commerce's verification report made no finding that this item was in any way deficient or was improperly included in G&A expenses.[105]

Commerce's Position:

We agree that the gain in question is related to investments held by Dow Corning. Commerce asked Dow Corning to explain the nature of certain income and expense items claimed as an offset to its G&A expenses, including the gain on the sale of assets and investments.[106] Dow

[100] *See* Petitioner's Case Brief at 11.
[101] *Id.* at 11, citing *Emulsion Styrene-Butadiene Rubber from the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part,* 82 FR 33045 (July 19, 2017), and accompanying Issues and Decision Memorandum (Rubber IDM) at Comment 3.
[102] *Id.*
[103] *See* Dow Corning's Case Brief at 50, citing the Further Manufacturing Cost Verification Report.
[104] *Id.* at 51.
[105] *See* Dow Corning's Rebuttal Brief at 11.
[106] *See* Dow Corning's Nov. 9 SQR at Section E.

Corning stated that "all of the items identified relate to Dow Chemical's business operations, not to investment activities." However, it appears that the gain in question resulted from Dow Corning's investment decision to sell certain shares.[107] Because it is Commerce's practice to exclude gains and losses from investment activities from the calculation of a respondent's G&A expense ratio,[108] we have disallowed the investment gain and recalculated Dow Corning's G&A expense ratio for the final determination.

The G&A and financial expense ratios should be applied to total U.S. manufacturing cost (*i.e.*, all silicon metal plus all further manufacturing costs), in order to ensure that the denominators of the G&A rate and financial rate are applied to a unit cost calculated on the same basis as the ratios. Dow Corning's G&A and financial expense rates were derived by dividing the G&A expenses and financial expenses by the company-wide total costs of goods sold (from the company-specific financial statement for G&A expenses and the consolidated financial statements for financial expenses); therefore, they must be applied to the reported per-unit further processing costs, inclusive of the total cost of silicon metal. This is consistent with Commerce's past practice.[109] We agree with Dow Corning that the ratios should be applied to the weighted-average cost of all materials within the product code, and have done so for the final determination.

Comment 4: Differential Pricing

Dow Corning's Case Brief

- If Commerce uses Dow Corning's downstream sales in its analysis, Commerce must utilize its standard average-to-average comparison method, without methodological adjustments to account for possible "pattern{s} of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time."[110]
- Commerce's practice, developed over time, is to use the Cohen's *d* test as a statistical metric to determine if such patterns exist.[111]
- However, this approach is fundamentally flawed given the facts of this investigation. Even if the limited CEP sales data of downstream sales on the record reveals a pattern of price discrimination, these data are unrepresentative of Dow Corning's entire universe of sales.
- Commerce's disregarding of the special rule for value added in the United States introduces distortions into the calculations, given the preponderant value added to the finished product through further manufacturing in the United States.
- Commerce's insistence on "sampling" renders problematic the use of a statistical measure such as Cohen's *d* to find significant price differences.
- The wide price disparities in the downstream sales reported by Dow Corning render any search for patterns of price discrimination futile.

[107] *See* Dow Corning Cost Verification Report at 9; *see also* Dow Corning's Nov. 9 SQR at Exhibit 2S-DS31.
[108] *See* Rubber IDM at 10-11 (Comment 3).
[109] *Id.*
[110] *See* Dow's Case Brief at 29, citing section 777A of the Act.
[111] *Id.*, quoting *Differential Pricing Analysis; Request for Comments*, 79 FR 26720 (May 9, 2014).

- Dow Corning's sales prices for its further-manufactured products vary according to the specific product at issue; yet Commerce would deduct a fixed CEP profit amount to all of these products without taking into account the vastly divergent prices.[112]

Petitioner's Rebuttal Brief

- Dow Corning's late complaints about the limited sales reporting, and its effect on any differential pricing analysis, must be dismissed. Dow Corning further argues for use of the average-to-average comparison methodology. Given the facts of this investigation (*i.e.*, limited reporting), Commerce's differential pricing analysis can only capture patterns of pricing using that limited body of reported sales.[113]
- Commerce applies its differential pricing analysis in all situations, including those involving limited reporting,[114] and has consistently rejected arguments that it should not conduct the differential pricing analysis based on the specific circumstances of individual investigations or reviews.[115] Commerce should, likewise, continue to apply its differential pricing analysis in this investigation.

