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DATE: August 29, 2012

MEMORANDUM TO: Paul Piquado  
Assistant Secretary  
for Import Administration

FROM: Gary Taverman  
Senior Advisor  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the June 1, 2010 through May 31, 2011 Administrative Review of the Antidumping Duty Order on Silicon Metal from the People's Republic of China

## SUMMARY

The Department of Commerce ("the Department") analyzed the case and rebuttal briefs submitted by interested parties in the above-referenced review. As a result of our analysis, we have made changes to the margin for the final results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

## **Background**

On March 7, 2012, the Department published in the Federal Register the Preliminary Results of the administrative review of the antidumping duty order on silicon metal from the People's Republic of China ("PRC").<sup>1</sup> We invited parties to comment on our Preliminary Results. On April 20, 2012 Globe Metallurgical Inc. ("Petitioner") and the respondent, Shanghai Jinneng International Trade Co., Ltd. ("Shanghai Jinneng") submitted case briefs with the Department. On May 4, 2012, Petitioner and Shanghai Jinneng filed rebuttal comments.

## **List of the Issues**

**Issue 1: Whether the Department Should Reduce the U.S. Price by Export Tax and/or Value-added Tax**

**Issue 2: Whether to Exclude Container Cliff and Edge Silicon from the Reported Production Quantity**

**Issue 3: By-Product Offsets**

**Issue 4: Surrogate Value for Labor**

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<sup>1</sup> See Silicon Metal from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 77 FR 13534 (March 7, 2012) ("Preliminary Results").

**Issue 5: The Appropriate Weight Over Which to Allocate Brokerage and Handling Expenses**

**Issue 6: Excluding Certain Expenses from Brokerage and Handling**

**Issue 7: Surrogate Value for Rail Freight**

**Issue 8: Transportation Cost for Quartz**

**DISCUSSION OF THE ISSUES:**

**Issue 1: Whether the Department Should Reduce the U.S. Price by Export Tax and/or Value-added Tax**

*Petitioner*

- The Department is required, pursuant to section 772(c)(2)(B) of the Tariff Act of 1930, as amended (“the Act”), to deduct value-added tax (“VAT”) and export tax from the U.S. price used to calculate the margin when they are included in the U.S. price. Here, there is evidence on the record that VAT and export taxes are included in Shanghai Jinneng’s reported U.S. prices (e.g., a government notice regarding a 15 percent export tax on silicon metal exports and a sales reconciliation worksheet showing VAT was included in U.S. prices).<sup>2</sup>
- It also creates inconsistencies in the Department’s margin calculations because the same margin will be calculated in two different non-market (“NME”) countries for export sales of the same product with the same normal value and the same price, except that the price from the PRC company includes VAT.
- The legislative history of the U.S. price provisions shows that failing to deduct such taxes would distort the comparison between U.S. price and normal value, and artificially reduce or eliminate the dumping margin calculated.<sup>3</sup> It also creates inconsistencies in the Department’s margin calculations because the same margin will be calculated for export sales with the same normal value in two different NME countries even though VAT is imposed in only one NME.
- Unlike the facts in Magnesium Corp. of America v. United States, 166 F.3d 1364, 1370-71 (Fed. Cir. 1999) (“Magnesium Corp.”), in the instant review, there is no uncertainty regarding whether VAT and export tax were included in the U.S. price. In Magnesium Corp. there was evidence that the exporters paid export taxes to the government, but there was no evidence that the exporters included these taxes in their prices to their customers. Further, the export tax is not a payment by an NME exporter to the NME government, but instead it is a payment by the U.S. customer in a market economy (“ME”) currency. Thus, the Department cannot rely on the decision of the U.S. Court of Appeals for the

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<sup>2</sup> Petitioner cites Letter from Shanghai Jinneng to the Honorable John Bryson, Secretary of Commerce, regarding, “Silicon Metal from the People’s Republic of China: Shanghai Jinneng’s International Trade Co., Ltd. - Supp. Section C QR,” dated October 7, 2011 at Exhibit SC-3.

<sup>3</sup> Petitioner cites to the Antidumping Act of 1921, the Trade Act of 1974, Pub. L. 93-618, and House Report No. 93-571, 93rd Cong., 1<sup>st</sup> Sess. 69 (1973).

Federal Circuit (“CAFC”) that the Department could not make the presumption in NME cases that a tax imposed on export sales was included in the export price.

- In accordance with the Department’s proposed change in practice,<sup>4</sup> because record evidence shows that the export tax and VAT on export sales were imposed on Shanghai Jinneng's U.S. sales, the export taxes and VAT were not refunded upon exportation, and Shanghai Jinneng was not exempt from the taxes, the Department should deduct these taxes from the U.S. price.

#### *Shanghai Jinneng*

- The Department should not deduct VAT and export tax from the reported U.S. prices in the final results of this review. Taxes paid in an NME country are an internal transfer of funds and no basis exists for determining whether a tax might be included in the price.
- Record evidence does not demonstrate that export taxes and VAT are included in the U.S. price or that the customer made payment to the PRC tax authorities. The Department did not request this information on a transaction-specific basis and taxes were not itemized on the invoice to the U.S. customer. With respect to VAT, while the invoice includes VAT, Shanghai Jinneng calculates and collects VAT on an aggregate basis and thus, there is no information on the record to calculate a transaction-specific deduction.
- The facts in this review are the same as those in Silicon Metal 2007 – 2008 where the Department concluded that such facts are identical to those in Magnesium Corp.<sup>5</sup> and found that because the Department does not rely on internal NME prices as reliable measures of value, the CAFC’s ruling in Magnesium Corp. is controlling precedent. The Department extended the principle in Magnesium Corp. to VAT, and followed the same approach regarding export taxes and VAT in Silicon Metal 2008 – 2009<sup>6</sup>, which it should continue to do so here.
- Petitioner’s use of legislative history rather than any legal authority is not relevant because the Department's treatment of export taxes and VAT in this administrative review is not addressed by the legislative history cited. The Department’s interpretation of the statute with regard to export taxes in NMEs is not contrary to the law.
- The only precedent for relying on PRC prices is when an input is obtained from an ME supplier and paid for in an ME currency<sup>7</sup>, but this differs markedly from the issue of

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<sup>4</sup> Petitioner cites Proposed Methodology for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings; Request for Comment, 76 FR 4866 (January 27, 2011).

<sup>5</sup> Shanghai Jinneng cites Magnesium Corp., 166 F.3d at 137.

<sup>6</sup> Shanghai Jinneng cites Silicon Metal from the People's Republic of China: Final Results and Partial Rescission of the 2008-2009 Administrative Review of the Antidumping Duty Order, 76 FR 3084 (January 19, 2011) (“Silicon Metal 2008 – 2009”), and accompanying Issues and Decision Memorandum at Comment 1.

<sup>7</sup> Shanghai Jinneng cites Remand Determination, Magnesium Corp. of America, et al. v. United States, No. 94-06-00789 (October 28, 1996) at 9.

export taxes and VAT which are transactions between an NME enterprise and its government.

### **Department's Position:**

On June 19, 2012, the Department revised its methodology for treating export taxes and other charges in NME antidumping duty proceedings.<sup>8</sup> In Export Taxes in NMEs, the Department explains that it will implement a methodological change to reduce export price or constructed export price in certain NME antidumping proceedings by the amount of export tax, duty, or other charge, pursuant to section 772(c)(2)(B) of the Act. However, the Department further stated that the methodological change detailed in the notice will be applied to ongoing and future administrative NME proceedings involving merchandise from the PRC and the Socialist Republic of Vietnam initiated after publication of Export Taxes in NMEs. Because the instant review was initiated before the publication of Export Taxes in NMEs, the Department will not apply this methodological change for the final results.

For these final results, pursuant to Magnesium Corp. and the Department's long-standing administrative practice,<sup>9</sup> the Department has not made any adjustment to Shanghai Jinneng's export prices for export tax or VAT. The salient issue in the instant case is the same issue that was before the CAFC in Magnesium Corp., and before the Department in the two immediately preceding administrative reviews of this order: whether the respondent's export prices reflect an NME export tax such that the export tax is "included in such price" within the meaning of section 772(c)(2)(B) of the Act. It is appropriate for the Department to continue to follow Magnesium Corp. and not adjust Shanghai Jinneng's export prices for the export tax and VAT because the Department continues to treat the PRC as an NME, and continues to reject reliance upon internal NME prices and costs as reliable measures of value.

