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September 19, 2014

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

FROM: Gary Taverman
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review of Small Diameter Graphite Electrodes from the People's Republic of China

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SUMMARY

We analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty (AD) order on small diameter graphite electrodes (SDGEs) from the People's Republic of China (PRC) for the period of review (POR) February 1, 2012, through January 31, 2013. Based on our analysis of the comments received, we have not made changes in the margin calculations for the Fangda Group[1] and continue to rely on total adverse facts available (AFA) for Fushun Jinly Petrochemical Co., Ltd. (Fushun Jinly). The final results do not differ from the *Preliminary Results*.[2] We recommend that you approve the positions we developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this review for which we received comments and rebuttal comments by parties:

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[1] The Fangda Group consists of Beijing Fangda Carbon Tech Co., Ltd. (Beijing Fangda), Chengdu Rongguang Carbon Co., Ltd. (Chengdu Rongguang), Fangda Carbon New Material Co., Ltd. (Fangda Carbon), Fushun Carbon Co., Ltd. (Fushun Caron), and Hefei Carbon Co., Ltd. (Hefei Carbon) We refer to the Fangda Group as a single entity pursuant to 19 CFR 351.401(f)(1). *See Small Diameter Graphite Electrodes From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances, in Part*, 73 FR 49408, 49411-12 (August 21, 2008) (where we collapsed the individual members of the Fangda Group), unchanged in *Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances: Small Diameter Graphite Electrodes from the People's Republic of China*, 74 FR 2049 (January 14, 2009).

[2] *See Small Diameter Graphite Electrodes from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission; 2012-2013*, 79 FR 15944 (March 24, 2014) (*Preliminary Results*).

Comment 1: Application of Total Adverse Facts Available
Comment 2: Surrogate Value for Pitch Oil
Comment 3: Surrogate Value for Steel Strap
Comment 4: Surrogate Value for Plastic Foam
Comment 5: Surrogate Value for Natural Gas
Comment 6: Application of Partial Facts Available for Tolling Data
Comment 7: Treatment of Irrecoverable Value-Added Taxes
Comment 8: Surrogate Value for Reintroduced Forming Scrap By-Product

BACKGROUND

On March 24, 2014, we published the *Preliminary Results*. We invited interested parties to comment on the *Preliminary Results*. On April 23, 2014, Fushun Jinly and the Fangda Group requested a hearing, but on August 7, 2014, withdrew their requests.[3] On April 30, 2014, we received case briefs from Fushun Jinly, the Fangda Group, and the petitioners, SGL Carbon LLC and Superior Graphite Co.

On May 2, 2014, we rejected Fushun Jinly's April 30, 2014, case brief, because we identified certain information that we determined was untimely filed new factual information, pursuant to 19 CFR 351.301(b)(2).[4] Specifically, we determined that Fushun Jinly's case brief identified a certain customer, the customer's specific actions during the period of review concerning POR entries, and the specific situation concerning sales of subject merchandise, affecting entries during the POR.[5] In our letter, we informed Fushun Jinly that we will not consider this new factual information, or any argument based on this information, in the final results of this review. We allowed Fushun Jinly to re-submit its case brief, provided that it does not include the untimely filed new factual information we identified or any comments that rely on this information.

On May 5, 2014, Fushun Jinly re-submitted its case brief with the information and arguments identified by the Department redacted. On May 5, 2014, we received rebuttal comments from all parties. On May 9, 2014, Fushun Jinly made a separate filing requesting the Department to reconsider its rejection of Fushun Jinly's argument in its initial case brief on the grounds that the Department in effect denied Fushun Jinly from having a meaningful opportunity to comment on the impact of the Department's determination in the *Preliminary Results* and ensuing liquidation instructions with respect to Fushun Jinly's customer.

The Department determines that it is not appropriate to reconsider our rejection of Fushun Jinly's initial case brief for these final results of the review. Fushun Jinly's argument in its May 9, 2014, filing is unsupported. Fushun Jinly's May 9, 2014, filing contains references to the previously rejected brief and an argument that relies on reframed new factual information that we have previously rejected. Further, we find that the May 9, 2014, filing contains an argument that is not meaningfully substantiated by evidence on the record and represents a mere re-

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[3] *See* Fushun Jinly/Fangda Group letter entitled "Small Diameter Graphite Electrodes from China; Withdrawal of Respondents' Request for a Hearing," dated August 7, 2014.
[4] *See* the Department's letter to Fushun Jinly dated May 2, 2014.
[5] *Id*.

characterization of an argument we have already rejected.[6] Accordingly, we continue to find that we properly rejected Fushun Jinly's initial case brief for containing new factual information.

On May 12, 2014, we rejected the Fangda Group's May 5, 2014, rebuttal brief, because we identified certain information that we determined was untimely filed new factual information, pursuant to 19 CFR 351.301(b)(2).[7] On May 13, 2014, the Fangda Group re-submitted its rebuttal brief with the information identified by the Department redacted. On July 7, 2014, we extended the time limit for the final results of review to September 22, 2014, pursuant to section 751(a)(3)(A) of the Act.[8]

SCOPE OF THE ORDER

The merchandise covered by the order includes all SDGEs of any length, whether or not finished, of a kind used in furnaces, with a nominal or actual diameter of 400 millimeters (16 inches) or less, and whether or not attached to a graphite pin joining system or any other type of joining system or hardware. The merchandise covered by the order also includes graphite pin joining systems for small diameter graphite electrodes, of any length, whether or not finished, of a kind used in furnaces, and whether or not the graphite pin joining system is attached to, sold with, or sold separately from, the small diameter graphite electrode. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes are most commonly used in primary melting, ladle metallurgy, and specialty furnace applications in industries including foundries, smelters, and steel refining operations. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes that are subject to the order are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 8545.11.0010,[9] 3801.10,[10] and 8545.11.0020.[11] The HTSUS numbers are provided for convenience and customs purposes, but the written description of the scope is dispositive.