Commerce's Position:

We disagree with Dow Corning. The purpose of a differential pricing analysis is to consider whether the A-to-A method is appropriate, consistent with 19 CFR 351.414(c)(1), to calculate a respondent's (estimated) weighted-average dumping margin.[116] With the A-to-A method, "targeted" dumping can be masked[117] both implicitly within each average U.S. price where higher transaction-specific prices offset lower transaction-specific prices and explicitly when offsetting positive comparison results with negative comparison results when aggregating the individual dumping margins. This potential for the masking of dumping and the distortion of a respondent's weighted-average dumping margin exists whether or not a respondent's request is granted to not report all of its U.S. sales. In either situation, all of the U.S. sales which are used to calculate a respondent's weighted-average dumping margin are also included in a differential pricing analysis. Thus, the results of a differential pricing analysis reasonably represent the ability of the A-to-A method to appropriately assess a respondent's dumping in the U.S. market.

As stated above, Commerce did not select a statistical sample from Dow Corning's further manufactured U.S. sales; rather, as discussed above, we allowed Dow Corning to limit its reporting based on its representations concerning the burden of reporting its full universe of downstream product sales. Irrespective of whether a respondent has reported all or a subset of its

[112] *Id.* at 37.
[113] *See* Petitioner's Rebuttal Brief at 20.
[114] *Id*. at 21, citing *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 82 FR 51806 (November 8, 2017) (*Softwood Lumber Canada Final Determination*), and accompanying Issues and Decision Memorandum at 53-65 (Comment 18).
[115] *Id*., citing *Large Residential Washers from the Republic of Korea: Final Results of Antidumping Administrative Review; 2015-2016*, 82 FR 42788 (September 12, 2017), and accompanying Issues and Decision Memorandum at 6-7 (Comment 1).
[116] *See* above at 3-4.
[117] *See* SAA at 842 (With targeted dumping "an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customer or regions").

U.S. sales, the differential pricing analysis is intended to address the two statutory requirements,[118] including whether there exists a pattern of prices that differ significantly, for the U.S. sales which are the basis for the weighted-average dumping margin. Accordingly, Commerce disagrees with Dow Corning's claim that the results of the differential pricing analysis in this investigation is flawed.

Similarly, Commerce disagrees with Dow Corning's assertion that the results of a differential pricing analysis are distorted because of the amount of further manufacturing value added within the United States. As stated above, the purpose of this differential pricing analysis is to consider whether the A-to-A method is appropriate to calculate Palmyra's estimated weighted-average dumping margin. These margin calculations are based on its CEP of imported Brazilian silicon metal, which is based on Dow Corning's U.S. sales of downstream products. Because Commerce has found that it is appropriate to calculate Palmyra's estimated weighted-average dumping margin based on such CEPs, including adjustments for further manufacturing costs and CEP profit, Commerce finds that it is also appropriate to base the differential pricing analysis on net U.S. prices with the same adjustments for further manufacturing costs and CEP profit.

Comment 5: Treatment of Certain Sales to an Unaffiliated Toller

Dow Corning's Case Brief

- Sales of byproducts should not be included in Commerce's calculations. Commerce, consistent with its established practice, should not include Dow Corning's reported sales of byproducts in its margin calculation.[119]
- These byproducts are an "unavoidable consequence" of chemical reactions during the further manufacturing processes; they are unsuitable for production of the intended final product, polysilicon.[120]
- Sales of byproducts are not properly treated as CEP sales. Commerce never requires respondents to report sales of byproducts, such as scrap.[121]
- These transactions lack both a reasonable cost or commercial sales value. There is only a standard cost assigned to the byproduct.
- Further, transactions involving byproducts are part of a convoluted tolling arrangement; this means that in addition to its putative sales price for these inputs, Dow Corning receives consideration (value) in the form of further processed products Dow Corning can use in its own operations.[122] The price assigned to these byproduct sales "is not intended to reflect the 'commercial value' of the byproduct."[123]
- Alternatively, Commerce should disregard sales of byproducts because the date of sale predates the POI. In fact, the material terms of sale were set by contract years prior to the