The history of Magnesium Corp. and the underlying administrative proceeding are set out at-length in the final results of the 2007-08 administrative review in this proceeding.<sup>10</sup> The critical parallel between the instant case and Magnesium Corp. is that both cases concern application of section 772(c)(2)(B) of the Act in the NME context. After considering the Department's explanation that it could not value an export tax and similar fees in the Russian Federation (which the Department treated as an NME) given its overall approach to internal NME transfers, the CAFC held that "no reliable way exists" to determine whether an export tax is included in the price of merchandise from an NME because the price of merchandise in an NME does not reflect its fair value. The CAFC explained its reasoning as follows:

In a market economy, Commerce can presume that any tax imposed on the merchandise to be exported will be included in the {U.S. price} of that

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<sup>8</sup> See Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings, 77 FR 36481 (June 19, 2012) ("Export Taxes in NMEs").

<sup>9</sup> See, e.g., Titanium Sponge from the Russian Federation; Notice of Final Results of Antidumping Duty Administrative Review, 61 FR 58525 (November 15, 1998), and accompanying Issues and Decision Memorandum at Comment 8.

<sup>10</sup> See Silicon Metal from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 75 FR 1592 (January 12, 2010) ("Silicon Metal 2007 – 2008"), and accompanying Issues and Decision Memorandum at Comment 1.

merchandise. However, that presumption is not available when the merchandise is produced in a non-market economy. By definition, in a non-market economy, the price of merchandise does not reflect its fair value because the market does not operate on market principles. Therefore, no reliable way exists to determine whether or not an export tax has been included in the price of a product from a non-market economy.<sup>11</sup>

The CAFC further found that the Department's determination not to adjust U.S. price based upon a NME export tax harmonized the statutory definition of NMEs and the statutory instruction to reduce U.S. price based upon export taxes, particularly the requirement of section 772(c)(2)(B) of the Act that the export tax must be "included in such price."<sup>12</sup>

Petitioner's assertion that Magnesium Corp. does not apply to the instant case rests upon its argument that Magnesium Corp. is a limited, fact-specific holding. According to Petitioner, the Magnesium Corp. respondents did not report having incorporated the export tax and fees into their prices, but the instant case is different because there is no uncertainty that Shanghai Jinneng includes VAT and export tax in the U.S. price. The Department disagrees with Petitioner's reading of Magnesium Corp., as Petitioner understates the breadth of the CAFC's holding. The CAFC did not identify the specifics of the respondents' reported data as limiting the scope of its application in any manner. Rather, the CAFC identified the nature of NMEs as an impediment to application of section 772(c)(2)(B) of the Act in NME cases. Thus, it was not necessary to ask Shanghai Jinneng for more information about export taxes and VAT.

Along the same lines, Petitioner claims that the Department has misinterpreted Magnesium Corp. as providing for an across-the-board rule that it will not apply section 772(c)(2)(B) of the Act in any NME proceeding. Petitioner further claims that the legislative history behind section 772(c)(2)(B) of the Act does not distinguish between its application in the ME and NME contexts; thus, it is inappropriate for the Department to adopt an across-the-board distinction between ME and NME cases in its application of section 772(c)(2)(B) of the Act.

However, again, Petitioner understates the breadth of the CAFC's holding in Magnesium Corp. In that case the appellate court recognized that section 772(c)(2)(B) of the Act contemplates scenarios where the export tax is not included in the price of the merchandise,<sup>13</sup> and deferred to the Department's discretion concerning section 772(c)(2)(B) of the Act in the NME context.

Further, as in the two immediately preceding administrative reviews of the order, it is also appropriate to treat PRC VAT in the same manner as export tax, consistent with Magnesium Corp., which establishes that tax payments by NME respondents to NME governments are intra-NME transfers. The Department has previously applied this principle to taxes that are not classified as export taxes.<sup>14</sup> We find no basis to depart from this practice here.

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<sup>11</sup> See Magnesium Corp., 166 F.3d at 1370.

<sup>12</sup> See id., 166 F.3d at 1370-71.

<sup>13</sup> See id., 166 F.3d at 1370 ("the statute clearly contemplates a situation where the export tax is *not included* in the price of the merchandise")(emphasis added).

<sup>14</sup> See Certain Cut-to-Length Carbon Steel Plate from Romania, 65 FR 1847 (January 12, 2000), and accompanying Issues and Decision Memorandum at Comment 2.

## Issue 2: Whether to Exclude Container Cliff and Edge Silicon from the Reported Production Quantity

### *Petitioner*

- The Department should exclude sales quantities of the off-grade subject products container cliff and edge silicon from the production quantity that was used to calculate the per-unit consumption of FOPs. Shanghai Jinneng’s unaffiliated producer does not keep production records for these products and has failed to demonstrate that the period of review (“POR”) sales quantities of container cliff silicon and edge silicon are reasonable proxies for production quantities. Moreover, there is no discernible relationship between the quantity of first quality silicon metal produced and the quantity of container cliff silicon sold because container cliff silicon was not sold in each month of the POR. Shanghai Jinneng made no claims about the relationship between the edge silicon sold and first quality silicon metal produced.
- In Silicon Metal 2007 – 2008, the Department included off-grade silicon metal in the total production quantity used in its calculations, but in that review, the respondent reported production quantities of off-grade silicon metal and the Department verified the quantities.<sup>15</sup> Here, Shanghai Jinneng’s unaffiliated producer does not have production records for the off-grade products.

### *Shanghai Jinneng*

- The Department should not exclude container cliff and edge silicon from the reported production quantity. First, container cliff and edge silicon are both subject merchandise, and record evidence demonstrates that they are produced in the silicon metal process.<sup>16</sup> All production of container cliff and edge silicon occurred during the POR because the producer was shut down until one month into the POR.<sup>17</sup> Petitioner’s analysis of the relationship between the sales of container cliff silicon and the production of first quality silicon metal is flawed because Petitioner’s analysis assumes that sales were made only in the same month as production. It was demonstrated that container cliff silicon was continually sold as it was produced, which is evidenced by the fact that the sold quantities of container cliff were consistently four percent of the quantity produced of first quality silicon metal.<sup>18</sup>
- In Lined Paper Products,<sup>19</sup> the Department articulated two conditions for using sales quantity in place of production quantity: (1) production records are not kept in the normal

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<sup>15</sup> See Silicon Metal 2007 – 2008, and accompanying Issues and Decision Memorandum at Comment 5.

<sup>16</sup> See letter from Shanghai Jinneng to the Honorable John Bryson, Secretary of Commerce, regarding, “Silicon Metal from the People’s Republic of China: Shanghai Jinneng International Trade Co., Ltd. – Supplemental Section D Questionnaire Response,” dated December 7, 2011 (“Supplemental Section D Response”) at 5 and Letter from Shanghai Jinneng to Rebecca Blank, Acting Secretary of Commerce regarding, “Silicon Metal from the People’s Republic of China: Shanghai Jinneng International Trade Co., Ltd.-Section D Questionnaire Response,” dated October 28, 2011 (“Section D Response”) at 17 and Exhibit D-9.

<sup>17</sup> See Section D Response at 18.

<sup>18</sup> See Section D Response at Exhibit D-10.

