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Investigation  
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June 16, 2021

**MEMORANDUM TO:** Christian Marsh  
Acting Assistant Secretary  
for Enforcement and Compliance

**FROM:** James Maeder  
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 Malaysia

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## I. SUMMARY

The Department of Commerce (Commerce) finds that silicon metal from Malaysia is, or is likely to be, sold in the United States at less than fair value, as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The petitioners are Globe Specialty Metals, Inc. and Mississippi Silicon LLC (collectively, the petitioners). The mandatory respondent selected for individual examination in this investigation is PMB Silicon Sdn. Bhd. (PMB Silicon).<sup>1</sup> The period of investigation (POI) is April 1, 2019, through March 31, 2020.

Below is the complete list of issues in this investigation for which we received comments from interested parties:

- Comment 1: Whether Commerce Should Apply Total Adverse Facts Available (AFA) to PMB Silicon's Reported Costs
- Comment 2: Whether Commerce Should Apply Partial AFA to PMB Silicon's Reported Sales
- Comment 3: Whether PMB Silicon's General and Administrative (G&A) Expenses Should Be Adjusted
- Comment 4: Whether Commerce Erred in Calculating PMB Silicon's Margin in the Preliminary Determination
- Comment 5: Moot Arguments

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<sup>1</sup> See *Silicon Metal from Malaysia: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 86 FR 7701 (February 1, 2021) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).



## II. BACKGROUND

On February 1, 2021, Commerce published the *Preliminary Determination* in this investigation and invited parties to comment on the decision.<sup>2</sup> On February 9, 2021, PMB Silicon timely responded to a supplemental questionnaire issued after the *Preliminary Determination* regarding its response to section D of the questionnaire (*i.e.*, the section related to cost of production and constructed value).<sup>3</sup> Between February 18 and February 24, 2021, PMB Silicon and the petitioners filed comments regarding PMB Silicon's February 9, 2021 SDQR.<sup>4</sup>

During the course of this investigation, travel restrictions were imposed that prevented Commerce personnel from conducting on-site verification. In the *Preliminary Determination*, Commerce notified interested parties that it was unable to conduct an on-site verification.<sup>5</sup> In lieu of on-site verification, Commerce sent a verification questionnaire to PMB Silicon to collect documentation in order to verify information that PMB Silicon had already submitted to the record.<sup>6</sup> On April 6, 2021, we received PMB Silicon's Verification Response.<sup>7</sup> Parties submitted case briefs on April 16, 2021,<sup>8</sup> and rebuttal briefs on April 23, 2021.<sup>9</sup>

## III. SCOPE OF THE INVESTIGATION

The product covered by this investigation is silicon metal. For a complete description of the scope of this investigation, *see* this memorandum's accompanying *Federal Register* notice at Appendix I.

## IV. CHANGES SINCE THE *PRELIMINARY DETERMINATION*

We calculated the export price and normal value (NV) using the same methodology as the *Preliminary Determination*, with the following exceptions:

- We revised PMB Silicon's reported conversion costs as to certain product grades to represent more accurately PMB Silicon's actual POI grade-specific refining times. *See* Comment 1.

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<sup>2</sup> *Id.*

<sup>3</sup> *See* PMB Silicon's Letter, "Silicon Metal from Malaysia; Section D Second Supplemental Response," dated February 9, 2021 (PMB Silicon's February 9, 2021 SDQR).

<sup>4</sup> *See* Petitioners' Letter, "Silicon Metal from Malaysia: Petitioners' Comments on Cost Methodology and Suggested Verification Questions," dated February 18, 2021; *see also* PMB Silicon's Letter, "Silicon Metal from Malaysia; Response to Petitioners' Comments," dated February 19, 2021 (PMB Silicon's February 19, 2021 Response); and Petitioners' Letter, "Silicon Metal from Malaysia: Petitioners' Response to PMB's Rebuttal Comments on Cost Methodology," dated February 24, 2021.

<sup>5</sup> *See Preliminary Determination*, 86 FR at 7702.

<sup>6</sup> *See* Commerce's Letter, "In Lieu of Verification Questionnaire," dated March 29, 2021.

<sup>7</sup> *See* PMB Silicon's Letter, "Silicon Metal from Malaysia," dated April 6, 2021 (Verification Response).

<sup>8</sup> *See* PMB Silicon's Letter, "Silicon Metal from Malaysia; Case Brief," dated April 16, 2021 (PMB Silicon's Case Brief); *see also* Petitioners' Letter, "Silicon Metal from Malaysia: Case Brief," dated April 16, 2021 (Petitioners' Case Brief).

<sup>9</sup> *See* PMB Silicon's Letter, "Silicon Metal from Malaysia; Rebuttal Brief," dated April 23, 2021 (PMB Silicon's Rebuttal Brief); *see also* Petitioners' Letter, "Silicon Metal from Malaysia: Petitioners' Rebuttal Brief," dated April 23, 2021 (Petitioners' Rebuttal Brief).

- We allocated a portion of operating losses incurred by PMB Silicon’s parent company, PMB Technology Berhad (PMBT) to PMB Silicon as a G&A expense adjustment. *See* Comment 3.
- We made certain changes to the Market Economy Macros (ME Macros) program used to analyze PMB Silicon’s home market sales to correct inadvertent errors. *See* Comment 4.

## V. DISCUSSION OF THE ISSUES

### Comment 1: Whether Commerce Should Apply Total AFA to PMB Silicon’s Reported Costs

#### *Petitioners’ Comments:*

- Sections 776(a)(1) and (2) of the Act provide the instances when Commerce should apply “facts otherwise available.”<sup>10</sup>
- Section 776(b) of the Act further provides that Commerce may use an adverse inference when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. In addition, section 776(b)(2) states that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record.<sup>11</sup>
- Section 773(c) of the Act also provides that, when Commerce relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate such information from independent sources that are reasonably at its disposal. Secondary information is “information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.”<sup>12</sup> Commerce considers information to be corroborated if it has probative value. In analyzing whether information has probative value, Commerce examines the reliability and relevance of the information to be used.<sup>13</sup> However, Commerce does not need to prove that the selected facts available are the best alternative information.<sup>14</sup>

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<sup>10</sup> *See* Petitioners’ Case Brief at 3.

<sup>11</sup> *Id.* at 3-4 (citing *Drill Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 76 FR 1971 (January 11, 2011); *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductor from Taiwan*, 63 FR 8909, 8932 (February 23, 1998); and Statement of Administrative Action accompanying the Uruguay Round Agreement Act, H.R. Doc. 103-316, Col. I (SAA) at 870 (1994)).

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

<sup>13</sup> *See* Petitioners’ Case Brief at 4-5 (citing *Certain Hardwood Plywood Products from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, in Part, and Alignment of Final Determination With Final Antidumping Duty Determination*, 82 FR 19022 (April 25, 2017), and accompanying PDM at 18-19; and *Countervailing Duty Investigation of Certain Hardwood Plywood Products from the People’s Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 53473 (November 16, 2017)).