[118] *See* section 777A(d)(1)(B) of the Act.
[119] *See* Dow Corning's Case Brief at 38.
[120] *Id.*; *see also* Dow Corning-Hemlock Sales Verification Report at 9-10 *and* Dow Corning's Supplemental Section B and C Response – Part 2, dated August 17, 2012.
[121] *Id.* at 39, citing, *e.g.*, *Certain Carbon and Alloy Steel Cut-to-Length Plate from Germany*, 82 FR 16360 (April 4, 2017).
[122] *Id.* at 40.
[123] *Id.*

POI.[124]

- If Commerce insists on using these sales, it must adjust the sales price to reflect the full consideration received by Dow Corning, including chemicals returned to Dow Corning as part of its tolling agreement. Commerce must either increase the price to account for these byproducts returned to Dow Corning, or offset the standard cost to capture this value added.[125]

Petitioner's Rebuttal Brief

- Dow Corning argues that sales of certain products are byproducts that should not be included in the calculation of Dow Corning's CEP. Dow Corning asserts this product is an "unavoidable consequence" of its production of certain trichlorosilane, which is used in the production of polysilicon.[126]
- Commerce analyzes byproduct vs. coproduct issues based on five factors: 1) how a respondent records and allocates costs in the ordinary course of business; 2) the significance of the product relative to other joint products; 3) whether the product is an unavoidable consequence of producing another product; 4) whether management intentionally controls production of the product; and 5) whether the product undergoes significant additional processing after the split-off point.[127]
- In examining these factors, especially the first two, it is clear that Dow Corning assigns standard costs; such accounting treatment is an indication that a jointly-produced product is a coproduct, rather than a byproduct.[128]
- Dow Corning's silence with respect to the second factor listed above demonstrates the significance of this product to it.
- Dow Corning assigns a standard cost to this product, which means that Dow Corning itself considers it to be a coproduct, rather than a byproduct.[129]
- Commerce only excludes U.S. sales in extraordinary circumstances. The Court of International Trade (CIT) has held that even U.S. sales "outside the ordinary course of trade" normally should be included as they may be the very cause of injury.[130] To the contrary, these sales are not atypical. They are part of Dow Corning's normal course of business, and are within the top twenty products sold by Dow Corning.
- Dow Corning's assertions that these sales were actually concluded long before the POI must be dismissed. The actual price and quantity of the final sales were subject to change at any time; thus, these sales fell within the POI.[131]

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[124] *Id.* at 42, citing Sales Dow Corning Sales Verification Report at Exhibit VD-DOW-3B.
[125] *Id.* at 44-45.
[126] *See* Petitioner's Rebuttal Brief at 21-22.
[127] *Id.* at 22, citing *Certain Hot-Rolled Steel Flat Products From the Republic of Turkey; Final Determination of Sales at Less Than Fair Value*, 81 FR 53428 (August 12, 2016) (*Hot-Rolled Steel From Turkey*), and accompanying Issues and Decision Memorandum at Comment 7.
[128] *Id.* at 23, citing *Hot-Rolled Steel From Turkey*. The petitioner makes additional arguments that are proprietary in nature.
[129] *See* Petitioner's Rebuttal Brief at 23; this argument includes additional proprietary information available in Petitioner's Rebuttal Brief.
[130] *Id. at 25*, citing *Am. Permac, Inc. v. United States*, 783 F. Supp 1421, 1423 (CIT 1992) and *Corus Staal BV v. U.S Department of Commerce*, 259 F. Supp. 1253, 1268 (CIT 2003).
[131] *Id.* at 27.

- In cases, such as this one, where a long-term contract sets no minimum quantity, Commerce does not use the contract date as the date of sale.[132]
- No adjustment should be made to the prices charged for a certain input product to reflect additional consideration received by Dow Corning.[133]

Commerce's Position:

Dow Corning reported that one of its ten reported downstream products sold in the United States was sold under a complicated tolling arrangement with a tolling company. Under this agreement, Dow Corning sold the product to the tolling company, the tolling company processed the product, remitted a payment to Dow Corning, returned to Dow Corning some of tolled product A it produced, and returned all of tolled product B it produced from the original product. The tolling company kept the remaining tolled product A as compensation for the tolling. This complex and unusual transaction was not merely a tolling arrangement, given that the customer, the tolling company, paid for the initial product it acquired from Dow Corning; it took title to the product, and did not return to Dow Corning all of the products which it (*i.e.*, tolling company) generated. We agree with Dow Corning that the payment Dow Corning received from the tolling company, plus the two further processed products Dow Corning received back from the tolling company (*i.e.*, tolled product A and tolled product B), represent the total compensation Dow Corning received from the tolling company for the original product. From the tolling company's perspective, in exchange for the payment and tolling services provided to Dow Corning, it receives a portion of tolled product A.