<sup>19</sup> See Certain Lined Paper Products from the People’s Republic of China: Notice of Final Results of the Antidumping Duty Administrative Review, 74 FR 17160 (April 14, 2009) (“Lined Paper Products”), and accompanying Issues and Decision Memorandum at Comment 1.

course of business and (2) reliance on the reported FOPs are not distortive. Both conditions are met here because (1) the producer does not keep production records and (2) sales of container cliff silicon were a consistent percentage of the production quantity of first quality silicon metal, demonstrating that container cliff silicon was sold as it was produced. Thus, the Department should continue to use sales quantity as a proxy for production quantity.<sup>20</sup> Moreover, the Department's reliance on sales quantity when production quantity is not available is consistent with its practice in granting by-product offsets.<sup>21</sup>

### **Department's Position:**

After reconsideration of the facts on the record, we agree with Petitioner that container cliff and edge silicon should be excluded from the production quantity used to calculate the per-unit consumption of the factors of production ("FOPs"). Although the Department agrees with Shanghai Jinneng that record evidence demonstrates that container cliff and edge silicon meet the description of subject merchandise in the scope of the order,<sup>22</sup> Shanghai Jinneng has failed to establish that it produced container cliff or edge silicon during the POR, failed to provide production quantity for container cliff and edge silicon, and failed to establish that the total quantity of container cliff and edge silicon sold during the POR serves as an appropriate proxy for production quantity. Because the quantity of subject merchandise produced during the POR is used to calculate the per-unit consumption figures for almost all of the FOPs and these figures are used to determine the dumping margin, it is very important to use accurate production quantities when calculating per-unit consumption.<sup>23</sup> For example, using an inflated total production quantity would understate the consumption of the FOPs and decrease the dumping margin. In the Preliminary Analysis Memorandum, we stated that "the total production quantity of subject merchandise is required in order to calculate per-unit consumption figures for FOPs."<sup>24</sup> However, we do not have production quantities for these off-grade products, and, as discussed in detail below, do not find that the sales quantity serves as a reasonable proxy for production quantity. Thus, to derive the most accurate total production quantity, we are only including in this quantity that subject merchandise for which there is evidence demonstrating that the merchandise was produced during the POR.

Unlike Lined Paper Products, Shanghai Jinneng has not demonstrated that use of sales quantities of off-grade products is not distortive. In both cases the companies did not record production

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<sup>20</sup> See Silicon Metal from the People's Republic of China: Notice of Final Results of 2005/2006 New Shipper Reviews, 72 FR 58641 (October 16, 2007), and accompanying Issues and Decision Memorandum at Comment 13 and Silicon Metal 2007 – 2008, and accompanying Issues and Decision Memorandum at comment 14.

<sup>21</sup> See Multilayered Wood Flooring: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011), and accompanying Issues and Decision Memorandum at Comment 23 ("Multilayered Wood Flooring").

<sup>22</sup> See Section D Response at Exhibit D-9.

<sup>23</sup> See, e.g., Certain Steel Threaded Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 8907 (February 27, 2009), and accompanying Issues and Decision Memorandum at Comment 5.

<sup>24</sup> See Memorandum to the File through Howard Smith, Program Manager, AD/CVD Operations, Office 4, from Rebecca Pandolph, International Trade Compliance Analyst, regarding "Silicon Metal from the People's Republic of China: Preliminary Analysis Memorandum for Shanghai Jinneng International Trade Co., Ltd.," dated March 1, 2012 ("Preliminary Analysis Memorandum") at 4.

quantities for certain products produced. However, in Lined Paper Products there was significantly more evidence linking the consumption quantities reported for FOPs to the quantities of final product sold. In Lined Paper Products, the companies recorded the quantities of raw materials consumed for each product and recorded these as costs of sales when the final product was sold.<sup>25</sup> The companies reconciled the cost of sales per the financial statements to the cost and quantity of material consumed in producing the goods sold per inventory records. The inventory consumption figures were relied upon in reporting to the Department. Thus in Lined Paper Products there was substantial evidence in the companies' books that the reported quantities of FOPs were used to produce the quantity of final product sold during the POR such that using sales quantities would not be distortive.

On the other hand, in this case, Shanghai Jinneng has not provided any evidence directly linking the consumption quantities reported for FOPs to the quantities of off-grade products sold. The only instance where Shanghai Jinneng's unaffiliated producer records the quantity and value of container cliff and edge silicon is at the time of sale,<sup>26</sup> which shows only that container cliff and edge silicon were sold during the POR, not that they were produced during the POR. To support its claim that the quantity of container cliff and edge silicon sold came from production during the POR, Shanghai Jinneng asserts that these products are produced during the silicon metal production process (a claim called into question by other record evidence, as discussed below), that the producer was closed until one month into the POR, and that container cliff was consistently sold in quantities equaling four percent of the quantity of first quality silicon metal produced.. According to Shanghai Jinneng, these circumstances indicate that the quantity of container cliff and edge silicon sold must have come from its production of silicon metal during the POR. Shanghai Jinneng, however, has not provided any evidence directly linking the consumption quantities for FOPs to the quantities of off-grade silicon products sold or any other evidence that container cliff and edge silicon were produced during the POR and thus there is no evidence on the record demonstrating that the use of sales quantities would not be distortive.

Although, as noted above, Shanghai Jinneng claims that container cliff and edge silicon must have come from its production of silicon metal since these products are produced during the silicon metal production process, there is no evidentiary support for the assertion that silicon metal production in general, or in this case, necessarily always generates off-grade container cliff and edge silicon. For instance, Shanghai Jinneng's affiliated producer, which produced subject merchandise during the prior POR, did not report the production of off-grade products generated during its production of silicon metal.<sup>27</sup> Moreover, although the production plant of Shanghai Jinneng's unaffiliated producer, which was the producer who reported FOPs in this review, was closed until one month into the POR, the record evidence does not demonstrate whether the quantity of off-grade silicon metal products sold came from production during the POR, as Shanghai Jinneng claims, or from inventory from the period before the plant was shut down.

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<sup>25</sup> See Lined Paper Products, and accompanying Issues and Decision Memorandum at Comment 1.

<sup>26</sup> See Supplemental Section D Response at 2 and 4-5.

<sup>27</sup> See letter from Shanghai Jinneng to Rebecca Blank, Acting Secretary of Commerce regarding, "Silicon Metal from the People's Republic of China: Shanghai Jinneng International Trade Co., Ltd. –Section D Questionnaire Response," dated September 19, 2011 at 4-5 and Exhibit D-1. The initial section D response from Shanghai Jinneng mistakenly reported data from its affiliated producer. Shanghai Jinneng later submitted a section D response pertaining to its unaffiliated producer.

Thus, the evidence on the record does not support that this sales quantity reflects the production quantity of container cliff and edge silicon or whether these products were even produced during the POR.

Further, while the Department does not dispute Shanghai Jinneng's claim that the quantity of container cliff silicon sold was consistently approximately four percent of the quantity of first quality silicon metal produced, this fact does not demonstrate that the quantity of container cliff silicon sold is related to the production of container cliff silicon during the POR. In addition, in *Silicon Metal 2007 – 2008*, the respondent, Jiangxi Gangyuan Silicon Industry Co., Ltd., reported the quantity of off-grade silicon metal that it produced using production records, unlike here. The Department accepted this reported quantity as part of the quantity of subject merchandise produced and used it in the margin calculation. Therefore, rejecting the sales quantity of off-grade silicon metal in this segment is consistent with our practice in the prior segments of this case. For these reasons, the Department finds that the sales quantity of container cliff and edge silicon is unreliable for calculating Shanghai Jinneng's FOPs. The only silicon metal production information on the record is the production quantity of first quality silicon metal produced during the POR and as such this is the production quantity supported by the record evidence. Therefore, the Department will not rely on the quantity of container cliff and edge silicon sold and will not include it in the total production quantity of silicon metal for the final results.<sup>28</sup>

Lastly, the Department disagrees with Shanghai Jinneng's argument that reliance on sales quantity when production quantity is not available is consistent with its practice in granting by-product offsets. As discussed below in Issue 3, the Department's practice is to not rely on sales quantity when production quantity is not available.