<sup>14</sup> *See* Petitioners’ Case Brief at 5 (citing SAA at 869).

- In this investigation, Commerce relied on a 16.92 percent rate as the highest rate for initiation purposes. However, Commerce should reconsider its reliance on this rate and, instead, use the highest rate from the petition, 54.22 percent, as the AFA rate.<sup>15</sup>
- PMB Silicon engaged in behavior that inhibited Commerce from conducting a meaningful analysis and PMB Silicon has failed to cooperate to the best of its ability within the meaning of section 776(b) of the Act.<sup>16</sup>
  - PMB Silicon compiled its cost data using unnecessary, theoretical allocations when it had the data available to report costs based on its actual production experience.<sup>17</sup>
  - “Slow-walking” development of PMB Silicon’s cost reporting methodology curtailed Commerce’s ability to ascertain the accuracy of the submitted information and, thereby, calculate the margin as accurately as possible.<sup>18</sup>
- The reliability of PMB Silicon’s submitted information is inherently suspect because PMB Silicon has either manipulated source documents or submitted non-final draft documents to suit its responses. PMB Silicon’s explanation for an error associated with a submitted production report raises serious questions. The production report at issue is purportedly a direct screen print document from PMB Silicon’s accounting system. Thus, the content of the report cannot be changed by a “technical error in the transmission of the document,” as claimed by PMB Silicon. Further, the “corrected” version of the report indicated that PMB Silicon altered the document by changing format (*i.e.*, border line), name, and adding certain information to the report. If the production report can be and, in fact, has been manipulated, it undermines all of the reported cost information, because all exhibits in the submissions relied on these reports and their summaries.<sup>19</sup>
- PMB Silicon claims the “technical error in the transmission of the document” meant that the transmitted report was a draft and not the final version. Assuming this assertion is accurate, this fact also raises the question as to what other “transmission errors” might exist in PMB Silicon’s submissions that have not been uncovered. Thus, PMB Silicon’s responses are not reliable for purposes of supporting its cost reporting methodology.<sup>20</sup>
  - PMB Silicon further claims that the draft version of the report was submitted in error, because only the plant manager has final copies of the reports and the manager was not available during the preparation of the response. However, PMB Silicon stated in the same response that staff members who prepare the daily production reports actually keep a copy of the final report generated on the days for which that person was responsible for preparing the report. As a result, PMB Silicon’s attempted justification remains unpersuasive. Therefore, PMB Silicon’s response cannot be deemed complete and accurate and cannot be relied upon for the final determination.<sup>21</sup>
- In addition, PMB Silicon’s cost reporting methodology is inherently flawed.<sup>22</sup>

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<sup>15</sup> See Petitioners’ Case Brief at 5.

<sup>16</sup> *Id.* at 5-6.

<sup>17</sup> *Id.* at 6-7.

<sup>18</sup> *Id.* at 7 (citing *Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1191 (CAFC 1990); and *Preliminary Determination PDM* at 3-4).

<sup>19</sup> See Petitioners’ Case Brief at 9-11.

<sup>20</sup> *Id.* at 11-12.

<sup>21</sup> *Id.* at 13-15.

<sup>22</sup> *Id.* at 15.

- PMB Silicon calculated the reported product costs based on three theoretical allocation bases (*i.e.*, theoretical trimming yields, theoretical refining yields, and theoretical refining times). However, PMB Silicon’s production report contains actual production information that allows PMB Silicon to calculate the actual grade-specific trimming yield, refining yield, and refining processing time. PMB Silicon withheld the actual production information in its possession, and it has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority.<sup>23</sup>
- PMB Silicon also “cherry-picked” production reports to support its theoretical trimming and refining yields. Although the actual daily average yields conveniently matched to the theoretical yields PMB Silicon used for the reported costs, wide fluctuations of the actual batch-specific yields throughout the day revealed that the actual POI grade-specific yield rates could be different from the theoretical yield rates used for the reported costs.<sup>24</sup>
- The theoretical refining times used in the allocation of conversion costs represent simulations based on assumptions. PMB Silicon also “cherry-picked” production reports to support its theoretical refining times. Although the actual daily average refining times conveniently approximate the theoretical refining times, the wide fluctuations of the batch-specific, actual refining times throughout the day reveal that the actual POI average grade-specific refining times could be substantially different from the theoretical refining times used in the reported costs.<sup>25</sup>
- Further, to reflect the differences in actual calcium content within a particular grade, PMB Silicon made an assumption that a product with lower actual calcium content involves additional refining time. Thus, PMB Silicon assigned to it the refining time of a different grade (*i.e.*, the grade with a lower calcium content). This assumption is inappropriate because the actual refining time depends on the chemical composition of actual raw material inputs. The fact that two products of the same grade have different calcium content does not mean that they had different refining times. Instead, their starting point, *i.e.*, the chemical composition of the input, could be different. Therefore, refining time is not purely a function of calcium content. PMB Silicon’s arbitrary assumption for assigning theoretical refining time to products resulted in unreliable cost calculations.<sup>26</sup>
- PMB Silicon did not act to the best of its ability in this investigation, as required by the Act.<sup>27</sup> As a result, Commerce should apply total AFA to PMB Silicon’s reported costs and assign it a rate of 54.22 percent, the highest margin from the petition.<sup>28</sup>

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<sup>23</sup> *Id.* at 16-18.

<sup>24</sup> *Id.* at 19-23.

<sup>25</sup> *Id.* at 24-27.

<sup>26</sup> *Id.* at 28-31.

<sup>27</sup> *Id.* at 35 (citing *Certain Steel Nails from Taiwan: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Administrative Review; 2015-2016*, 83 FR 6163 (February 13, 2018) and accompanying Issues and Decision Memorandum (IDM) at Comment 2; *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1382 (CAFC 2003) (*Nippon Steel Corp.*); *NSK Ltd. v. United States*, 481 F. 3d 1355 (CAFC 2007); *Viet I-Mei Frozen Foods Co. v. United States*, 839 F. 3d 1099 (CAFC 2016); and *Diamond Sawblades Manufacturers’ Coalition v. United States*, 415 F. Supp. 3d 1365 (CIT 2019)).

<sup>28</sup> *Id.* at 35-36.