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[6] *See* 19 CFR 351.309(b)-(c).
[7] *See* the Department's letter to the Fangda Group dated May 12, 2014.
[8] *See* memorandum entitled "Small Diameter Graphite Electrodes from the People's Republic of China: Extension of Deadline for Final Results of Antidumping Duty Administrative Review" dated July 7, 2014.
[9] The scope described in the order refers to the HTSUS subheading 8545.11.0000. We note that, starting in 2010, imports of SDGEs are classified in the HTSUS under subheading 8545.11.0010 and imports of large diameter graphite electrodes are classified under subheading 8545.11.0020.
[10] HTSUS subheading 3801.10 was added to the scope of the *SDGE Order* based on a determination in *Small Diameter Graphite Electrodes From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 77 FR 47596 (August 9, 2012) (first circumvention determination). The products covered by the first circumvention determination are SDGE (or graphite pin joining system) that were 1) produced by UK Carbon and Graphite Co., Ltd. (UKCG) from PRC-manufactured artificial/synthetic graphite forms, of a size and shape (*e.g.*, blanks, rods, cylinders, billets, blocks, *etc.*), 2) which required additional machining processes (*i.e.*, tooling and shaping) that UKCG performed in the United Kingdom (UK), and 3) were re-exported to the United States as UK-origin merchandise.
[11] HTSUS subheading 8545.11.0020 was added to the scope of the *SDGE Order* based on a determination in *Small Diameter Graphite Electrodes from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order and Rescission of Later-Developed Merchandise Anticircumvention Inquiry*, 78 FR 56864 (September 16, 2013) (second circumvention determination). The products covered by the second circumvention determination are SDGEs produced and/or exported by Jilin Carbon Import and Export Company with an actual or nominal diameter of 17 inches.

SEPARATE RATE FOR NON-SELECTED COMPANIES

In the *Preliminary Results*, we found that Xinghe County Muzi Carbon Co., Ltd. (Muzi Carbon) and Jilin Carbon Import and Export Company (Jilin Carbon) demonstrated their eligibility for separate-rate status.[12] We have not received any information since then that would lead us to reconsider our preliminary finding. Therefore, we continue to determine that Muzi Carbon and Jilin Carbon are eligible for separate-rate status.

Neither the statute nor the Department's regulations address the establishment of a rate to be applied to individual companies not selected for examination when the Department limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Our practice in this regard has been to average the margins for the selected companies, excluding margins that are zero, *de minimis*, or based entirely on facts available. Consistent with that practice and the *Preliminary Results*, because we calculated a weighted-average dumping margin above *de minimis* for the Fangda Group and determined a rate for Fushun Jinly Petrochemical Carbon Co., Ltd. (Fushun Jinly) based entirely on facts available, as the separate rate for non-selected companies, we established a margin for Muzi Carbon and Jilin Carbon based on the margin we calculated for the mandatory respondent, the Fangda Group. For the final results of this review, because we did not change the dumping margin for the Fangda Group, the rate assigned to the eligible non-selected separate rate companies remains 21.16 percent.

DISCUSSION OF ISSUES

Comment 1: Application of Total Adverse Facts Available

In the *Preliminary Results*, we determined that Fushun Jinly improperly described the sales process for all of its U.S. sales by making erroneous statements and by submitting misleading documentation, as well as withholding relevant information and necessary documentation concerning its U.S. sales until late in the administrative review.[13] The contradictory information provided by Fushun Jinly in this review led us to find in the *Preliminary Results* that Fushun Jinly failed to disclose the exact nature of its U.S. sales process and that it withheld information concerning the precise role and involvement of a certain third party in the sales process associated with Fushun Jinly's reported U.S. transactions until late in the administrative review.[14] Further, we found the record evidence showing that there were certain irregularities associated with the entries of Fushun Jinly's merchandise into the Customs territory of the United States which may have resulted in the possible evasion of the AD cash deposits with respect to said entries. Specifically, we found the record showing that, in determining the appropriate cash deposit rate associated with Fushun Jinly's entries, U.S. Customs and Border Protection (CBP) relied on what appears to be misrepresented information in identifying the seller/exporter for such entries; because improper documentation was used for entries of Fushun Jinly's merchandise sold by Company B to the importer, Company A,[15] the merchandise entered

[12] *See Preliminary Results*, and accompanying Preliminary Decision Memorandum at 9-11.
[13] *See Preliminary Results*, and accompanying Preliminary Decision Memorandum at page 5.
[14] *Id*.
[15] We are withholding companies' names because Fushun Jinly claimed business proprietary treatment for this information.

at Fushun Jinly's AD cash deposit rate, instead of the PRC-wide cash deposit rate; for certain entries, Fushun Jinly produced documentation that the importer used in misrepresenting the appropriate information.[16]

In the *Preliminary Results*, we found that the actions of parties, including Fushun Jinly, involved in the entry of subject merchandise for consumption in the United States, compromised the efficacy of the AD laws and undermined the Department's inherent ability to safeguard the integrity of this proceeding.[17] Further, we found that Fushun Jinly's admittance of certain actions it undertook with respect to entries of subject merchandise casts doubt on the accuracy of Fushun Jinly's response in its entirety.[18] The discussion of the evidence supporting the Department's facts available determination involves extensive use of business proprietary information. A full discussion of the matter was provided in the AFA memo.[19] As explained fully in the AFA memo, we found that the application of facts otherwise available to Fushun Jinly is warranted pursuant to sections 776(a)(2)(A), 776(a)(2)(C), and 776(a)(2)(D) of the Tariff Act of 1930, as amended (the Act).[20] In the *Preliminary Results*, we found that, when selecting from among the facts otherwise available, an adverse inference is warranted with respect to Fushun Jinly.[21] Additionally, we found that we cannot consider or rely on any of the information that Fushun Jinly provided in this review, because we determined that such information does not meet the requirements of section 782(e) of the Act.[22]