### **Issue 3: By-Product Offsets**

#### *Shanghai Jinneng*

- Although the quantities of the silicon metal by-products ash silicon and silica fume that were generated during the POR were not recorded, the Department should grant offsets for these by products based on the quantity of ash silicon sold during the POR and based on estimates of the quantity of silica fume generated.
- Record evidence shows that ash silicon and silica fume are by-products of silicon metal production and the silicon metal producer that reported the FOPs only produced silicon metal; thus, these by-products were generated from the production of subject merchandise. Petitioner has not submitted evidence that ash silicon and silica fume are not by-products of silicon metal production. The by-products were generated during the POR because the producer's plant was closed until one month into the POR.
- The Department's practice with regard to granting by-product offsets has evolved. The Department previously limited the quantity of the by-product to the lesser of by-product

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<sup>28</sup> See Memorandum to the File through Howard Smith, Program Manager, AD/CVD Operations, Office 4, from Rebecca Pandolph, International Trade Compliance Analyst, regarding "Silicon Metal from the People's Republic of China: Final Analysis Memorandum for Shanghai Jinneng International Trade Co., Ltd.," dated August 29, 2012 ("Final Analysis Memorandum").

production quantity or sales quantity during the POR.<sup>29</sup> The Department's current practice is to rely on production quantity to offset the reported FOPs for by-products generated during the production of the merchandise under consideration, but if a respondent does not maintain by-product production records, the Department will value the by-product offset using other means, including sales quantity. For instance, in Multilayered Wood Flooring, the respondent did not have production or inventory records for scrap but the Department granted a scrap offset using sales quantity based on the finding that the scrap was from production during the period. The Department also stated in Multilayered Wood Flooring that its practice is to allow respondents an offset for scrap generated during production if the respondent provides evidence that the scrap has commercial value.<sup>30</sup>

- In this case, ash silicon and silica fume were generated during the production of silicon metal during the POR. Ash silicon has commercial value because it was sold during the POR. With respect to silica fume, the producer bagged and collected silica fume which it would only do if it intended to sell it.
- The Department's statement in Frontseating Service Valves<sup>31</sup> that a by-product offset is limited to the total production quantity of the by-product, which the Department cited in the Preliminary Analysis Memorandum, does not apply here because the statement was made in response to the petitioner's argument that the Department should have used its outdated "lesser of" method in that case. Further, the respondent in Frontseating Service Valves had production records for its by-product.
- The Department should follow its practice in Multilayered Wood Flooring and calculate the by-product offset for ash silicon based on sales quantity. For the silica fume by-product offset, the Department should use the realistic estimate of half the yield expected when the unaffiliated producer entered into a contract with a third party to construct and operate the silica fume bag house prior to the POR.

#### *Petitioner*

- The Department's current practice is to limit a by-product offset to the total quantity of the by-product generated during the POR, and grant an offset if the by-product has commercial value.<sup>32</sup> In Multilayered Wood Flooring, the Department explicitly stated that the claimed offsets were related to the production of merchandise under consideration. In Frontseating Service Valves, the Department cited both Silicon Metal 2007 – 2008 and Multilayered Wood Flooring, when it explained that based on the current practice, a by-product offset is limited to the total production quantity of the by-product.

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<sup>29</sup> Commerce's prior practice was discussed in Silicon Metal 2007 – 2008, and accompanying Issues and Decision Memorandum at Comment 5.

<sup>30</sup> Multilayered Wood Flooring, and accompanying Issues and Decision Memorandum at Comment 23.

<sup>31</sup> See Frontseating Service Valves From the People's Republic of China: Final Results of the 2008-2010 Antidumping Duty Administrative Review of the Antidumping Duty Order, 76 FR 70706 (November 15, 2011) ("Frontseating Service Valves"), and accompanying Issues and Decision Memorandum at Comment 18.

<sup>32</sup> See id.

- Shanghai Jinneng failed to demonstrate the quantities of ash silicon and silica fume that were generated during the POR, as required by the Department’s practice. Therefore, the Department should continue to deny an offset for these by-products.

**Department’s Position:**

Shanghai Jinneng claimed an offset for two by-products: silica fume and ash silicon. The Department recently explained its practice as follows: “ the by-product offset is limited to the total production quantity of the byproduct . . . produced during the POR, so long as it is shown that the byproduct has commercial value.”<sup>33</sup> The antidumping questionnaire issued to Shanghai Jinneng explicitly asked for both production records and records such as sales invoices demonstrating the disposition of its by-product(s).<sup>34</sup> Thus, a respondent needs to provide and substantiate the quantity of by-products it generated from the production of subject merchandise during the POR as well as demonstrate that the by-product has commercial value. Providing the production quantity is important because in considering a by-product offset, the Department examines whether the by-product was produced from the quantity of FOPs reported and whether the respondent’s production process for the merchandise under consideration actually generated the amount of the by-product claimed as an offset.<sup>35</sup>

Shanghai Jinneng has not provided or substantiated a production quantity for silica fume. Shanghai Jinneng stated that its unaffiliated producer “did not develop its own production records for silica fume since it re-started production in 2010.”<sup>36</sup> Although Shanghai Jinneng states that it is undisputed that silica fume is a by-product of silicon metal and its unaffiliated producer produces only silicon metal, this does not demonstrate that the quantity of silica fume for which Shanghai Jinneng claims the offset was produced during this POR. While the production plant of Shanghai Jinneng’s unaffiliated producer was closed until one month into the POR, the record evidence does not demonstrate whether the silica fume came from production during the POR or came from inventory from the period before the plant was shut down. Furthermore, Shanghai Jinneng based the quantity of silica fume claimed as a by-product offset on an estimate. Specifically, Shanghai Jinneng halved the silica fume yield from a contract, which was not in effect during the POR, with a third-party company that had been responsible for the operation of the baghouse that was used to collect silica fume.<sup>37</sup> This estimate is based entirely on speculation rather than record evidence of how much silica fume was produced during the POR, and cannot serve as a proxy for record evidence of the quantity of silica fume generated during the POR.

Furthermore, Shanghai Jinneng has not substantiated its claim that silica fume had commercial value. For a by-product offset to have commercial value, the respondent must demonstrate that the product was sold for revenue or reintroduced into production. In this case, there is no evidence that Shanghai Jinneng’s unaffiliated producer either sold or re-introduced silica fume

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<sup>33</sup> See Frontseating Service Valves, and accompanying Issues and Decision Memorandum at Comment 18.

<sup>34</sup> See Letter from Howard Smith, Program Manager, AD/CVD Operations, Office 4 to Shanghai Jinneng regarding, “2010-2011 Administrative Review of Silicon Metal from the People’s Republic of China,” dated August 2, 2011 at E-9 to E-10.

<sup>35</sup> See Mid Continent Nail Corporation v. United States, Ct. No. 08-224, Slip Op. 2010-47 (CIT May 4, 2010).

<sup>36</sup> See Section D response at 18-19.

<sup>37</sup> See Section D response at 18-20.

into the production process during the POR.<sup>38</sup> While Shanghai Jinneng asserts that the silica fume has commercial value, it has not demonstrated that another party was willing to pay for the product. Instead, Shanghai Jinneng argues that the commercial value of silica fume is demonstrated by the costs incurred by the unaffiliated producer to prepare the silica fume for sale, such as the cost of the plastic bags used to package it.<sup>39</sup> The fact that the silica fume is bagged does not amount to evidence that the silica fume has commercial value. Additionally, although Shanghai Jinneng argues that silica fume has commercial value because the unaffiliated producer entered into a contract with a third party who was responsible for collecting and selling the silica fume prior to the POR, there is no evidence of these prior sales on the record of the current review. Shanghai Jinneng has not placed on the record of this review any contracts for selling silica fume during the current POR and a few months prior to the POR its unaffiliated producer ended the relationship with the third party who had been responsible for selling silica fume.<sup>40</sup> While Shanghai Jinneng has proposed using an estimate based on the yield expected from the contract between its unaffiliated supplier and a third party, there are no contracts to support the claimed yield on the record and furthermore, the relationship between these two parties ended prior to the POR. Thus, as noted above, the estimate is based entirely on speculation rather than record evidence of how much silica fume was produced during the POR.

Shanghai Jinneng also has not substantiated a production quantity for ash silicon or demonstrated that the claimed quantity for the ash silicon offset was from production during the POR. Shanghai Jinneng stated that its unaffiliated producer “does not record the production quantity of ash silicon.”<sup>41</sup> As with silica fume, although ash silicon may be produced during the production of silicon metal, this does not demonstrate that the quantity of ash silicon for which Shanghai Jinneng claims the offset was produced during this POR, or that the sales of ash silicon are tied to the production of ash silicon during the POR. Although the production plant of Shanghai Jinneng’s unaffiliated producer was closed until one month into the POR, the record evidence does not demonstrate whether the quantity sold came from production during the POR or came from inventory from the period before the plant was shut down.