- If Commerce opts not to apply total AFA, Commerce should use the single highest total cost of manufacturing calculated from the cost data and apply it to all control numbers (CONNUMs) as partial AFA. Alternatively, Commerce could use the cost of the highest product code within each CONNUM, rather than the average as calculated by PMB Silicon.<sup>29</sup>
- In the event that Commerce chooses not to resort to partial AFA, Commerce should resort to neutral facts available due to PMB Silicon's failure to support its theoretical allocation bases. Under this scenario, Commerce should ignore all grade-specific allocations, and calculate a single set of average costs for all CONNUMs.<sup>30</sup>

*PMB Silicon's Comments:*

- PMB Silicon has cooperated to the best of its ability in this investigation by submitting voluminous submissions totaling almost 3,600 pages of documents.<sup>31</sup>
- PMB Silicon's commitment to comply with Commerce's various requests in this proceeding was clearly demonstrated by PMB Silicon's clear, accurate, and complete data. Further, PMB Silicon explained the purported error and it does not warrant the use of total AFA.<sup>32</sup>
- Resorting to total AFA would contravene governing law regarding the application of facts otherwise available and adverse inferences.<sup>33</sup>
  - Section 776(a) of the Act defines the conditions under which Commerce may resort to facts available (FA) in making its determination. Commerce can only use FA to fill a gap in the record and may not apply FA "in disregard of information of record that is not missing or otherwise deficient."<sup>34</sup>
  - If the conditions under section 776(a) of the Act are satisfied, Commerce is permitted to use FA to fill a gap in the records, but it may not draw adverse inferences (*i.e.*, apply AFA). Rather, before Commerce may apply AFA, both the conditions under sections 776(a) and 776(b) of the Act must be satisfied.<sup>35</sup>
  - The Act also establishes conditions under which Commerce must utilize a respondent's submitted data instead of applying AFA. Section 782(d) of the Act provides that, before Commerce may disregard all or part of a respondent's responses that Commerce considers to be deficient, Commerce "shall" inform the respondent of the deficiency and provide the respondent an opportunity to remedy or explain the deficiency. If Commerce has not identified deficiencies and provided the respondent an opportunity to remedy or explain it, Commerce may not disregard the respondent's responses and apply FA, let alone AFA.<sup>36</sup>
  - Further, according to section 782(e) of the Act, Commerce "shall not" decline to use submitted information that does not meet all applicable requirements if: (1) the information was submitted by the established deadlines; (2) the information is

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<sup>29</sup> *Id.* at 36.

<sup>30</sup> *Id.* at 36-37.

<sup>31</sup> See PMB Silicon's Rebuttal Brief at 2.

<sup>32</sup> *Id.* at 2-3.

<sup>33</sup> *Id.* at 3.

<sup>34</sup> *Id.* at 4 (citing *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F. 3d 1333 (*Zhejiang Dunan*), 1348 (CAFC 2011); and *Gerber Food (Yunnan) Co. v. United States*, 387 F. Supp. 2d 1270, 1288 (CIT 2005)).

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

<sup>36</sup> See PMB Silicon's Rebuttal Brief at 5.

verifiable; (3) the information is not so incomplete that it cannot be reliable; (4) the respondent acted to the best of its ability; and (5) it would not be difficult for Commerce to use the information. Thus, if the criteria set forth in section 782(e) of the Act are satisfied, Commerce must use the respondent's submitted information.<sup>37</sup>

- Section 776(b) of the Act states that Commerce may apply AFA only if Commerce makes an additional finding that a respondent “failed to cooperate by not acting to the best of its ability to comply with the request for information.” Commerce must articulate why it finds that a respondent did not act “to the best of its ability,” which would amount to “either a willful decision not to comply or behavior below the standard for a reasonable respondent.”<sup>38</sup> Further, total AFA is justified only in a situation that involves a deficiency pertaining to “core, not tangential” information and “isolated” instances of misreporting do not justify the application of total AFA.<sup>39</sup>
- PMB Silicon fully cooperated with Commerce’s investigation.
  - In the normal course of business, PMB Silicon calculates a single average product cost for silicon metal. Thus, based on its production experience, PMB Silicon used the theoretical yield rates (*i.e.*, trimming and refining rates) and refining times to calculate CONNUM-specific costs for reporting purposes. PMB Silicon reasonably used the available information related to theoretical yield rates and refining times to calculate the CONNUM-specific costs to the best of its ability.<sup>40</sup>
  - Due to the limited time to respond and voluminous amounts of daily production reports which the company had to compile and review, it was virtually impossible to use the actual production data to calculate CONNUM-specific costs. Further, the records showed that the differences between the actual production experience and theoretical yields and refining times were not materially significant.<sup>41</sup>
  - With respect to the petitioners’ unfounded allegations related to PMB Silicon’s submission of a certain production report, PMB Silicon explained that the Malaysian government’s general lockdown in response to the COVID-19 pandemic has affected PMB Silicon’s ability to collect information requested by Commerce. Also, because PMB Silicon does not have an automated production system, it manually compiles daily production data. While these factors affected how the documentation was presented to Commerce, they do not affect the validity of the underlying data. PMB Silicon’s submitted data are both trustworthy and reliable and Commerce should reject the petitioners’ baseless claims with respect to applying AFA to PMB Silicon’s cost data.<sup>42</sup>
- PMB Silicon’s cost allocation reasonably reflected its production experience.

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 6 (citing *Nippon Steel Corp.; China Steel Corp. v. United States*, 26 F. 1339, 1359-1360 (CIT 2003); and *POSCO v. United States*, 337 F. Supp. 3d 1365, 1373 (CIT 2018)).

<sup>39</sup> *Id.* at 7 (citing *Mukand, Ltd. v. United States*, 35 Int’l Trade Rep. (BNA) 1266, affirmed, 767 F.3d 1300 (CAFC 2014); *Zhejiang Dunan; Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321 (CIT 2020); *Fujian Mach. & Equip. Imp & Exp. Corp. v. United States*, 276 F. Supp. 2d 1371, 1374 (CIT 2003); and *Nat’l Nail Corp. v. United States*, 390 F. Supp. 3d 1356, 1375 (CIT 2019)).

<sup>40</sup> *Id.* at 8-9.

<sup>41</sup> *Id.* at 9.

<sup>42</sup> *Id.* at 10-11.

- The occurrence of variations in the actual yields and refining times between individual production runs that were identified by the petitioners were limited to a small number of production runs. In addition, PMB Silicon provided the actual production reports for several months and illustrated that PMB Silicon's actual production experience closely corresponded to the theoretical yields and refining times used in the reported costs. Thus, PMB Silicon's usage of these theoretical allocation bases was reasonable.<sup>43</sup>
- PMB Silicon acknowledges that there were some differences between the actual and theoretical refining times used for certain product grades with higher calcium content. However, because PMB Silicon's assumption was based on the theoretical refining time necessary to lower theoretical calcium content in the raw material to the specified calcium content for the final grade, the actual refining time could be different if the actual calcium content in the raw material was different from PMB Silicon's assumed theoretical calcium content in the raw material.<sup>44</sup>
- In general, longer refining time is required to produce high-purity grade products, which means that more slag will be generated, causing a higher refining yield loss. However, the refining yield and refining time are also dependent on the initial analysis of the molten silicon before refining. Thus, the variations in the calcium content, quality, and type of raw material inputs used in the production affect the initial analysis of the molten silicon and the refining time needed to meet the specified calcium content of the final product grades. As a result, the varying calcium level of the inputs can cause deviation between the actual and theoretical refining times.<sup>45</sup>
- PMB Silicon's refining time allocation method conservatively allocated conversion costs. If PMB Silicon used the actual refining times, PMB Silicon would have allocated lower conversion costs to products with higher calcium content. By assigning the higher theoretical refining times to these products, higher conversion costs were allocated to these products for the reported costs. Conversely, lower conversion costs were assigned to products with lower calcium content. The resulting higher reported costs for these products with higher calcium content results in more sales of these lower-priced products being made below cost. Thus, PMB Silicon's reported costs had the effect of modestly increasing the calculated margin.<sup>46</sup>

**Commerce's Position:** We disagree with the petitioner that the application of total AFA is warranted because of PMB Silicon's cost reporting methodology.