In its case brief, Fushun Jinly acknowledges that it initially submitted erroneous information concerning its sales process, making it appear that the only change from prior reviews (that also involved sales to Company A) was that Fushun Jinly sold the subject merchandise to Company A but, unlike in prior reviews, it received the payment from Company B. Fushun Jinly argues that the submission of this erroneous information is the result of how it has viewed its interaction with Company A concerning its sales during the POR, and that Fushun Jinly did not disclose all the details concerning sales to Company A simply because Fushun Jinly viewed them as inconsequential and not out of a desire to conceal them. Fushun Jinly contends that, aside from another party making a payment, it believed that no significant change occurred in the current review's sales process concerning sales to Company A. Fushun Jinly asserts that there was no benefit to be had from its unintended withholding of information as it reported the correct and actual prices in its sales list. Fushun Jinly asserts that only after the receipt of the Department's second supplemental questionnaire, which questioned the specific disconnect between Fushun Jinly's narrative in its prior responses and the sales documentation it provided in those responses, did Fushun Jinly realize that its sales process was not as simple as Fushun Jinly making sales to Company A and receiving payment from Company B; Fushun Jinly acknowledges that at the time of its response to the Department's second supplemental questionnaire, it provided a full explanation of its sales process along with the supporting sales documentation (certain of which was not previously provided and certain of which replaced previously provided information).

[16] *See Preliminary Results*, and accompanying Preliminary Decision Memorandum at 6.
[17] *Id*.
[18] *Id*.
[19] *See* memorandum entitled "Small Diameter Graphite Electrodes from the People's Republic of China - The Use of Adverse Facts Available" dated March 18, 2014 (AFA memo).
[20] *Id*., at 6-13.
[21] *Id*., at 13-14.
[22] *See Preliminary Results*, and accompanying Preliminary Decision Memorandum at 7.

Consequently, Fushun Jinly argues, although it did not submit completely responsive information until it responded to the Department's second supplemental questionnaire, the Department incorrectly concluded that Fushun Jinly withheld information from the Department.

Fushun Jinly takes issue with the Department's statements in the AFA memo and in the *Preliminary Results* that the information the Department required and requested from Fushun Jinly was not submitted until late in the administrative review. Fushun Jinly asserts that, although its response to the Department's second supplemental questionnaire was more than one month after the Department fully extended the *Preliminary Results* it was, nevertheless, two and a half months prior to the issuance of the fully extended *Preliminary Results*. Fushun Jinly argues that the Department had sufficient time before the deadline for the *Preliminary Results* to request additional information from Fushun Jinly to discern the true nature of its selling process.

Fushun Jinly takes issue with the Department's determination in the AFA memo that the information Fushun Jinly submitted cannot serve as an accurate basis for reviewing Fushun Jinly's entries during the POR and, therefore, is not verifiable on the basis of Fushun Jinly's involvement in what the Department determined, and what Fushun Jinly itself admitted, was an inappropriate invoicing practice. Specifically, Fushun Jinly downplays the Department's expressed concern in the AFA memo concerning the potential off-book invoicing associated with the issuance of secondary invoices for the sale of same goods, which the Department determined casts serious doubt on the accuracy of all information that Fushun Jinly presented in this review. Fushun Jinly argues that the revenue from secondary invoices was not included in its accounting records and its reported U.S. sales, as invoiced to Company B, were reconciled to its financial statements.

Fushun Jinly asserts that the record does not support the Department's speculation in concluding that Fushun Jinly was assisting Company A to evade the AD laws by virtue of Company A entering subject merchandise using Fushun Jinly's cash deposit rate instead of the PRC-wide rate. Fushun Jinly asserts that, because Fushun Jinly does not know how or when Company A would enter subject merchandise into the United States, the Department appears to punish Fushun Jinly for the perceived sins of Company A. Further, in marginalizing the necessity for the actual use of secondary invoices that Fushun Jinly issued and provided to Company A for entries of subject merchandise exported by Company B (and, thus, the resultant use of Fushun Jinly's cash deposit rate), Fushun Jinly argues that entries in question were entitled to Fushun Jinly's cash deposit rate in the first place. This is so, argues Fushun Jinly, because Company B is a British Virgin Islands (BVI) company without its own AD rate and that under the Department's non-market economy (NME) reseller rules and the cash deposit hierarchy established in the prior administrative review, entries of merchandise manufactured by Fushun Jinly and sold/exported by Company B are appropriately subject to the manufacturer's (*i.e.*, Fushun Jinly's) cash deposit rate. To this end, Fushun Jinly argues, the Department improperly concluded that Company B was a PRC entity, subject to the PRC-wide rate, on the basis of certain record evidence showing the physical address, phone, and facsimile information for Company B in the PRC. Fushun Jinly asserts that it indicated in its supplemental responses that Company B is a BVI entity and provided its corporate address in BVI; if the Department found this information not convincing, it should have requested Fushun Jinly to provide Company B's corporate registration materials or certificate of incorporation in either a second or subsequent supplemental questionnaires.

Fushun Jinly encourages the Department to reverse its findings in the *Preliminary Results* and continue the administrative review of Fushun Jinly. Fushun Jinly argues that it was fully responsive to the Department's second supplemental questionnaire and explained previous inconsistencies in its responses concerning its sales process. Fushun Jinly asserts that it also provided complete sales documentation with respect to the transactions between it, Company A, and Company B. Further, Fushun Jinly asserts that the *Preliminary Results* did not express any concerns with Fushun Jinly's reported U.S. sales of factors of production (FOP) data and none of the issues identified by the Department call into question the veracity of these data, precluding the Department from fulfilling its obligation to calculate the AD margin, if any, for Fushun Jinly.