We disagree with Shanghai Jinneng that the Department expanded its practice regarding by-product offsets in Multilayered Wood Flooring so that the Department is required to value by-product offsets using some other means, such as sales quantity, when a respondent does not maintain by-product production records. Although the Department used sales quantity for the by-product offset in Multilayered Wood Flooring, it also clearly stated that with respect to the claimed scrap offsets, “the quantity claimed was demonstrated to be from production during the period.”<sup>42</sup> The respondent in Multilayered Wood Flooring provided information such as sales records for each month showing that a quantity of salable wood scrap is generated and sold monthly.<sup>43</sup> As noted above, Shanghai Jinneng has not demonstrated that the quantity claimed for the ash silicon offset is from production during the POR. Instead, Shanghai Jinneng has provided estimates of the quantity of ash silicon that came from production during the POR based on the

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<sup>38</sup> See Section D response at 18-19.

<sup>39</sup> See Section D response at Exhibits D-6, D-8, and D-11.

<sup>40</sup> See Section D response at 18.

<sup>41</sup> See Id.

<sup>42</sup> See Multilayered Wood Flooring, and accompanying Issues and Decision Memorandum at Comment 23.

<sup>43</sup> See id.

quantity of ash silicon sold.<sup>44</sup> Further, in past cases the Department has rejected the mere fact that a company demonstrates that it sold scrap as a justification for allowing a scrap offset.<sup>45</sup> It is also not sufficient for a respondent to demonstrate that a by-product has commercial value; the respondent must also show that the by-product was produced during the POR and provide the quantity produced.<sup>46</sup> Unlike Multilayered Wood Flooring, where the respondent demonstrated that its scrap had commercial value because it was sold during the POR and demonstrated that it came from production during the period, Shanghai Jinneng has only demonstrated that one of its by-products, ash silicon, had commercial value during the POR. Shanghai Jinneng's statement that, where a respondent does not maintain production records, "the Department's practice requires it to value the by-product offset using some other means," is incorrect.<sup>47</sup> The party requesting the offset bears responsibility for substantiating the quantity of the by-product produced and demonstrating that the by-product has commercial value.<sup>48</sup>

With regard to Shanghai Jinneng's argument that the Department's practice as stated in Frontseating Service Valves does not apply to Shanghai Jinneng, the Department disagrees. Shanghai Jinneng argues that the Department's practice as explained in Frontseating Service Valves does not reflect the Department's practice as explained in Multilayered Wood Flooring for cases where a respondent does not maintain production records of its by-products. However, as noted by Petitioner, the Department cited both Silicon Metal 2007 – 2008 and Multilayered Wood Flooring when it stated that "the by-product offset is limited to the total production quantity of the byproduct, in this case brass scrap, produced during the POR, so long as it is shown that the byproduct has commercial value."<sup>49</sup> In Frontseating Service Valves, the by-product offset granted to both respondents was based on the reported quantities of scrap during the POR.<sup>50</sup> To demonstrate commercial value, one respondent documented its sales of scrap during the POR and the other re-introduced the scrap into its production process.<sup>51</sup> The Department considers both whether the by-product was produced during the POR and whether it has commercial value. Thus, as noted above, a respondent needs to provide and substantiate the quantity of by-products it generated from subject merchandise during the POR.

In Silicon Metal 2007 – 2008, the Department granted a by-product offset, in that case for silica fume, because the respondents were able to demonstrate that the by-product had commercial since both of them sold the by-product during the POR and they were able to provide the POR production quantity of the by-product.<sup>52</sup> In this case, Shanghai Jinneng has not provided the

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<sup>44</sup> See Section D response at 18-19.

<sup>45</sup> See, e.g., Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 FR 53079 (September 8, 2006), and accompanying Issues and Decision Memorandum at Comment 23.

<sup>46</sup> See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 75 FR 64259, 64265 (October 19, 2010) (unchanged in Certain new Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review, 76 FR 22871 (April, 25, 2011)).

<sup>47</sup> See "Administrative Case Brief of Shanghai Jinneng International Trade Co., Ltd.," dated April 20, 2012 at 2.

<sup>48</sup> See Silicon Metal 2007 – 2008, and accompanying Issues and Decision Memorandum at Comment 15.

<sup>49</sup> See Frontseating Service Valves, and accompanying Issues and Decision Memorandum at Comment 18.

<sup>50</sup> See id.

<sup>51</sup> See id.

<sup>52</sup> See Silicon Metal 2007 – 2008, 74 FR at 32889.

actual production quantities during the POR for either silica fume or ash silicon, and so the Department has determined not to grant the requested by-product offsets.

#### **Comment Issue 4: Surrogate Value for Labor**

##### *Shanghai Jinneng*

- The Department should use the labor data from the Thai National Statistics Office (“NSO”) to value labor because the International Labour Organization (“ILO”) data used by the Department in the Preliminary Results is neither contemporaneous with the POR (it is from calendar year 2000) nor the appropriate industry-specific category for the silicon metal industry. Although the NSO is not industry-specific, it is contemporaneous with the POR. Reliance on data from calendar year 2000 is unreasonable and questionable due to the global changes that have occurred in the past 12 years.
- If the Department continues to use the non-contemporaneous ILO data, it should not use ILO data under ISIC Revision 3-D sub-classification 27 “manufacture of base metals” because silicon metal is a nonmetallic element. Instead, the Department should use data under ISIC Revision 3-D sub-classification 26 for “Manufacture of Other Non- Metallic Mineral Products,” the definition of which matches Shanghai Jinneng’s production process for silicon metal.<sup>53</sup>

##### *Petitioner*

- The Department should not use the labor data from the NSO to value labor because it is not in accordance with the Department’s current practice to use industry-specific data from Chapter 6A of the ILO Yearbook which captures all labor costs. The NSO data are aggregate data for all manufacturing industries in Thailand and the source documentation indicates that the data are wage data only that do not include other costs related to labor.
- Shanghai Jinneng provided no evidence to support its claim that the ILO data from 2000 are unreliable or resulted in a labor surrogate value that was unreasonable or distortive.
- The ISIC sub-classification is an activity-based classification scheme that categorizes industries “according to the character, technology, organization and financing of production.”<sup>54</sup> ISIC Revision 3-D sub-classification 26 is not suitable for use here because it includes the manufacture of products such as glass and ceramics that do not bear any resemblance to silicon metal manufacturing. ISIC Revision 3-D sub-classification 27 explicitly encompasses the manufacture of bulk ferroalloys, which are

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<sup>53</sup> See Shanghai Jinneng’s case brief at 9 citing the definition from the North American Industry Classification System in attachment 1 of its letter from Shanghai Jinneng to the Honorable John Bryson, Secretary of Commerce, regarding, “Silicon Metal from the People’s Republic of China” dated March 27, 2012 (“Shanghai Jinneng’s Final SV Submission”).

<sup>54</sup> Petitioner citing to Letter from Petitioner to the Honorable John Bryson, Secretary of Commerce, regarding, “Silicon Metal From the People's Republic of China; 2010-11 Administrative Review; Submission of Factual Information to Rebut, Clarify, or Correct Surrogate Value Information Submitted by Shanghai Jinneng International Trade Co., Ltd.” dated April 16, 2012 at 68 (April 16, 2012).

produced in a nearly identical production process and the Department has consistently found ferroalloys to be comparable to silicon metal

### **Department's Position:**

We disagree with Shanghai Jinneng, in part. In Labor Methodologies,<sup>55</sup> the Department revised its methodology for valuing labor by deciding to use Chapter 6A: Labor Cost in Manufacturing, from the International Labor Organization Yearbook of Labor Statistics (“ILO Yearbook”) to value labor, noting that “Chapter 6A data reflects all costs related to labor including wages, benefits, housing, training, etc.” While the Thai NSO data are contemporaneous with the POR, there is no information on the record about what costs, e.g., bonuses, employee housing, and welfare services, are included in the data. In contrast, the ILO Yearbook defines what costs are included in Chapter 6A labor cost data.<sup>56</sup> Additionally, the Thai NSO data reflect the monthly “average wage of employed persons” whereas the Department’s preference is to use earnings over wages.<sup>57</sup> For these reasons, the Department does not find the Thai NSO data to be the best information to value labor.