In the *Preliminary Determination*, we relied on PMB Silicon's cost reporting methodology for allocating raw material costs based on the reported theoretical trimming and refining yields and for allocating conversion costs based on the reported theoretical refining times. For this *Final Determination*, we continue to rely on PMB Silicon's cost allocation methodology. However for

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<sup>43</sup> *Id.* at 10-13.

<sup>44</sup> *Id.* at 14.

<sup>45</sup> *Id.* at 14-15.

<sup>46</sup> *Id.* at 15-16.



the final determination, as discussed further below, for certain product grades, we find that the theoretical refining times used in the allocation of the conversion costs did not reasonably reflect PMB Silicon's typical production experience, based on a review of the submitted production data.<sup>47</sup> Based on our review of the record, we find it appropriate to reallocate PMB Silicon's reported conversion costs, for certain grades, to reflect more accurately the typical grade-specific refining times experienced by PMB Silicon during the POI. Therefore, we reallocated PMB Silicon's reported conversion costs based on the average of actual refining times experienced by PMB Silicon during the POI for those grades.

When Commerce evaluates a respondent's submitted costs, section 773(f)(1)(A) of the Act directs that costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles (GAAP) of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise. Accordingly, Commerce will normally rely on a company's normal books and records if two conditions are met: (1) the books are kept in accordance with the home country's GAAP; and (2) the books reasonably reflect the cost to produce and sell the merchandise.

Also, section 776(a) of the Act provides that Commerce, subject to section 782(d) of the Act, will select from "facts otherwise available" on the record if necessary information is not available on the record or an interested party: (1) withholds information that has been requested by Commerce; (2) fails to provide such information within the deadlines established, or in the form or manner requested by Commerce, subject to subsections (c)(1) and (e) of section 782 of the Act; (3) significantly impedes a proceeding; or (4) provides such information, but the information cannot be verified.

Section 776(b) of the Act further provides that Commerce may use an adverse inference in selecting from the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. In so doing, Commerce is not required to determine, or make any adjustments to, a weighted-average dumping margin based on assumptions about information an interested party would have provided if the interested party had complied with Commerce's request for information.<sup>48</sup> In addition, the SAA explains that Commerce may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."<sup>49</sup> Affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse

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<sup>47</sup> See Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – PMB Silicon Sdn. Bhd.," dated June 16, 2021 (Cost Memorandum).

<sup>48</sup> See section 776(b)(1)(B) of the Act; *see also* Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (June 29, 2015). The 2015 law does not specify dates of application for those amendments. On August 6, 2015, Commerce published an interpretative rule, in which it announced the applicability dates for each amendment to the Act, except for amendments contained to section 771(7) of the Act, which relate to determinations of material injury by the International Trade Commission. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015).

<sup>49</sup> See SAA at 838; *see also* *Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663, 69664 (December 10, 2007).

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

In this case, PMB Silicon does not have a formal cost accounting system and, thus, it calculates one single weighted-average cost for silicon metal in the normal course of business.<sup>52</sup> Hence, while PMB Silicon's normal books and records comply with Malaysian GAAP, they did not reasonably reflect the cost differences associated with producing the merchandise under consideration during the POI. Consequently, as directed in the initial section D questionnaire, for purposes of reporting product-specific per-unit costs in the format requested by Commerce, PMB Silicon developed a cost allocation methodology to calculate the product-specific costs.<sup>53</sup> Specifically, PMB Silicon<sup>54</sup>

To determine the reasonableness of PMB Silicon's theoretical yields and refining times used for the reported costs, Commerce requested supporting documents for the theoretical allocation bases (*i.e.*, standards rates). In response, PMB Silicon provided the requested sampling of the actual daily production reports for several days within the POI.<sup>55</sup> Based on a review of these sample reports, Commerce requested the actual production reports for one month for each of the grades produced by PMB Silicon to assess the accuracy and reliability of the theoretical allocation bases (*i.e.*, theoretical yields and times).<sup>56</sup> Commerce also identified certain inconsistencies between the sample reports and the theoretical allocation bases and requested that PMB Silicon provide additional clarification.<sup>57</sup> To comply with Commerce's requests, PMB Silicon provided the actual daily production reports covering seven months (*i.e.*, approximately 180 daily production reports) and provided clarification for the inconsistencies identified by Commerce.<sup>58</sup>

The initial inconsistencies identified by Commerce, on which we sought additional clarification in the form of supplemental questionnaires, form the basis of the petitioners' allegation of manipulation; however, we disagree that there is evidence of manipulation. Throughout this proceeding, PMB Silicon provided detailed explanations for the initial inconsistencies identified by Commerce and for its production data collection processes, both in the normal course of business and during the general lockdown in Malaysia related to COVID-19. PMB Silicon

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<sup>50</sup> See *Nippon Steel Corp.*

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

<sup>52</sup> See PMB Silicon's Letter, "Silicon Metal from Malaysia; Section D Response," dated September 25, 2020 (PMB Silicon's September 25, 2020 DQR), at 23.

<sup>53</sup> See, *e.g.*, *Strontium Chromate from Austria: Final Affirmative Determination of Sales at Less than Fair Value*, 84 FR 53676 (October 8, 2019) (*Strontium Chromate from Austria*), and accompanying IDM at Comment 2 (in which Commerce accepted a respondent's product-specific costs using a reasonable cost allocation methodology because the respondent did not calculate product-specific costs in the normal course of business).

<sup>54</sup> See PMB Silicon's Letter, "Silicon Metal from Malaysia; Section D Supplemental Response," dated December 29, 2020 (PMB Silicon's December 29, 2020 SDQR) at 10-17 and Exhibit 12; see also PMB Silicon's September 25, 2020 DQR at Exhibit D-6.

<sup>55</sup> See PMB Silicon's December 29, 2020 SDQR at Exhibit 10.

<sup>56</sup> See PMB Silicon's February 9, 2021 SDQR at 1-2 and Exhibits 1 to 7.

<sup>57</sup> *Id.* at 2-11.

<sup>58</sup> *Id.* at 2-11 and Exhibits 1-8.

explained that it does not have a company-wide automated standardized production system and, as a result, it manually records and compiles daily production information, starting from the initiation of silicon metal production to the crushing process.<sup>59</sup> PMB Silicon reported that the manually-written production slips are summarized in Excel and reviewed by production department employees to prepare a daily production report for the plant manager.<sup>60</sup> PMB Silicon explained that the large number of manual production slips and reports associated with individual batch-runs made it unfeasible to use the actual production data to calculate the product-specific costs.<sup>61</sup> To illustrate the voluminous amount of manual production slips and reports, PMB Silicon provided detailed explanations and step-by-step demonstrations of how it records various manual slips and reports to create a summarized daily production report in the normal course of business.<sup>62</sup> Specifically, PMB Silicon's illustration began with the daily production recipes, which showed the required raw material inputs to produce an optimal quality of silicon metal, and traced through the process to the packing slips for finished products.<sup>63</sup> Consequently, the record does not support a finding that PMB Silicon withheld actual production information requested by Commerce, or that it significantly impeded this proceeding by "slow-walking."<sup>64</sup> Thus, we find that PMB Silicon fully cooperated to the best of its ability in this investigation and AFA is not warranted.