The petitioners argue that the Department should continue to rely on AFA for Fushun Jinly in the final results of this review. The petitioners contend that the Department has a broad discretion to determine when it is appropriate to apply AFA to a respondent[23] and the Department appropriately found in the *Preliminary Results* that Fushun Jinly met the criteria for AFA. The petitioners argue that beginning with its original Section A questionnaire response and throughout the course of this review, Fushun Jinly failed to respond to the Department's requests for information in a timely and truthful manner.[24] The petitioners argue that Fushun Jinly provided inadequate explanations for its erroneous statements, misleading submissions of documentation, and withholding of relevant and necessary information requested by the Department, and has never given the Department sufficient grounds to change its finding of total AFA in the final results. Stating that the accuracy of the information was certified by Fushun Jinly and its counsel at the time the information was submitted, the petitioners dismiss Fushun Jinly's proclamation in its case brief that "confusion arose," as part of Fushun Jinly's explanation for misleading the Department with false statements and documentation. The petitioners contend that an application of AFA to Fushun Jinly is warranted because Fushun Jinly failed repeatedly throughout this review to satisfy the statutory standard of section 776(a) of the Act, *i.e.*, to meet its responsibility for providing accurate information to the Department in the form and manner that the Department requests by the deadline that the Department sets.

The petitioners contend that Fushun Jinly misrepresents the course of events when it states in its case brief that it fully explained to the Department the sales process by the time of its response to the Department's second supplemental questionnaire. First, the petitioners argue, Fushun Jinly's response to the second supplemental questionnaire raised serious questions as to the credibility of its previously submitted information as well as the credibility of the new information reported in the second supplemental response itself.[25] Second, the new information presented in the Fushun Jinly's second supplemental response regarding its U.S. sales was beyond the scope of

[23] The petitioners cite *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1380 (Fed. Cir. 2003) and *Ad Hoc Shrimp Trade Action Comm. v. United States*, 675 F. Supp. 2d 1287, 1304 (CIT 2009).
[24] The petitioners recount various statements, involving business proprietary information, made in their comments preceding the *Preliminary Results*, "4th Administrative Review of Small Diameter Graphite Electrodes from the People's Republic of China - Fushun Jinly" dated February 28, 2014, filed March 4, 2014.
[25] The petitioners cite their comments preceding the *Preliminary Results*, "4th Administrative Review of Small Diameter Graphite Electrodes from the People's Republic of China - Fushun Jinly's Second Supplemental Response and Request for a Meeting" dated December 6, 2013.

the Department's questionnaire and, therefore, should have been found to constitute an unsolicited and untimely response.[26]

Citing various statements and conclusions that the Department has made in the *Preliminary Results*, the petitioners support the Department's finding that Fushun Jinly failed to cooperate to the best of its ability and that an adverse inference was warranted with respect to Fushun Jinly in this review.

Department's Position: We continue to find that the application of AFA with respect to Fushun Jinly is appropriate in this administrative review. Fushun Jinly does not cite to any record evidence that the Department overlooked or misinterpreted in reaching its AFA determination in the *Preliminary Results*, nor does it offer any argument that persuades us to reverse or reconsider this finding.

The current administrative review represents the fifth time in the proceeding in which Fushun Jinly had been individually examined. Fushun Jinly is well aware of the rigorous nature of the process we undertake in analyzing AD questionnaire responses. Through its participation in this proceeding on many occasions, Fushun Jinly is cognizant of the importance of providing us with the fundamental information we seek on an accurate and timely basis. With respect to information requested in Section A of the AD questionnaire, it is imperative for us to have a clear picture of the respondent's sales process because it guides our understanding of which party's transactions are appropriately covered by the review, the appropriate date of sale, the appropriate universe of sales, reporting of appropriate adjustments, *etc*.

As detailed in the AFA memo, in its section A questionnaire response Fushun Jinly stated that it "is not aware of any merchandise sold to other companies in China that was ultimately shipped to the United States" and that it "made no sales through resellers." The record evidence showed these statements to be incorrect. The statements Fushun Jinly made along with the sales documentation it provided in its initial questionnaire response explained that Fushun Jinly sold subject merchandise directly to the U.S. customer, Company A, pursuant to its purchase orders, and that another company, Company B made payment. Once again, the record evidence showed that Fushun Jinly's statements were inaccurate and the sales documentation it provided unsupportive of its U.S. sales process.

In the first supplemental questionnaire, we requested Fushun Jinly to: 1) demonstrate how the payment ties to the invoiced value for the sample invoice Fushun Jinly provided in Section A response, 2) explain why the gross unit price that Fushun Jinly reported in its U.S. sales list for the sample invoice does not match the price stated in the commercial invoice that Fushun Jinly issued to Company A, 3) explain the legal and/or commercial relationship/affiliation between

[26] Commenting on Fushun Jinly's subsequent attempt to add new factual information to the record, the petitioners cite the Department's February 27, 2014, letter to Fushun Jinly in which the Department rejected as untimely Fushun Jinly's February 24, 2014, submission containing the Certificate of Incorporation for Company B (noting first that Fushun Jinly already had two prior and separate opportunities to provide this information, and finding that such information seeks to corroborate Fushun Jinly's November 26, 2013 second supplemental questionnaire response instead of rebutting, clarifying, or correcting information in the February 12, 2014, memorandum to file, "Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Placement of CBP Entry Packages on the Record.").

Company A and Company B, 4) explain why the payment for the sample sale was made by Company B and not Company A and what role Company B played in Fushun Jinly's shipments of subject merchandise to the United States during the POR, 5) document all communication with Company B concerning shipments of subject merchandise to the United States during the POR, and 6) describe the timing and identify the party to which the title to goods was transferred for the sample U.S. sale. As detailed in the AFA memo, Fushun Jinly's answers to the first supplemental questionnaire were not responsive to our attempts to clarify Fushun Jinly's U.S. sales process and, often, were elusive.