Based on the above description of the tolling transaction between Dow Corning and the tolling company, we agree that it is a very unusual and complex transaction that has multiple parts which are not easily quantified. Specifically, we note that some of the tolled products being moved back and forth between the two companies depend on the day-to-day requirements of Dow Corning, rather than on set quantities to be returned. Further, as the prices Dow Corning reported for the transaction do not reflect the full value for all parts of the transaction, as discussed above, we do not have the requisite information to adjust them for use in our margin calculations. Furthermore, these sales constitute only a small percentage of Dow Corning's total sales value of reported downstream products. Therefore, for the final determination, we have excluded these U.S. sales from our margin calculation.

As to Dow Corning's assertion that the sales of the original product should not be used as a basis for determining U.S. price because it is a byproduct, we disagree. First, a product's classification as a byproduct does not necessarily disqualify it as a basis for U.S. price. Even so, Dow Corning failed to establish, and the record does not support, that the original product was, in fact, a byproduct. For instance, as noted above, we do not have on the record all relevant information to calculate the extended values of the tolled product A and tolled product B returned to Dow Corning. As mentioned above, a significant factor in classifying a product as a byproduct is its relative value as compared to that of all products emerging from a process. In addition, while

[132] *Id.* at 30, citing *Notice of Final Determination of Sales at Less Than Fair Value: Citric Acid and Certain Citrate Sales from Canada*, 74 FR 16843 (April 13, 2009).
[133] *Id.* at 31-32; the details of this argument include business proprietary information available in Petitioner's Rebuttal Brief.

Dow Corning's focus is that the original product is not usable in making certain downstream products, the processes giving rise to the original product and its relative value in comparison to other products produced from the same process are of more importance. Moreover, while Dow Corning describes the particular type of original product as being an unwanted product, we disagree with this characterization, as the product was being used to generate two other products of value to Dow Corning.

We agree with the petitioner that the sales volume and value of the original product were a significant enough source of revenue that the product was selected as part of Dow Corning's limited U.S. sales reporting. However, notwithstanding the determination of whether this product is a byproduct or not, we agree with Dow Corning to disregard these sales for purposes of this LTFV analysis. Thus, as stated above, we have not included these U.S. sales in our margin calculations.

Comment 6: Treatment of Downstream Sales to Affiliated Customers

Dow Corning's Case Brief

- Commerce should base U.S. price on the transfer prices paid by Dow Corning during the POI. However, if Commerce persists in using sales prices of downstream products, it must exclude such sales to affiliated parties.[134]
- Company B[135] is an affiliated customer of Hemlock, which is an affiliated customer of Dow Corning, which in turn is an affiliated customer of Palmyra. Nevertheless, Dow Corning was not in a position to compel Company B to report its downstream sales and cost data as requested by Commerce; as a result, no adverse inference may be drawn.[136]

Petitioner's Rebuttal Brief

- The now-complete record demonstrates that the parties at issue are not, in fact, affiliated.[137] The equity ownership between the two parties at issue is insufficient to establish affiliation. One company was not in a position to exercise control over the other company.[138]
- Commerce may not simply disregard the sales of polysilicon by these entities. Commerce limited Dow Corning's reporting requirements in response to Dow Corning's complaints regarding the complexity and burden of a full response; now, Dow Corning seeks to further manipulate Commerce's analysis by urging the exclusion of yet more sales.[139]
- If Commerce finds that the parties at issue are affiliated, Dow Corning should not benefit from its failure to report the downstream sales transactions. In the absence of the data requested, Commerce can either use the reported prices and costs between the affiliates as a proxy, or can apply a margin to those sales based on the petition, as was done for the

[134] *See* Dow Corning's Case Brief at 45.
[135] The name of this company is business proprietary.
[136] *See* Dow Corning's Case Brief at 46.
[137] *See* Petitioner's Rebuttal Brief at 33.
[138] *Id.* at 34; this discussion, including the names of the specific entities, is business proprietary.
[139] *Id.* at 36.

Preliminary Determination.