With respect to PMB Silicon's submission error associated with one of its production reports (*i.e.*, the "technical error in the transmission of the document"), PMB Silicon explained that it was operating under the COVID-19 lockdown imposed by the Malaysian government. Thus, not all personnel were available, and the data had to be accessed remotely during the preparation of Commerce's supplemental questionnaire response. PMB Silicon stated that the plant manager who was in possession of the final version of the daily production report was not available and PMB Silicon was required to retrieve the data from other personnel;<sup>65</sup> consequently, employees who collected the production data mistakenly transmitted a draft version of the daily production report.<sup>66</sup> PMB Silicon also explained that, because PMB Silicon does not have a standardized and computerized production system, it does not have a system that automatically generates production reports. Thus, PMB Silicon relies on individual production department employees to input production data manually. Therefore, depending on the individual employee preparing the production reports, the name and format of the reports can be slightly different.<sup>67</sup> More importantly, Commerce selected and reviewed PMB Silicon's daily production reports for approximately 180 days and did not find any inconsistencies.<sup>68</sup> Accordingly, based on PMB Silicon's explanations and submitted records, we find it reasonable to conclude that: (1) the inadvertent submission of a draft report and the slight format variations in the report were due to

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<sup>59</sup> See PMB Silicon's Letter, "Silicon Metal from Malaysia; Section D Third Supplemental Response," dated March 12, 2021 (PMB Silicon's March 12, 2021 SDQR) at 5 and Exhibits 1-9.

<sup>60</sup> *Id.* at 5-7.

<sup>61</sup> See PMB Silicon's February 19, 2021 Response at 3.

<sup>62</sup> See PMB Silicon's March 12, 2021 SDQR at Exhibits 1-9.

<sup>63</sup> *Id.*

<sup>64</sup> See PMB Silicon's December 29, 2020 SDQR; *see also* PMB Silicon's February 9, 2021 SDQR; and PMB Silicon's March 12, 2021 SDQR.

<sup>65</sup> See PMB Silicon's March 12, 2021 SDQR at 7.

<sup>66</sup> See PMB Silicon's March 12, 2021 SDQR at 5-8 ; *see also* PMB Silicon's February 19, 2021 Response at 3-5.

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

<sup>68</sup> See PMB Silicon's February 9, 2021 SDQR at Exhibits 1-7; *see also* PMB Silicon's March 12, 2021 SDQR at Exhibits 1-9.

the limitation of PMB Silicon's production system and various personnel involved in preparing production reports; and (2) PMB Silicon's submitted information is sufficiently reliable for purposes of calculating an accurate margin. Therefore, we disagree with the petitioners that PMB Silicon's submitted information is unreliable because PMB Silicon has either submitted a non-final draft or allegedly manipulated source documents.

We also disagree with the petitioners' claim that PMB Silicon's cost reporting methodology is fundamentally flawed. PMB Silicon used what is, essentially, a standard cost methodology, which is a generally accepted methodology for calculating product-specific costs. Moreover, Commerce did not instruct PMB Silicon to recalculate its reported COP unit costs.

Both parties agree that the variations in the chemical content and quality of the raw material inputs used in the production affect the analysis of the molten silicon output and the refining times needed to meet the specified content of the final product grades.<sup>69</sup> This situation will cause different production runs for the same products to have different production yields and processing times from batch-to-batch and from period-to-period. This is similar to when timing differences cause unit product costs to vary significantly, to the point where the unit cost differences between products no longer reflect the differences in the physical characteristics of the products and the associated production activities.<sup>70</sup> Faced with this scenario, and voluminous numbers of production runs, PMB Silicon adopted a standard cost methodology (*i.e.*, used its long-term production experience to allocate costs) and then applied a factor to reconcile any aggregate difference to total actual costs. Commerce was able to test the theoretical standards used by PMB Silicon and found them to be reasonably consistent with the averages from the production data on the record.<sup>71</sup> Where the averages from the production data on the record differed significantly from PMB Silicon's standards, we have adjusted costs accordingly.<sup>72</sup> The correlation between grades as measured by the historical averages (*i.e.*, estimates based on experience) appear, in this case, to result in reasonable cost differences that are reflective of the different physical characteristics.

Accordingly, we find that PMB Silicon's selected allocation methodology was reasonable for reporting product-specific costs and that the petitioners' proposed calculations, based on individual production runs for each product, would not have necessarily resulted in a more reasonable methodology. When a respondent does not calculate product-specific costs in the normal course of business, as in this case, Commerce directs the respondent to calculate the product-specific costs using a reasonable cost allocation methodology.<sup>72</sup> We find that the cost allocation methodology using theoretical allocation bases developed by PMB Silicon, which allowed it to create the product-specific costs requested by Commerce, was reasonable. Furthermore, PMB Silicon demonstrated through its cost reconciliation that the total reported costs were based on the total actual production costs recorded in the audited financial statements.<sup>73</sup> Accordingly, Commerce did not instruct PMB Silicon to recalculate its costs using

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<sup>69</sup> See PMB Silicon's Rebuttal Brief at 14-15; *see also* Petitioners' Case Brief at 29-30.

<sup>70</sup> *Forged Steel Fittings from the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value*, 85 FR 66302 (October 19, 2020), and accompanying IDM at Comment 3.

<sup>71</sup> See Cost Memorandum.

<sup>72</sup> See *Strontium Chromate from Austria* IDM at Comment 2.

a different methodology, and we are accepting PMB Silicon's reported costs for this final determination.

As mentioned above, Commerce reviewed PMB Silicon's actual daily production reports and determined that PMB Silicon's submitted documents supported its proposed methodology. To determine the reasonableness of PMB Silicon's theoretical allocation bases, we compared the theoretical yields (*i.e.*, trimming and refining yields) and refining times to PMB Silicon's actual production experience recorded in the daily production reports (*i.e.*, approximately 180 days).<sup>73</sup> We recognize that PMB Silicon's actual yields and refining times recorded in the daily production reports vary from the theoretical yields and refining times used in the reported costs, because the assumptions embedded in the construction of the theoretical yields and refining times may differ from PMB Silicon's actual production experience (*e.g.*, quality of input materials). Nevertheless, the theoretical yields and refining times used in the reported costs should trend consistently with PMB Silicon's actual production experience during the POI.