In Labor Methodologies the Department also explained that it would value labor using industry-specific labor rates from the primary surrogate country. Following this practice, in the Preliminary Results the Department valued labor using the two-digit description Sub-Classification 27 under ISIC-Revision 3 (“Manufacture of Basic Metals”) because it is specific to the industry being examined. Thailand, however, has not reported data specific to two-digit industry classifications since 2000.<sup>58</sup> Thailand, however, did report total manufacturing labor data in 2005.<sup>59</sup> When choosing between less contemporaneous industry-specific data and more recent data, the Department prefers not to rely on labor data when there is a significant lag between the reporting date of that data and the period of review.<sup>60</sup> Consistent with Citric Acid and Galvanized Steel, for the final results of review, the Department has not relied on the industry-specific labor data from 2000 because there is a significant lag between the reporting date and the period of review. Therefore, the Department has used labor data reported in 2005 in

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<sup>55</sup> See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor, 76 FR 36092 (June 21, 2011) (“Labor Methodologies”).

<sup>56</sup> See ILO Main statistics (annual) – Wages, <http://laborsta.ilo.org/applv8/data/c5e.html>.

<sup>57</sup> See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments, 71 FR 61716, 61721 (October 19, 2006) and Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor; Request for Comment, 76 FR 9544 ,9545 (February 18, 2011).

<sup>58</sup> See Preliminary Results, 77 FR at 13537.

<sup>59</sup> See letter from Petitioner to John Bryson, Secretary of Commerce regarding, “Silicon Metal from the People’s Republic of China; 2010-11 Administrative Review; Comments on Surrogate Country Selection and Submission of Surrogate Value Data” dated November 4, 2011 at Exhibit 12 and Shanghai Jinneng’s Final SV Submission at page 10 of Attachment 1.

<sup>60</sup> See Citric Acid and Certain Citrate Salts from the People’s Republic of China: Final Results of the First Administrative Review of the Antidumping Duty Order, 76 FR 77772 (December 14, 2011) (“Citric Acid”), and accompanying Issues and Decision Memorandum at Comment 7 and Galvanized Steel Wire From the People’s Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 76 FR 68407, 68419 (November 4, 2011) (“Galvanized Steel Wire”)(unchanged in Galvanized Steel Wire From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 77 FR 17430 (March 26, 2012)). .

Chapter 6A of the ILO Yearbook for total manufacturing in Thailand as the surrogate value for labor. Consistent with Department practice,<sup>61</sup> we inflated the labor rate to be contemporaneous with the POR.<sup>62</sup>

We did not address parties' arguments about which ISIC Revision 3-D sub-classification to use (i.e., two-digit classification) because we have not used a two-digit classification in the final results of review. Instead, we are using the more general, total manufacturing labor data classification.

### **Issue 5: The Appropriate Weight Over Which To Allocate Brokerage and Handling Expenses**

In the Preliminary Results, the Department calculated the per-unit surrogate value for brokerage and handling by dividing the total brokerage and handling cost reported by participants in a World Bank survey by 10 metric tons ("MT"). The Department divided total brokerage and handling costs by 10 MT because instructions for the survey state that parties should report costs for a shipment that weighs 10 MT.

- The Department incorrectly calculated the per-unit brokerage and handling cost by allocating total surrogate costs over the assumed weight of 10 MT for a full container load. This approach does not match the actual experience of Shanghai Jinneng and is inconsistent with how such costs are charged in the normal course of business (see information from Maersk Line, an international freight forwarder). Instead the Department must allocate the per-container expenses over the actual weight of the container shipped.
- To gather the brokerage and handling data, the World Bank's Doing Business 2012: Thailand based its methodology on a research paper<sup>63</sup> that relied on certain assumptions to make the data comparable across numerous countries. These assumptions were carried over in Doing Business 2012: Thailand. However, the research paper did not state an assumed weight for the container and it used costs on a per-container basis. This indicates that the costs in the World Bank's Doing Business 2012: Thailand, the source of the surrogate value, are also on a per-container basis.
- Although 10 MT is the assumed shipment weight described in the survey used to compile the data in the World Bank's Doing Business 2012: Thailand, there is no way to know

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<sup>61</sup> See, e.g., Chlorinated Isocyanurates From the People's Republic of China: Final Results of 2008-2009 Antidumping Duty Administrative Review, 75 FR 70212 (November 17, 2010), and accompanying Issues and Decision Memorandum at Comment 2; and Certain Cased Pencils From the People's Republic of China: Final Results of the Antidumping Duty Administrative Review, 75 FR 38980 (July 7, 2010), and accompanying Issues and Decision Memorandum at Comment 1.

<sup>62</sup> See Memorandum to the File through Howard Smith, Program Manager, AD/CVD Operations, Office 4, from Rebecca Pandolph, International Trade Compliance Analyst, regarding "Antidumping Duty Administrative Review of Silicon Metal from the People's Republic of China: Factor Valuation Memorandum," dated March 1, 2012 ("Preliminary Surrogate Value Memorandum") at Attachment 3.

<sup>63</sup> Shanghai Jinneng cites "Trading on Time" by Djankov, Freund, and Pham dated 2008 in Attachment 1 of Shanghai Jinneng's Final SV Submission.

whether the respondents to the survey actually took the assumed 10 MT load into account when responding. Regardless, brokerage and handling costs are always charged on a per-container basis regardless of weight. Documents from the Customs Department of Thailand show that brokerage consists of document preparation and customs clearance. Information from Maersk Line for shipments from Russia shows that the document preparation and customs clearance functions are normally charged on a per-container basis.

- The assumption that a dry cargo, 20-foot full container weighs 10 MT is not based on record evidence. The actual weight of a 20-foot full container varies by product. For example, both Maersk Line and searates.com list 28.2 MT as the maximum payload of a dry freight 20-foot container.
- Alternatively, if the Department does not treat the entire brokerage and handling cost as a per-container charge and allocate the entire cost over the actual weight of the container that was shipped, the Department could treat one component of the brokerage and handling cost, namely port and terminal handling charges, as a per-weight charge and allocate this charge alone over the assumed weight of 10 MT (the survey's brokerage and handling cost consists of three separate components, document preparation, customs clearance and technical control, and port and terminal handling charges). Nevertheless, the other two components of brokerage and handling expenses, document preparation and customs clearance and technical control should continue to be allocated over the actual weight of the container because these are per-container charges.

#### *Petitioner*

- The Department should reject Shanghai Jinneng's arguments and make no change to its calculation of the brokerage and handling surrogate value in the final results of this review. The Department has previously noted that the brokerage and handling cost from Doing Business 2012: Thailand is based on a container load of 10 MT, thus "it would be inconsistent to use an alternative quantity to calculate the brokerage and handling surrogate value."<sup>64</sup> Moreover, in Off-the-Road Tires,<sup>65</sup> the Department explained that costs from Doing Business are broad market averages; thus variations in shipment weight are considered when calculating brokerage and handling expenses using data from Doing Business.
- Shanghai Jinneng failed to provide any evidence to support its claim that brokerage and handling expenses in Thailand are always charged on a per-container basis. Instead, Shanghai Jinneng provided costs from a single shipping company for exports from Russia, which neither represent a broad market average nor are relevant to Thai brokerage and handling costs. Also, the documents from the Customs Department of Thailand

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<sup>64</sup> Petitioner citing Certain Stilbenic Optical Brightening Agents From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 77 FR 17436 (March 26, 2012), and accompanying Issues and Decision Memorandum at Issue 5.

<sup>65</sup> Petitioner cites to Certain Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of the 2009-2010 Antidumping Duty Administrative Review and Final Rescission, in Part, 77 FR 14495 (March 12, 2012), and accompanying Issues and Decision Memorandum at Comment 11.

website that Shanghai Jinneng provided have no information about the basis on which those costs are charged to the customer.