As the discussion in the AFA memo demonstrates, Fushun Jinly was provided with ample opportunities to remedy or explain the deficiencies that the Department identified in its Section A response. Here, it is not only the number of times in seeking clarification from Fushun Jinly concerning its U.S. sales process that is dispositive of how we interpret "ample opportunities" but also the number of questions in the first supplemental questionnaire that were issued for the sole purpose of understanding Fushun Jinly's U.S. sales process. Accordingly, we fulfilled our obligation of providing Fushun Jinly with an opportunity to remedy or explain the deficiency in its original questionnaire, within the meaning of section 782(d) of the Act.[27]

Fushun Jinly's response to our first supplemental questionnaire continued to suggest that the U.S. customer for its reported U.S. sales was Company A and that Company B was merely the party that paid for the merchandise. In response to our continued questioning of Fushun Jinly's U.S. sales process and applicable documentation, the explanations Fushun Jinly provided in its second supplemental response, along with the documentation it furnished therein revealed for the first time in this review that Fushun Jinly made sales to Company B pursuant to contracts with Company B with the knowledge of the ultimate U.S. customer, Company A, and that Company B resold the subject merchandise to Company A; and that Fushun Jinly signed contracts with and issued invoices to Company B. Further, for the first time in this review, Fushun Jinly provided its contracts with Company B covering all U.S. sales, certain commercial invoices it issued to Company B that were not previously submitted to us, the commercial invoices that Company B issued to Company A for resale of products that Fushun Jinly sold to Company B, and CBP summary entry forms 7501. Also, Fushun Jinly admitted, for the first time in this review, that it provided certain improper documentation to Company A that was used for entries of Fushun Jinly's merchandise sold by Company B (Fushun Jinly submitted inadvertently such documentation in its Section A response as well as in its first supplemental questionnaire response in describing its U.S. sales process).

As we stated in the AFA memo, "the record evidence shows that the information and documentation Fushun Jinly provided in its second supplemental response are contrary from those it made in its initial questionnaire responses."[28] "The disparity in information illustrates that Fushun Jinly concealed the exact nature of its U.S. sales process and withheld information concerning the precise role and involvement of {Company B} in the sales process associated

[27] *See Gerber Food (Yunnan) Co., Ltd. v. United States*, 491 F. Supp. 2d 1326, 1335-1336 (CIT 2007) (*Gerber Food*) (interpreting section 782(d) of the Act as requiring the Department to issue a supplemental questionnaire before invoking AFA under section 776(b) of the Act).
[28] *See* AFA memo at 6.

with Fushun Jinly's reported U.S. transactions until late in the administrative review..."[29] Further, in the AFA memo we contrasted the statements and the documentation provided by Fushun Jinly in its various responses and concluded that "Fushun Jinly improperly described the sales process for all of its U.S. sales by making erroneous statements and by submitting misleading documentation."[30] Accordingly, we found that the application of facts otherwise available is warranted pursuant to section 776(a)(2)(A) of the Act because Fushun Jinly withheld information concerning its U.S. sales process, information that was available to it when it made the erroneous statements in its initial questionnaire response.[31] We continue to find, for purposes of these final results, that Fushun Jinly withheld information that was requested from it, within the meaning of section 776(a)(2)(A) of the Act. Fushun Jinly initially had an opportunity, a responsibility in fact, to apprise us of its U.S. sales process in its initial questionnaire response, or even in its first supplemental questionnaire response, and it was Fushun Jinly's responsibility to provide a complete and accurate sales response within the applicable deadlines.[32]

Further, we found that the application of facts available is warranted pursuant to section 776(a)(2)(C) and (D) of the Act because Fushun Jinly misrepresented its U.S. sales process and acknowledged the issuance of improper documentation associated with certain POR entries of its shipments. On this basis, we found that the information submitted by Fushun Jinly can no longer serve as an accurate basis for reviewing Fushun Jinly's entries during the POR and, therefore, is no longer verifiable.[33] We reached this determination, in part, because we found Fushun Jinly's act of issuing secondary invoices for the sale of same goods, concerning certain POR entries, sufficiently egregious to discount the accuracy of Fushun Jinly's response in its entirety.[34] As we elaborated in the AFA memo, this is so because once Fushun Jinly admitted to a certain wrongdoing (*i.e*., inappropriate invoicing for certain entries), we have no certainty that the information purported by Fushun Jinly to be true and accurate is, in fact, true and accurate such that we can rely on it for the purposes of the review. Fushun Jinly argues that the revenue from secondary invoices was not included in its accounting records and its reported U.S. sales, as invoiced to Company B, were reconciled to its financial statements. While this may be true, the way in which Fushun Jinly handled secondary invoices in its accounting records does not diminish the fact that they were issued in the first place, nor detracts from our suspecting the integrity of Fushun Jinly's response. In sum, in the AFA memo we found, and we continue to find in these final results, that the application of facts otherwise available is warranted pursuant to section 776(a)(2)(C) of the Act because Fushun Jinly significantly impeded the current segment of this proceeding by initially withholding information that would have prompted additional inquiries and allowed us to conduct a thorough review, and its misrepresentation of the facts has cast doubt on the accuracy of all the information submitted by Fushun Jinly. The application of facts otherwise available is warranted pursuant to section 776(a)(2)(D) of the Act, because the information provided by Fushun Jinly cannot be verified because it can no longer serve as an accurate basis for reviewing Fushun Jinly's entries during the POR. There remain

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[29] *Id*.
[30] *Id*., at 7.
[31] *Id*., at 9.
[32] *See Myland Industrial, Ltd. v. United States,* 31 CIT 1696, 1704 at n.2 (2007).
[33] *See* AFA memo at 9-10.
[34] *Id*.

credible doubts regarding the accuracy of the submitted information, making any verification thereof an exercise in futility.[35]

We determined that we will not consider any information submitted by Fushun Jinly in this review because such information does not meet the requirements of section 782(e) of the Act, namely the submitted information: 1) cannot serve as a reliable basis for reaching an accurate dumping determination within the meaning of section 782(e)(3) of the Act, 2) cannot be used without undue difficulties in determining which of Fushun Jinly's information is accurate and which is not, and 3) can no longer be verified as there are doubts regarding the accuracy of the information.[36] Fushun Jinly would have us use the information it submitted in its second supplemental questionnaire response. However, this information is not reliable, because the misreporting and inaccuracies revealed by this response call into question all of Fushun Jinly's submitted information in this review. In fact, Fushun Jinly's actions in this review illustrate a pattern of behavior of not acting to the best of its ability to comply with requests for information and support a finding that Fushun Jinly failed to cooperate to the best of its ability.[37] Accordingly, in situations such as this, where we find that Fushun Jinly failed to meet the requirements of section 782(e) of the Act, contrary to Fushun Jinly's assertions, the Department is not required to use Fushun Jinly's information.[38] Further, we find that the information in Fushun Jinly's second supplemental questionnaire response in no way remedied or explained the prior deficiencies. In fact, we find that response to be "not satisfactory" within the meaning of section 782(d)(1) of the Act because it revealed the unreliability of all of the information submitted by Fushun Jinly in this review.