Based on PMB Silicon's records, the theoretical trimming and refining yields used in the allocation of the raw material costs were reasonably consistent with PMB Silicon's actual production experience. However, the theoretical refining times used in the allocation of the conversion costs for a subset of product grades (*i.e.*, product grades with higher calcium content) varied significantly from PMB Silicon's actual production experience.<sup>74</sup> PMB Silicon itself acknowledged that there were some differences between the actual and theoretical refining times used for certain product grades with higher calcium content.<sup>75</sup> According to PMB Silicon, the longer refining time is required to produce high purity product grades in terms of calcium content.<sup>76</sup> Thus, generally, more refining time is required for a product with lower calcium content than a product with higher calcium content.<sup>77</sup> In addition, PMB Silicon stated that the variations in the calcium content in raw material inputs also affect the refining times needed to meet the specified calcium content of finished products. Thus, the varying calcium levels in the raw material inputs can be the cause of deviation between the theoretical and actual refining times.<sup>78</sup> Further, PMB Silicon stated that, because PMB Silicon was in the first year of production, it was still developing its production process with respect to using raw materials from different sources and the volatility of refining time was also attributed to the lack of skilled workers and lack of familiarity with the production process.<sup>79</sup> Based on our review, the production records revealed that the theoretical refining times used for allocating conversion costs to specific grades were inconsistent with PMB Silicon's actual production experience in some instances. Specifically, PMB Silicon over-allocated the conversion costs to certain product grades with higher calcium content. Thus, for the final determination, we reallocated PMB

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<sup>73</sup> See PMB Silicon's February 9, 2021 SDQR at Exhibits 1-7; *see also* PMB Silicon's March 12, 2021 SDQR at Exhibits 1-9.

<sup>74</sup> See PMB Silicon's September 25, 2020 DQR at Exhibit D-6; *see also* PMB Silicon's December 29, 2020 SDQR at Exhibit 12; and PMB Silicon's February 9, 2021 SDQR at Exhibits 1-7.

<sup>75</sup> See PMB Silicon's Rebuttal Brief at 13-15.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See PMB Silicon's December 29, 2020 SDQR at 12-13; *see also* PMB Silicon's Rebuttal Brief at 13-15.

<sup>79</sup> See PMB Silicon's December 29, 2020 SDQR at 12-13.

Silicon's reported conversion costs to reflect more accurately the actual grade-specific refining times experienced by PMB Silicon during the POI.<sup>80</sup>

## **Comment 2: Whether Commerce Should Apply Partial AFA to PMB Silicon's Reported Sales**

### *Petitioners' Comments:*

- PMB Silicon's Verification Response reveals problems with its sales reporting and suggests that its home market sales to one customer were not actually home market sales.<sup>81</sup> The customer correspondence, currency of payment, the location of the company, the destination reported in field DESTH, the labeling of materials in English, information on the packing lists, and fumigation language contained in the Certificates of Analysis suggest that the sales were not made to Malaysia and that they were, therefore, improperly reported as home market sales.<sup>82</sup>
- As partial AFA, Commerce should reclassify these sales as U.S. sales transactions, apply the highest transaction-specific margin to the total value of the misreported sales, and incorporate the resultant level of dumping into the amounts generated by the SAS margin program to yield the final dumping margin.<sup>83</sup>
- Alternatively, Commerce should remove all transactions with this customer from the home market sales data prior to calculating the dumping margin.<sup>84</sup>

### *PMB Silicon's Comments:*

- PMB Silicon's Verification Response, as well as other record information, indicates that the sales in question were Malaysian home market sales.<sup>85</sup> The correspondence with the customer, sales documents, payment terms, purchase records, and delivery terms do not indicate that the sales were destined for anywhere other than Malaysia, much less that they were destined for the United States.<sup>86</sup>
- PMB Silicon properly reported other sales to this customer – that were actually U.S. sales – in the U.S. sales database.<sup>87</sup> The documentation for those sales clearly shows the destination port in the United States and includes a certificate of origin and a U.S. Customs and Border Protection Form 7501.<sup>88</sup> The documentation for this customer's Malaysian sales lack these items that would indicate a U.S. sale, because they are Malaysian home market sales.<sup>89</sup>
- All documentation for the sales at issue is in English because English is an official language of Malaysia and documenting business information in English is in line with PMB Silicon's normal practices.<sup>90</sup> The fact that the documentation for these home

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<sup>80</sup> See Cost Memorandum.

<sup>81</sup> See Petitioners' Case Brief at 32.

<sup>82</sup> *Id.* at 32-34.

<sup>83</sup> *Id.* at 37.

<sup>84</sup> *Id.* at 37.

<sup>85</sup> See PMB Silicon's Rebuttal Brief at 16.

<sup>86</sup> *Id.* at 16-17.

<sup>87</sup> *Id.* at 17.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

market sales is in English does not indicate that the sales were destined for an international market, much less the United States.<sup>91</sup>

- The fact that this company's home market purchases were delivered to a seaport area does not indicate that these purchases were exported from Malaysia.<sup>92</sup> PMB Silicon is located in East Malaysia and commonly makes home market sales to customers in West Malaysia that are transported to the home market purchaser *via* ocean transport.<sup>93</sup> There are also production facilities located in the seaport area that consume silicon metal.<sup>94</sup>
- PMB Silicon commonly uses terms on its home market packing lists that the petitioners claim indicate an export sale.<sup>95</sup> There are several record examples of these terms being used to describe home market sales, and use of these terms does not indicate that the items were destined for export.<sup>96</sup>
- Effective fumigation requires a confined space, such as a shipping container.<sup>97</sup> Photographs of the silicon metal being delivered to the customer's facility show that the merchandise was delivered in open bags.<sup>98</sup> Therefore, the references to fumigation on documents related to these sales was unintentional.<sup>99</sup>

**Commerce's Position:** We decline to apply AFA to these home market sales or remove them from the home market database because we find that PMB Silicon provided sufficient documentation to support its position that these were, in fact, home market sales. The petitioners argue that PMB Silicon's responses to sections B and C of the questionnaire (*i.e.*, the sections related to home market and U.S. sales, respectively) impeded this investigation. However, the petitioners' comments are limited in their scope and provide an incomplete description of the record as a whole. We have examined the record in light of the parties' comments and our statutory framework and find there is insufficient evidence to support the petitioners' arguments to apply partial AFA or to remove these transactions from the home market database.

As an initial matter, our review of the record does not indicate that any necessary information is missing. To apply FA or AFA, section 776(a)(1) of the Act first requires a finding that such information is absent from the record. Further, sections 776(a)(2)(A)-(D) of the Act provide that if an interested party: (A) withholds information that has been requested by Commerce; (B) fails to provide such information in a timely manner or in the form or manner requested subject to section 782(c)(1) and (e) of the Act; (C) significantly impedes an antidumping proceeding by Commerce; or (D) provides such information but the information cannot be verified as provided for in section 782(i) of the Act, Commerce shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination. As no necessary information is missing from the record pursuant to section 776(a)(2) of the Act, and none of the conditions outlined in section 776(a)(2) of the Act have been met, we find that it would be inappropriate to apply FA or AFA here.

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 18.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 18-19.