Commerce's Position:[140]

Upon review of the full record since the *Preliminary Determination*, we agree with the petitioner that Dow Corning and Company B are not affiliated.

A finding of affiliation under section 771(33)(F) of the Act requires Commerce to find that there is "control" in the context of a variety of relationships described by the statutory provision. For these purposes, "control" means that a person is legally or operationally in a position to exercise restraint or direction over another person.[141] Thus, actual exercise of control is not required, but merely the ability to exercise restraint or direction. One of the relationships identified in section 771(33) is where two or more persons are legally or operationally in a position to exercise restraint or direction over a third person. Commerce's regulation, 19 CFR 351.102(b)(3), explains that with respect to certain relationships, including joint venture agreements, "control" will not be found unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.

In the *Preliminary Determination*, Commerce could not determine whether Dow Corning and Company B were affiliated based on their common control, via their respective affiliates, of Hemlock (a Dow Corning affiliate which sold to Company B during the POI certain downstream products it produced from silicon metal further processed by Dow Corning), by virtue of a joint venture agreement, because of deficiencies in Dow Corning's reported information. Nevertheless, Commerce requested that Dow Corning report additional information regarding the joint venture relationship, as well as Company B's downstream sales to its unaffiliated U.S. customers, in the event that we found Dow Corning and Company B to be affiliated.[142] After the *Preliminary Determination*, Dow Corning reported the requested additional information regarding the joint venture agreement.[143] This information provided record evidence indicating that, given its limited equity ownership and appointments to the board of directors of the company that owns and controls Hemlock Operations, Company B is not in a position to exercise restraint or direction over the holding company of Hemlock Operations, and thus also not in a position to exercise restraint or direction over the production, pricing, or cost of the subject merchandise further manufactured by Hemlock Operations.[144] Accordingly, we find that Dow Corning and Company B are not affiliated, and we have included the reported sales from Hemlock to Company B in our margin calculations.

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[140] Commerce's full analysis of this issue involves extensive discussion of business proprietary information, and therefore, is contained in the Memorandum, "Affiliated Party Issues in the Antidumping Duty Investigation of Silicon Metal from Brazil," dated February 27, 2018, which is incorporated herein by reference, and summarized in a form that may be publicly released below.

[141] *See* 19 CFR 351.102(b)(3).

[142] *See* Commerce's Oct. 13 SQR.

[143] *See* Dow Corning's Sept. 29 SQR; *see also* Dow Corning's Nov. 9 SQR.

[144] *See* Dow Corning's Sept. 29 SQR at 2-5; *see also* Dow Corning's Nov. 9 SQR at 3-12.

Comment 7: Minor Corrections

Dow Corning's Case Brief

- Commerce must incorporate the minor corrections to a wide variety of fields in its database arising as a result of verification. These include fields involving credit expenses and silicon content. Dow Corning's latest sales data does not incorporate the necessary changes. However, Dow Corning's suggested corrections are contained in the cover letter submitted with its latest database.[145]
- While Commerce did not instruct Dow Corning to revise its cost and sales database for these changes, Commerce should nonetheless make the suggested changes using computer programming language provided by Dow Corning.[146]

Petitioner's Case Brief

- In addition, Commerce should adjust Dow Corning's further manufacturing costs to account for corrections identified at verification.[147] These corrections involve Dow Corning's affiliate, Hemlock.

Commerce's Position:

We agree with Dow Corning and the petitioner, and have incorporated all corrections resulting from verification findings in the final determination margin calculations.[148]

[145] *See* Dow Corning's Case Brief at 52, citing the letter from Dow Corning, "Submission of Corrected Sales Databases," dated January 26, 2018.
[146] *Id.* at 53, citing "Minor Corrections Presented at Cost Verification," dated October 18, 2017, and "Minor Corrections Presented at U.S. Further Manufacturing Cost Verification," dated January 10, 2018.
[147] *See* Petitioner's Case Brief at 12. The full details are business proprietary and can be found in Globe's Case Brief.
[148] *See* Dow Corning Final Calculation Memo.

XII. Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, then we will publish the final determination of the investigation and the final estimated weighted-average dumping margins in the *Federal Register*.

☒	☐
Agree	Disagree

2/27/2018

X 

Signed by: CHRISTIAN MARSH
Christian Marsh
Deputy Assistant Secretary
for Enforcement and Compliance