We do not find persuasive Fushun Jinly's challenge of our finding that the actions of Fushun Jinly and its importer as they relate to the entries of Fushun Jinly's merchandise likely resulted in the evasion of the AD cash deposits. Fushun Jinly made the same assertion before and we found it unsubstantiated by record evidence.[39] Specifically, Fushun Jinly renews its argument that the issuance and provision of secondary invoices to Company A, associated with certain entries, was an exercise in futility because entries in question were entitled to Fushun Jinly's cash deposit rate

[35] *Id*., at 10.
[36] *Id*.
[37] *Id*., at 14.
[38] *See Gerber Food*, 491 F. Supp. 2d at 1336 (where the court found that, on the basis of the criterion in section 782(e)(4) of the Act (requiring a respondents to demonstrate that it acted to the best of its ability in providing the requested information), "the court does not construe §1677e(a)(2) and (b) {sections 776(a)(2) and (b) of the Act}; and § 1677m(d) and (e) {sections 782(d) and (e) of the Act}, when read together, to preclude Commerce from invoking the facts otherwise available and adverse inference provisions in all instances in which Commerce, despite initially receiving unsatisfactory responses to its information requests, eventually obtains from an interested party… the information it requested in conducting an administrative review under 19 U.S.C. § 1675 (2000) {section 751 of the Act}. If the court were to so construe these related provisions, a participant in the administrative review would incur no adverse consequences for withholding requested information until the later stages of the questionnaire process, or for significantly impeding the review by repeatedly providing questionnaire responses with significant deficiencies, and thereby failing to act to the best of its ability in providing the information requested. The plain meaning of §§ 1677e and 1677m {sections 776 and 782 of the Act} is to the contrary.") *See also Tung Mung Development Co., Ltd., v. United States*, 25 CIT 752, 789 (2001) (where the court found that the remedial provisions of section 782(d) of the Act "are not triggered unless the respondent has met **all** of the five enumerated criteria {under section 782(e)}. Failure to fulfill any one criterion renders § 1677m(d) {section 782(d)} inapplicable" (emphasis in original)).
[39] *See* AFA memo at 11-12.

in the first place, on the basis of Fushun Jinly's assertion that Company B is a BVI company. As we explained in the AFA memo, the record shows that the actual commercial invoices that Company B issued to Company A for certain entries list Company B as the seller of goods and provide Company B's physical address in the PRC as well as the phone and facsimile numbers in the PRC.[40] Because Company B did not have its own AD rate at the time of entry and there is nothing in the commercial invoices that indicate that Company B is a non-PRC entity, the appropriate cash deposit rate for entries supported by these sales documents would have been determined by CBP to be the previously established rate for the PRC-wide entity.[41] Fushun Jinly's provision of secondary invoices to its importer, Company A, resulted, however, in merchandise entering the United States Customs territory under Fushun Jinly's cash deposit rate.[42] As we concluded in the AFA memo, "the secondary invoices were, indeed, necessary under these circumstances and, in fact, were likely used to evade the posting of the cash deposits applicable to the PRC-wide entity."[43] As such, contrary to Fushun Jinly's assertion, Fushun Jinly did, in fact, assist Company A in avoiding the posting of the appropriate cash deposits for certain entries of Fushun Jinly's merchandise by providing secondary invoices to Company A.

Further, as we explained in the AFA memo, record evidence contradicts Fushun Jinly's assertion that Company B is a BVI entity. The record evidence shows one physical PRC address for Company B in the payment documentation and a different physical PRC address for Company B in invoices issued by Fushun Jinly to Company B, in Company B's contracts, and in the certain invoices that Company B issued to Company A.[44] To this end, as we mentioned in the AFA memo, the record evidence shows that, in order to negate the indication of Company B as the seller/exporter and its physical address in the PRC (and thus to negate the appearance of Company B as a PRC-wide entity) for first two sales, Company A relied on secondary invoices issued by Fushun Jinly (where Fushun Jinly appears as the seller/exporter); for the remaining transactions, the record shows that the commercial invoices that Company B issued to Company A, continue to list Company B as the seller of goods but now provide Company B's "P.O. Box" address in the BVI and do not provide any telephone or facsimile numbers in the BVI.[45] In addition, these invoices identify for the first time the manufacturer (*i.e.*, Fushun Jinly) and the manufacturer's address, the information that was not present in Company B's preceding invoices, for which Fushun Jinly issued secondary invoices.[46] It is this transition in Company B's sales documentation with Company A, in identifying itself first as the PRC entity for certain entries (mitigated by the eventual use of Fushun Jinly's secondary invoices issued to Company A) and then as the BVI company for subsequent entries, that has led us to conclude that the strategy of Company A evolved from relying on Fushun Jinly's secondary invoices to using the sales documentation of Company B in which Company B presents itself as a non-PRC entity. Under this scheme, it allowed the entries for these remaining transactions to be made, again, at

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[40] *Id*.
[41] *Id*.
[42] *Id.* As detailed in the AFA memo at page 11, we examined entry documentation that we obtained from CBP and confirmed that the invoice in question were in fact, used to enter subject merchandise sold/exported by Company B (as reflected in its invoices) at the cash deposit rate previously established for Fushun Jinly.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.

Fushun Jinly's previously established cash deposit rate, instead of the PRC-wide rate.[47] This unexplained and unorthodox transition in Company B's sales documentation with Company A, in the way Company B is identified in terms of the seller's/exporter's origin, indicates that the importer's goal is to evade posting the appropriate cash deposits.