### **Department's Position:**

The Department has determined that 10 MT should continue to be used to calculate the brokerage and handling surrogate value because this is the weight of the shipment in a 20-foot container for which participants in the Doing Business 2012: Thailand survey reported brokerage and handling costs.<sup>66</sup> Specifically, the brokerage and handling costs used to calculate the surrogate value were based upon the assumption that a 20-foot container contained 10 MT of product.<sup>67</sup> If the Department were to use a container load of 28.2 MT, which is reported as the full container load of a 20-foot container at Maersk Line and searates.com, it would be using a weight not related to the costs reported in the Doing Business 2012: Thailand survey which would result in an incorrect per-unit cost. Using 10 MT in the per-unit calculation maintains the relationship between costs and quantity from the survey (which is important because the numerator and the denominator of the calculation are dependent upon one another), makes use of data from the same source, and is consistent with the Department's past practice.<sup>68</sup>

Moreover, we disagree with Shanghai Jinneng's contention that brokerage and handling costs are always charged on a per-container basis regardless of weight. To support its assertion, Shanghai Jinneng provided ocean freight and brokerage and handling rates from Maersk Line for exports from multiple cities in Russia. However, there is no evidence that Maersk Line would apply the same rates on the same basis (i.e., per-container) for exports from Thailand. Furthermore, the Doing Business 2012: Thailand survey asked respondents to “{b}efore competing the survey, please carefully review the assumptions of the case study.”<sup>69</sup> The 10 MT weight is a clear reporting criterion in the survey assumptions for participants.<sup>70</sup> Although freight forwarders may under certain circumstances charge on a per-container basis rather than a weight basis, the participants in this survey, which is the source of the brokerage and handling cost, were clearly instructed to report the cost for a 20-foot container weighing 10 MT.

Shanghai Jinneng also argues that Djankov, Freund and Pham's report did not mention a weight for the 20-foot container used in their study, which must mean that the costs were reported on a per-container basis. The Department does not find this argument persuasive. Although the report discussed their assumptions for the cargo being transported, we do not know how the participants were instructed to report costs because the report does not discuss this and the record does not contain the survey issued to the participants in Djankov, Freund and Pham's study. Moreover, the Doing Business 2012: Thailand publication noted that while the methodology developed by

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<sup>66</sup> See Preliminary Surrogate Value Memorandum at Attachment 9.

<sup>67</sup> Id.

<sup>68</sup> See Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part, 76 FR 49729 (August 11, 2011), and accompanying Issues and Decision Memorandum at Comment 6. See also Certain Stilbenic Optical Brightening Agents from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 77 FR 17436 (March 26, 2012), and accompanying Issues and Decision Memorandum at Issue 5.

<sup>69</sup> See Preliminary Surrogate Value Memorandum at Attachment 9.

<sup>70</sup> See id.

Djankov, Freund and Pham was used, minor changes were made to that methodology.<sup>71</sup> Therefore, even if the participants in Djankov, Freund and Pham’s study reported costs on a per-container basis, this does not mean that participants in the Doing Business 2012: Thailand survey did so because that survey clearly indicates that participants were asked to report based on a 20-foot container weighing 10 MT.

Lastly, the Department disagrees with Shanghai Jinneng’s suggested alternative methodology of calculating document preparation and customs clearance and technical control costs on a per-container basis and only using 10 MT to calculate per-unit port and terminal handling charges. As discussed above, we find the evidence that Shanghai Jinneng presented to demonstrate that brokerage and handling costs are charged on a per-container basis unpersuasive. Aside from the evidence to support its claim that brokerage and handling in general is charged on a per-container basis, evidence which we found did not demonstrate that a per-container basis was used in Doing Business 2012: Thailand, Shanghai Jinneng did not provide any additional evidence to support its claim that only the port and terminal handling service might be charged on a per-weight basis. Therefore, the Department is continuing to calculate all components of brokerage and handling cost on a per-weight basis.

## **Issue 6: Excluding Certain Expenses from Brokerage and Handling**

### *Shanghai Jinneng*

- The port and terminal handling costs which are included in the brokerage and handling surrogate value derived from Doing Business 2012: Thailand should be excluded from that value in order to avoid double counting these expenses.
- Specifically, Profreight International Co., Ltd. (“Profreight”), whose prices were reported in Thailand’s Board of Investment (“BOI”) publication, Costs of Doing Business in Thailand: September 2011 Update and were used to value ocean freight, indicates that it provides full door to door delivery service which includes freight forwarder services such as the movement of the goods to the port and loading cargo at the port. Thus, port and terminal handling costs are already included in the surrogate value for ocean freight.

### *Petitioner*

- The Department should reject Shanghai Jinneng’s argument because it is based on speculation and generalizations for which there is no support on the record. Profreight’s “full door to door delivery systems” are only offered as part of its “Cargo Collection, Delivery & Packing” services and do not include either “Customs Formality & Clearance” or “International Freight Forwarder” services. In addition, there is no indication whether Profreight bundles these services into a single package with one fee.
- The explanatory notes in Costs of Doing Business in Thailand: September Update for the rates from Profreight explicitly state that the rates exclude customs clearance and

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<sup>71</sup> See Shanghai Jinneng’s Final SV Submission at page 14 of Attachment 1. The report states “This methodology was developed by Ojankov, Freund and Pham (2008) and is adopted here with minor changes.”

“shipping line charges,” which contradicts Shanghai Jinneng’s claim that the rate is comprehensive and includes port and terminal handling expenses.

### **Department’s Position:**

We disagree with Shanghai Jinneng. Profreight’s website describes its freight services as including “cargo collection, delivery and packing,” “customs formality and clearance,” “international freight forwarder,” “multi-modal transport” and “distribution service.”<sup>72</sup> As Petitioner noted, there is no indication whether these services are bundled together under a single fee. Furthermore, although Profreight may offer full door to door delivery service, Shanghai Jinneng has not demonstrated that the fee in Costs of Doing Business in Thailand: September 2011 Update was for this door-to-door delivery service. Shanghai Jinneng has also not demonstrated that the door-to-door delivery service fee covered the exact same services as the “ports and terminal handling” costs in the World Bank’s Doing Business 2012: Thailand and thus, has not demonstrated that the Department has double counted this cost.

Moreover, there is no indication whether the fee reported in the Costs of Doing Business in Thailand: September 2011 Update is a bundled fee that covered all of the services that Profreight offers. In fact, the explanatory notes to Profreight’s international ocean freight price state that the “rates do not include customs clearance for exports or shipping line charges or 7% VAT.”<sup>73</sup> Shanghai Jinneng’s argument assumes that the rate is comprehensive and if a service is not explicitly excluded from the rate, such as the excluded customs clearance service, then the rate must include that service. However, the explanatory notes to the rates reported in Costs of Doing Business in Thailand: September 2011 Update indicate that these rates are not comprehensive as Shanghai Jinneng suggests because some of the international freight forwarding services provided by Profreight, such as the “customs formality and clearance” service, are explicitly excluded from the international ocean freight rate.<sup>74</sup> Further, the explanatory notes only show that certain charges are explicitly excluded from the international ocean freight rate but do not provide evidence of the full range of charges included in ocean freight including whether a ports and terminal handling charge is included as Shanghai Jinneng argues.<sup>75</sup> Thus, the Department does not find that leaving the “ports and terminal handling” costs in the World Bank’s Doing Business 2012: Thailand brokerage and handling expense constitutes double-counting. Therefore, we have continued to include this expense in the surrogate value for brokerage and handling for the final results.

### **Issue 7: Surrogate Value for Rail Freight**

#### *Shanghai Jinneng*

- The surrogate rail freight rate from the preliminary results should not be used because: (1) the rate data, which the Department identified as coming from the State Railway of Thailand, do not appear on that agency’s website and thus are not from that source; and

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<sup>72</sup> See Shanghai Jinneng’s Final SV Submission at pages 54-56 of Attachment 1.

<sup>73</sup> See letter from Shanghai Jinneng to Rebecca M. Blank, Acting Secretary of Commerce regarding, “Silicon Metal from the People’s Republic of China,” dated November 4, 2011 (“Shanghai Jinneng’s SV Comments”) at Exhibit 4.