Specifically, we do not find that PMB Silicon withheld or failed to provide information, significantly impeded the investigation, or provided unreliable information. In this situation, the necessary information is on the record, but parties disagree as to the accuracy of this information. We, therefore, assessed each disputed home market sale and the associated documentation with particular attention to the materials provided in the Verification Response, as discussed below. Our review of the record did not indicate that any information is missing from the record that warrants the use of FA, nor did our review of the record indicate that PMB Silicon's provided data were unreliable or that PMB Silicon impeded this investigation such that the application of FA or AFA is warranted.

The U.S. Court of Appeals for the Federal Circuit (CAFC) has affirmed Commerce's method of defining home market sales in calculating NV pursuant to section 773 of the Act.<sup>100</sup> Sales are properly considered home market sales by objectively analyzing the facts and circumstances at the time of the sale, including specifically, whether the seller knew, or should have known, that the product was destined for the local market or for export at the time of the sale.<sup>101</sup>

We examined PMB Silicon's correspondence with the customer, including a list of meeting agenda items, that the petitioners cite as evidence that the sales pertain to the U.S. market and not the Malaysian home market.<sup>102</sup> The emailed agenda contains several items for discussion and does not center on one specific topic, product, country, or kind of sale.<sup>103</sup> There is only one reference to the U.S. market in one of the agenda items, which PMB Silicon explains consisted of passing along general commercial information.<sup>104</sup> There is no information that contradicts this explanation. We additionally find it logical that PMB Silicon sent the agenda to parties for whom this information would be relevant, and the inclusion of certain personnel does not have any bearing on the ultimate destination for these sales.

The petitioners argue that this company's transactions were suspicious, in part, because they were denominated in U.S. dollars (USD).<sup>105</sup> However, PMB Silicon explained that the sales correspondence relied on pricing indices denominated in USD and, therefore, the sales at issue occurred in USD.<sup>106</sup> We note that the silicon metal market exists in numerous countries, and the record contains many examples of how the value of silicon metal is tied to international currencies, particularly USD.<sup>107</sup> In addition, the purchasing company is not Malaysian, and the purchasing office is located in a third country that does not use USD as its local currency.<sup>108</sup> Therefore, it does not seem unreasonable that an international transaction between a foreign

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<sup>100</sup> See, e.g., *INA Walzlager Schaeffler KG v. United States*, 957 F. Supp. 251 (CIT 1997), affirmed 108 F.3d 301 (CAFC 1997); and *Allegheny Ludlum Corp. v. United States*, 215 F. Supp. 2d 1322, 1330-1331 (CIT 2000).

<sup>101</sup> *Id.*

<sup>102</sup> See Verification Response at e.g., PDF p. 14. Exhibits 1-4,7, and 8 (containing the same email correspondence to support each sale).

<sup>103</sup> *Id.*

<sup>104</sup> See PMB Silicon's Rebuttal Brief at 17.

<sup>105</sup> See Petitioners' Case Brief at 33.

<sup>106</sup> See PMB Silicon's Rebuttal Brief at 17.

<sup>107</sup> See, e.g., PMB Silicon's Letters, "Silicon Metal from Malaysia; Section A Supplemental Response," dated October 13, 2020 (PMB Silicon's October 13, 2020 SAQR) at 18-19 and Exhibit 7; "Silicon Metal from Malaysia; Section B Supplemental Response," dated November 23, 2020 at 7-8; and Verification Response at Exhibit 6.

<sup>108</sup> See Petitioners' Case Brief at 32.



company and a Malaysian company would be executed in USD rather than Malaysian Ringgit (RM) or the purchaser's home country currency. This information indicates that the currency in which a sale is transacted does not necessarily have to be tied to the currency of the market in which the sale is made.

Similarly, the packaging of the sale is insufficient to support the petitioners' arguments that the sales in question were destined for any particular market. The record is clear that PMB Silicon keeps its business and production records in English, and even sales negotiations are conducted in English.<sup>109</sup> Home market sales documents and correspondence with other purchasers are also in English.<sup>110</sup> It is, therefore, not remarkable that home market packaging would be labeled in English.

We also examined sales and delivery documentation to determine whether PMB Silicon should have known at the time of sale that these transactions could have been destined for a market other than Malaysia, and whether this information supports a finding that the sales were not home market sales. The record does not support such a finding. First, we agree with PMB Silicon's assertion that its documentation for home market *versus* U.S. sales is different, and the documentation for the sales in question is consistent with the documentation for its other home market sales.<sup>111</sup> Further, the sales in question left PMB Silicon's custody within Malaysia when they were delivered to a specific address near a seaport that serves international destinations, in addition to peninsular Malaysia, which is still the home market.<sup>112</sup> Although the petitioners are correct that the destination location reported in the home market DESTH variable was a general location, the Verification Response provided the specific delivery location for these home market sales.<sup>113</sup> The delivery location identified in the documentation is not at the seaport itself, and there is no indication that the facility is used for export *versus* local storage. Moreover, there is no indication that these sales may have been transported following delivery, and there is no record evidence to support the petitioners' argument that the shipments were exported. Because the seaport serves other Malaysian destinations, such as those in West Malaysia, in addition to export markets, no conclusion about its destination can be drawn even if there were definitive documentation demonstrating that these sales left the port area. In addition, other home market sales to another customer were delivered to the same destination, and had the same "Port of Discharge" listed on the packing lists, but all parties agree that those sales were, in fact, home market sales.<sup>114</sup>

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<sup>109</sup> See, e.g., Verification Response at Exhibit 6. We also note that all Certificates of Analysis, Certificates of Weight, and other internal documents from PMB Silicon on the record are in English.

<sup>110</sup> See, e.g., Verification Response at Exhibits 5, 6, and 9.

<sup>111</sup> See, e.g., Verification Response at Exhibit 6 *versus* Exhibit 7, showing similar documents and procedures for home market sales to the customer in question as compared to a different home market customer.

<sup>112</sup> See Verification Response at Exhibits 1-4, indicating the sales terms for the transactions at issue and the specific delivery location.

<sup>113</sup> *Id.* at PDF p. 30, 58-66, 100, 392-394.

<sup>114</sup> *Id.* at PDF p.239-280; see also PMB Silicon's October 13, 2020 SAQR at PDF p. 209, 211, and 214. We note that the CIT has found delivery near a port location one factor suggestive of export (see *Stupp Corp. v. United States*, 359 F. Supp. 3d 1293, 1310 (2019 CIT)); however, the seaport at issue here serves West Malaysian destinations in addition to non-Malaysian destinations and we, therefore, cannot draw a similar conclusion given the facts in this case.