Lastly, as we stated in the AFA memo, no documentation has been submitted on the record that confirms Fushun Jinly's statement that Company B is a BVI entity. In fact, the record shows that Company B is domiciled in both the PRC and BVI.[48] Based on how all POR entries for Fushun Jinly's merchandise were made (as discussed above), we can logically conclude that Company B is a PRC entity. Fushun Jinly asserts that in order to assuage the concerns over Company B's origin, a further inquiry into Company B's corporate registration documentation was warranted. As a preliminary matter, the record shows that Fushun Jinly did not provide such information at any time at which it made the repeated assertions that Company B is a BVI entity.[49] It is incumbent upon interested parties to support their assertions to the Department with evidence. More importantly, our determination that the information submitted to CBP was also misrepresented for remaining entries (for which no secondary invoices were used) was based strictly on the sales documentation we examined for Company B (observing the shift from the PRC to BVI identity, that we determined was a contemplated substitute for using secondary invoices), which serve as the only basis available to CBP to discern whether the seller/exporter is a PRC entity or a market economy entity.

For these reasons, we continue to find that the use of AFA is warranted in these final results, within the meaning of sections 776(a)(2)(A), (C), and (D), and 776(b) of the Act.

Comment 2: Surrogate Value for Pitch Oil

The petitioners argue that pitch can be derived from coal, oil, or wood. According to the petitioners, we should use HTS 2709.00 to value pitch oil in the final results because it covers petroleum-type pitch oil rather than HTS 2706.00 "Mineral Tars, Including Reconstituted Tars; Tar Distilled From Coal, From Lignite Or From Peat" which is limited to pitch oil made from coal-type products. The petitioners claim that it is more reasonable to value pitch oil based on 2709.00 given the predominance of petroleum-based products in the production of graphite electrodes.

Fangda Group argues that the record indicates that Ukrainian HTS 2706.00 covers "Mineral Tars, Including Reconstituted Tars"[50] and is not specific to coal derived pitch oil. Fangda Group also argues that HTS 2709.00 "Petroleum oils, oils from bituminous minerals, crude" does not cover mineral tars like pitch oil and that we determined in *Electrodes 3* that HTS 2706.00 was

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[47] *Id*.
[48] *See* AFA memo at 12 and footnotes 52, 53, 54, and 55.
[49] *See* Fushun Jinly's September 17, 2013, and November 26, 2013, supplemental questionnaire responses.
[50] *See* memorandum dated March 18, 2014, from Dmitry Vladimirov to the File, entitled "Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Selection of Surrogate Values," at Exhibit 6.

appropriate to value pitch oil and HTS 2709.00 was inappropriate.[51] Further Fangda Group states that the petitioners did not place any information on the record to demonstrate that HTS 2706.00 is no longer specific to the pitch oil inputs used by the Fangda Group to produce subject merchandise.

Department's Position: The Ukrainian HTS 2706.00 covers "Mineral Tars, Including Reconstituted Tars" not "Mineral Tars, Including Reconstituted Tars; Tar Distilled From Coal, From Lignite Or From Peat" and is therefore not limited to coal-derived mineral tars.

In the third administrative review, where we were faced with similar arguments, we valued pitch oil with HTS 2706.00 and declined to value it with HTS 2709.00.90.00 "Petroleum Oils And Oils From Bituminous Minerals, Crude, NESOI."[52] Further, no information has been placed on the record that demonstrates that HTS 2706.00 is not specific to pitch oil. Although there is no information on the record which directly indicates the formula used to produce, or the ingredients contained in the pitch oil consumed by Fangda Group, its FOP tables provide both English and Chinese language names for material inputs, and the Chinese language name for this input translates to "Coal Tar."[53] Further, we disagree with the petitioners' argument that we should value pitch oil with an oil derived value simply because other oil-based products are used in the production of graphite electrodes. Both coal and oil (among other things) contain carbon, the essential ingredient in graphite electrodes. For these reasons, we continue to value pitch oil with Ukrainian HTS 2706.00 for these final results.

Comment 3: Surrogate Value for Steel Strap

The petitioners claim that HTS 7211.29 "Other Flat-Rolled Iron Or Non-Alloy Steel Products, NESOI, Under 600 mm Wide, Cold Rolled, Not Clad, Plated, Or Coated," which we used to value Fangda Group's steel straps used for packing in the *Preliminary Results* is not representative of steel strapping used for packaging; rather, HTS 7312.90, "Plaited Bands, Slings And The Like" is.

Fangda Group argues that HTS 7312.90 covers plaited, *i.e.*, braided steel bands and slings which are steel products which require more processing than its packing material which is characterized as HTS 7211.29. Fangda Group argues that in the *Electrodes 3* we found HTS 7211.29 to be more specific to Fangda Group's steel strap/steel strip/steel buckle than HTS 7312.90.[54] Additionally, Fangda Group contends that there is no information on the record to establish that it used plaited steel straps to pack subject merchandise.

Department's Position: No information has been placed on the record that demonstrates that the steel strap used by Fangda Group were plaited, braided or otherwise indicates that HTS 7312.90

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[51] *See* memorandum dated March 4, 2013, from Dmitry Vladimirov to the File, entitled "Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Selection of Surrogate Values," at 4 (Electrodes 3 SV Memo) unchanged in the *Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 55680 (September 11, 2013) (*Electrodes 3*).
[52] *Id*.
[53] *See, e.g.*, Fangda Group's March 6, 2013 response at Appendix S2-D-2-FC - FOP Worksheet.
[54] *See* Electrodes 3 SV Memo at 6-7, unchanged in *Electrodes 3*.

should be used to value the steel straps used by Fangda Group to package subject merchandise. For the purposes of these final results, we continue to use HTS 7211.29 to value the steel straps used by Fangda Group.

Comment 4: Surrogate Value for Plastic Foam

The petitioners argue that HTS 3921.11 "Plates, Sheets, Etc., NESOI, Cell Polymer Of Styrene," which we relied on to value Fangda Group's plastic foam packing material is not representative of the plastic used by Fangda Group to pack subject merchandise, but that HTS 3926.90 "Articles of Plastic, NESOI" is more appropriate. The petitioners argue that there is no information on the record showing that the plastic foam consumed by Fangda Group was limited to "plates or sheets," or was 100 percent polystyrene. In their view, HTS 3926.90 includes all plastic foam shapes and foams made of other plastics.