<sup>74</sup> See id.

<sup>75</sup> See id.

(2) the rates are only for rail transportation between Bangkok and five different cities in Thailand and thus they are not broad market average rates. Instead, the Department should value rail freight using the generic per-ton cost for various distances, regardless of origin, from the State Railway of Thailand's website.<sup>76</sup>

- The surrogate rates used by the Department include a fuel surcharge which went into effect just after the POR (on June 1, 2011); therefore, this fuel charge should not have been included in the surrogate value.

#### *Petitioner*

- The explanatory notes to the rates used by the Department clearly identify the source of the rates as the State Railway of Thailand. Also, the rates are the same as the rates from the tariff schedule on the State Railway of Thailand's website.<sup>77</sup>
- Although the rates relate to routes that all originate from Bangkok, they represent a broad-market average because they are rates for a variety of destinations within Thailand and are more likely to be representative of rail costs than the shipments between smaller cities that have a lower volume of rail traffic.
- Shanghai Jinneng's claim that a fuel surcharge was not in effect during the POR is incorrect. Explanatory notes to the rates indicate that a fuel charge was in effect from August 11, 2009 until further notice.

#### **Department's Position:**

We disagree with Shanghai Jinneng. Although Shanghai Jinneng asserts that the rates from the "Rail Transportation Costs from Bangkok" table in Costs of Doing Business in Thailand: September 2011 Update, which are the rates used by the Department in the Preliminary Results, are not derived from the State Railway of Thailand, the explanatory notes in Costs of Doing Business in Thailand: September 2011 Update clearly identify the State Railway of Thailand as the source of the information.<sup>78</sup> Furthermore, Shanghai Jinneng has not supported its assertion that the rates used in the Preliminary Results are unreliable beyond stating that the "Rail Transportation Costs from Bangkok" table does not appear on the website for the State Railway of Thailand. The rates in the table represent rates from the State Railway of Thailand as applied by the Thai government to real-life examples of shipping from the capital city of Bangkok to cities at various distances throughout Thailand.

In valuing FOPs, section 773(c)(1) of the Act instructs the Department to use "the best available information" from the appropriate ME country. When selecting possible surrogate values for use in an NME proceeding, the Department's preference is to use, where possible, a publicly available value which is: 1) an average non-export value; 2) representative of a range of prices within the POR or most contemporaneous with the POR; 3) product-specific; and 4) tax-

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<sup>76</sup> See id.

<sup>77</sup> See Shanghai Jinneng's Final SV Submission at pages 61-62 of Attachment 1.

<sup>78</sup> See Shanghai Jinneng's SV Comments at Exhibit 4.

exclusive.<sup>79</sup> The rail freight rates are an average non-export value because they represent domestic rail freight rates between Bangkok and several cities at various distances across Thailand. The explanatory notes to the rail freight rates from Costs of Doing Business in Thailand: September 2011 Update explain that the source is the State Railway of Thailand, as of April 8, 2011 and are thus, contemporaneous with the POR.<sup>80</sup> Additionally, the rates are divided between class 3 consisting of “electrical appliances, automobiles, tin, logs, timber and tiles” and class 4 consisting of “fresh fish, rice, rubber, cement, manganese, gypsum, sand, gravel, etc.”<sup>81</sup> The Department has selected class 4 as more product-specific because quartz is the input transported by rail during the POR,<sup>82</sup> which is most similar to certain products in class 4 such as sand, gravel, and manganese.<sup>83</sup> None of the rates for rail freight on the record state whether tax is included or excluded. Furthermore, the “Rail Transportation Costs” rate table advocated for by Shanghai Jinneng contains rail rates based on ranges of distances.<sup>84</sup> The rates from the “Rail Transportation Costs from Bangkok” table are an application of rates to actual distances between Bangkok and destinations in Thailand.<sup>85</sup> In this case we find that it is more appropriate to value rail freight using costs for actual distances rather than general rates because these costs reflect an accurate application of the rates to real-life examples of shipping over various distances. Therefore, the Department finds that the rates from the “Rail Transportation Costs from Bangkok” table in Costs of Doing Business in Thailand: September 2011 Update represent the best information for valuing Shanghai Jinneng’s rail freight.<sup>86</sup>

Lastly, Shanghai Jinneng argues that according to Costs of Doing Business in Thailand: September 2011 Update, a fuel surcharge was not in effect until June 2011. However, as noted by Petitioner, Costs of Doing Business in Thailand: 2011 states that a fuel surcharge was in effect from August 11, 2009 until further notice.<sup>87</sup> Costs of Doing Business in Thailand: September 2011 Update states that the fuel surcharge was in effect from June 1, 2011 until further notice.<sup>88</sup> Thus, the fuel surcharge in Cost of Doing Business in Thailand: 2011 was in effect from August 2009 “until further notice,” and was only changed in June 2011, which is after the POR. Furthermore, the fuel surcharge applied in the “Rail Transportation Costs from Bangkok” table from Costs of Doing Business in Thailand: September 2011 Update, and used by the Department in the Preliminary Results, was the fuel surcharge in effect from August 11, 2009. For example, the “Rail Transportation Costs from Bangkok” table, which the Department used to value rail freight lists the distance from Bangkok to Kohn Kaen as 442 kilometers and the fuel surcharge applied as 48.80 baht. This fuel surcharge matches the charge in the fuel surcharge table that became effective as of August 11, 2009. However, the fuel surcharge from Costs of Doing Business in Thailand: September 2011 Update, which became effective June 1,

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<sup>79</sup> See, e.g., Multilayered Wood Flooring, and accompanying Issues and Decision Memorandum at Comment 24; see also Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China, 72 FR 9508(March 2, 2007), and accompanying Issues and Decision Memorandum at Comment 17.

<sup>80</sup> See id.

<sup>81</sup> See id.

<sup>82</sup> See Section D Response at Exhibit D-5.

<sup>83</sup> See Shanghai Jinneng’s SV Comments at Exhibit 4.

<sup>84</sup> See Shanghai Jinneng’s Final SV Submission at pages 61-62 of Attachment 1.

<sup>85</sup> See Shanghai Jinneng’s SV Comments at Exhibit 4.

<sup>86</sup> See id.

<sup>87</sup> See id.

<sup>88</sup> See id.

2011, for distances of 401-500 kilometers is 64.90 baht.<sup>89</sup> Thus, the Department included a fuel surcharge in the surrogate rail rate that was in effect during the POR. Therefore, the Department will continue to include the fuel surcharge in its calculation of the rail freight surrogate value.

### **Issue 8: Transportation Cost for Quartz**

#### *Shanghai Jinneng*

- The Department incorrectly calculated the transportation costs for the quartz input. Quartz was transported by both truck and rail during the POR. The Department separately calculated truck and rail transportation costs and then added these costs together to derive the total transportation costs for quartz. The Department should have weight-averaged the rail and truck transportation costs to derive the total costs.

Petitioner did not comment on this issue.

#### **Department's Position:**

We agree with Shanghai Jinneng. Because Shanghai Jinneng used rail freight to transport a portion of the quartz input and used truck freight to transport the remaining portion of its quartz input (rather than transporting all of the input part of the distance over which it was shipped by rail and the rest of the distance over which it was shipped by truck), the transportation surrogate value should be the weighted-average of both rates. Therefore, for the final results the Department has calculated the cost of transporting quartz by weight-averaging the rail and truck surrogate costs.<sup>90</sup>

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<sup>89</sup> See Shanghai Jinneng's SV Comments at Exhibit 4 and letter from Petitioner to John Bryson, Secretary of Commerce regarding, "Silicon Metal from the People's Republic of China; 2010-11 Administrative Review; Comments on Surrogate Country Selection and Submission of Surrogate Value Data" dated November 4, 2011 at Exhibit 18.

<sup>90</sup> See Final Analysis Memorandum for amended SAS program language.

**Recommendation**

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of review in the Federal Register.

Agree \_\_\_\_\_

Disagree \_\_\_\_\_

\_\_\_\_\_  
Paul Piquado  
Assistant Secretary  
for Import Administration

\_\_\_\_\_  
Date