We also examined the record concerning the petitioners' allegations that fumigation references contained in the Certificates of Analysis suggest that the sales were not made to Malaysia. The petitioners claim that these fumigation references suggest that the sales in question were not made to Malaysia because PMB Silicon has previously indicated that only export sales require fumigation, and PMB Silicon reported that it incurred no fumigation costs for any home market transactions.<sup>115</sup> However, on its face, we find that the specific language in the Certificates of Analysis does not indicate that these products were fumigated. The notation only states that fumigation processes were carried out in accordance with the requirements of the destination country. Because shipments within Malaysia do not require fumigation, we find that this notation does not contradict PMB Silicon's claims and does not demonstrate that these shipments were fumigated or that they were exported. In addition, numerous home market Certificates of Analysis contain this identical reference, including Certificates of Analysis for other home market transactions that the petitioners do not argue should not be considered home market sales.<sup>116</sup> Thus, the record does not support the conclusion that the products in the transactions at issue were fumigated and, instead, supports the conclusion that PMB Silicon's Certificates of Analysis include a reference to fumigation regardless of whether fumigation was carried out.

This institutional preference for standardized formatting over accuracy is also present in PMB Silicon's packing lists. The petitioners correctly noted the packing lists for the transactions at issue include certain terminology that could suggest that the silicon metal was exported.<sup>117</sup> We examined PMB Silicon's documentation and found that this terminology is present not only for the transactions at issue, but for many other home market sales, including those that are accepted by all parties as home market transactions.<sup>118</sup> Given this consistency across documents, we accept PMB Silicon's explanation that this is its routine terminology and this wording does not actually indicate a shipment is being exported outside of Malaysia.

Based on a review of all the record evidence, we conclude that the evidence supports PMB Silicon's claims that the transactions at issue were legitimate POI home market sales. As a result, we decline to apply FA or partial AFA and continue to include these transactions in the home market database for this *Final Determination*.

### **Comment 3: Whether PMB Silicon's G&A Expenses Should Be Adjusted**

#### *Petitioners' Comments*

- According to the fiscal year 2019 unconsolidated financial statement of PMBT, PMB Silicon's parent company, PMBT would have incurred operating losses if dividend income were excluded from the total revenue. Because PMB Silicon's financial results are consolidated into PMBT's consolidated financial statements, Commerce should allocate PMBT's operating losses and include them in the calculation of PMB Silicon's G&A expense ratio.<sup>119</sup>

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<sup>115</sup> See Petitioners' Case Brief at 34; see also PMB Silicon's Letter, "Silicon Metal from Malaysia; Sections B and C Second Supplemental Questionnaire," dated January 19, 2021 at 30.

<sup>116</sup> See, e.g., Verification Response at Exhibits 5, 6, and 9.

<sup>117</sup> See Petitioners' Case Brief at 34.

<sup>118</sup> See, e.g., Verification Response at Exhibits 5, 6, and 9.

<sup>119</sup> See Petitioners' Case Brief at 37-38.

*PMB Silicon's Comments*

- PMB Silicon did not comment on this issue.

**Commerce's Position:** We agree with the petitioners that a portion of PMBT's operating losses should be included in the calculation of PMB Silicon's G&A expense ratio. Although PMBT does not provide services to PMB Silicon directly, PMBT exists solely for the benefit of its subsidiaries by holding shares and overseeing investments in companies it owns. As a result, PMBT's operating losses should be borne by PMBT's consolidated subsidiary companies. Accordingly, we consider it reasonable to allocate PMBT's operating losses to PMB Silicon based on the percentage of PMB Silicon's cost of goods sold relative to PMBT's consolidated cost of goods sold.<sup>120</sup> Therefore, for this *Final Determination*, we allocated a portion of PMBT's fiscal year 2019 operating losses and included them in the G&A expense ratio calculation for PMB Silicon.<sup>121</sup>

**Comment 4: Whether Commerce Erred in Calculating PMB Silicon's Margin in the Preliminary Determination**

*PMB Silicon's Comments:*

- A SAS coding error in the ME Macros program inappropriately set the home market gross unit price variables denominated in RM and USD (GRSUPRH\_RM, GRSUPRH\_USD) with values of zero to "missing."<sup>122</sup> Excluding these values distorts the weighted-average home market CONNUM values, and Commerce should correct this error for the *Final Determination*.<sup>123</sup>
- An extraneous variable, HMINGCOM, is present in the programming but was not included as part of PMB Silicon's databases.<sup>124</sup> This variable should be deleted from the programming.

*Petitioners' Comments:*

- Commerce intentionally chose to exclude zero values from weight averaging because it prevents distortions for home market transactions that were made in more than one currency.<sup>125</sup> PMB Silicon did not provide any evidence to support its assertion that this programming produces errors or distortions.<sup>126</sup>
- Programming language was intentionally added to the margin calculation, both in the ME Macros program and the Margin program; characterizing this addition as a ministerial error is incorrect.<sup>127</sup> The program functioned correctly by eliminating zero values prior to the PROC MEANS step.<sup>128</sup>

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<sup>120</sup> See *Large Diameter Welded Pipe from Canada: Final Affirmative Determination of Sales at Less Than Fair Value*, 84 FR 6378 (February 27, 2019), and accompanying IDM at Comment 6.

<sup>121</sup> See Cost Memorandum.

<sup>122</sup> See PMB Silicon's Case Brief at 1-3.

<sup>123</sup> *Id.* at 3-4.

<sup>124</sup> *Id.* at 4.

<sup>125</sup> See Petitioners' Rebuttal Brief at 2.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 2-4.

<sup>128</sup> *Id.* at 3.

- When zero values are not excluded, the weight-averaged home market price is distorted and artificially understated.<sup>129</sup> When zero values are set to missing and excluded from the PROC MEANS step, the weight-averaged home market prices are not distorted.<sup>130</sup>
- As PMB Silicon challenged this practice as a ministerial error and not as a methodological choice in its case brief, it has forfeited its right to challenge this practice based on methodology.<sup>131</sup>
- The home market variable HMINGCOM is extraneous and has no impact on the margin calculation.<sup>132</sup>

**Commerce's Position:** We agree with PMB Silicon that the changes to the ME Macros and Margin programs caused unintended distortions to the weight-averaged home market prices. In accordance with our normal methodology, we have removed this programming language and are no longer setting zero values to missing when computing weight-averaged values. Although we agree with the petitioners that variable HMINGCOM is extraneous and has no effect, we have removed it from the program because it is unnecessary.

#### **Comment 5: Moot Arguments**

The petitioners provided various arguments regarding the proper rates to apply as total AFA and argued in the alternative that Commerce should apply partial AFA or neutral AFA if it did not find total AFA appropriate.<sup>133</sup>

**Commerce's Position:** As we do not find it appropriate to apply total or partial AFA to PMB Silicon, these arguments are moot.

## **VI. RECOMMENDATION**

Based on our analysis of the comments received, we recommend adopting all of the above positions. If this recommendation is accepted, we will publish the final determination of this

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 4.

<sup>132</sup> *Id.* at 5.

<sup>133</sup> *See* Petitioners' Case Brief at 38-44.

investigation in the *Federal Register* and will notify the International Trade Commission of our determination.



\_\_\_\_\_  
Agree



\_\_\_\_\_  
Disagree

6/16/2021

X



Signed by: CHRISTIAN MARSH

Christian Marsh  
Acting Assistant Secretary  
for Enforcement and Compliance