Fangda Group responds that it reported HTS 3921.11 because the plastic that it consumes is a cellular plastic, *i.e.*, Styrofoam. Fangda Group contends that HTS 3926.90 is a plastics basket category and cites, *e.g.*, *PRC CVP 23* to establish that a basket category is "unsuitable for valuation purposes where a more representative surrogate exists."[55] Fangda Group argues that HTS 3926.90 includes a diverse set of products made from non-cellular plastic including: ice bags, handles and knobs, ladders, *etc.* and maintains that items designated HTS 3921.11 and made from cellular plastic are more specific to the foam caps it used to pack subject merchandise than a catch-all category of miscellaneous non-cellular plastic items. Further, Fangda Group argues that in *Electrodes 3* the Department found HTS 3921.11 to be more specific to Fangda Group's plastic foam input than HTS 3926.90[56] and that petitioners have not presented any record information which suggests that Fangda Group used non-cellular plastic to pack subject merchandise.

<u>Department's Position</u>: No information has been placed on the record that demonstrates that the plastic foam used by Fangda Group was non-cellular or otherwise indicates that HTS 3926.90 should be used to value the plastic foam used by Fangda Group to package subject merchandise. We agree that HTS 3926.90 is a basket category, which includes a wide variety of items of non-cellular plastic and that HTS 3921.11 is a more representative surrogate because it is specifically limited to items of cellular plastic.[57] We disagree with the petitioners' argument that HTS 3921.11 is not applicable because there is no information on the record that Fangda Group's plastic foam was in a form excluded by HTS 3921.11, or was not all polystyrene. First, HTS 3921.11 includes "Sheets, Plates, *Etc*. NESOI" items of cellular plastic, which is a more diverse selection than the mere "sheets and plates" to which the petitioners argue, the category is limited. Second, HTS 3921.11 is specific to "cell polymer of styrene," and there is no information on the record that the plastic foam that Fangda Group used to pack subject merchandise is not all Styrofoam or the like. For the purposes of these final results, we have continued to use HTS 3921.11 to value the plastic foam used by Fangda Group.

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[55] *See Carbazole Violet Pigment 23 from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 75 FR 36630 (June 28, 2010) (*PRC CVP 23*), and the accompanying Issues and Decision Memorandum at Comment 3.
[56] *See* Electrodes 3 SV Memo at 7, unchanged in *Electrodes 3*.
[57] *Id*.

Comment 5: Surrogate Value for Natural Gas

The petitioners argue that we should rely on HTS 2709.00 "Condensed Natural Gas" rather than HTS 2711.21 "Natural Gas, Gaseous." The petitioners claim that there is no information on the record that the natural gas consumed by Fangda Group was transported by pipe line in a gaseous form to Fangda Group's factories and the Department should therefore determine that it was transported by truck as a condensate.

Fangda Group argues that there is no information on the record that indicates that Fangda Group consumed condensed natural gas rather than natural gas in a gaseous state. Fangda Group claims that it reported its consumption of natural gas in cubic meters consistent with the manner in which utilities (which deliver gaseous natural gas in pipelines) both measure and charge for natural gas consumption.[58] Fangda Group asserts that in both *Electrodes 1* and *Electrodes 3* we used HTS 2711.21 rather than HTS 2709.00 or 2709.00.10.[59]

Department's Position: No information has been placed on the record that demonstrates that the natural gas used by Fangda Group was condensed or otherwise indicates that HTS 2709.00 should be used to value the natural gas used by Fangda Group to produce subject merchandise. For these final results, we continue to use HTS 2711.21 to value the natural gas used by Fangda Group as we have in previous segments of this proceeding.

Comment 6: Application of Facts Available for Fangda Group Tolling Data

The petitioners contend that the FOP data submitted by the Fangda Group are incomplete and unreliable because they do not incorporate the FOP data for its unaffiliated tolling companies. The petitioners argue that the Department should apply partial facts available, should rely on the highest reported input and the lowest reported offset reported by any of the producers in the Fangda Group (adjusted for unreconciled differences) for each reported factor and, based on this information, determine a single normal value to match to all of Fangda Group's U.S. sales.

The petitioners assert that the Fangda Group knew of its obligation to provide useable and reliable tolling factor data because it participated in the less-than-fair value investigation, as well as administrative reviews. The petitioners argue that the Fangda Group did not attempt to obtain the tolling factor data from any of its tollers prior to the Department's request to do so.

Citing *Nachi-Fujikoshi Corp. v. United States*, 890 F. Supp. 1106, 1111 (CIT 1995), among other cases, the petitioners assert that the burden of developing a complete and accurate administrative record, which they claim includes the tolling data, lies solely with the respondent. The petitioners argue that the Fangda Group was not exempt from submitting these data merely

[58] *See* Fangda Group's July 11, 2013, Section D response at Exhibit D-6.

[59] *See Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of the First Administrative Review of the Antidumping Duty Order and Final Rescission of the Administrative Review, in Part*, 76 FR 56397 (September13, 2011) (*Electrodes 1 Final*) and the accompanying Issues and Decision Memorandum at Comment 11, unchanged in *Small Diameter Graphite Electrodes from the People's Republic of China: Amended Final Results of the First Administrative Review of the Antidumping Duty Order*, 77 FR 15042 (*Electrodes 1 Amended Final*); *see also* Electrodes 3 SV Memo at 8, unchanged in Electrodes 3.

because the Fangda Group had acknowledged the tollers' refusal to reveal their business proprietary data to the Fangda Group. Similar to what a respondent has done in *Refrigerators from Mexico*,[60] the petitioners argue that the Fangda Group could have instructed its tolling companies to submit their data to the Department directly.

Citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (CAFC 2003) (*Nippon Steel*), the petitioners argue that the use of total AFA is appropriate because it is reasonable for the Department to expect more forthcoming responses from the Fangda Group in reporting toller factor data requested by the Department when respondents in other cases were able to fully cooperate with respect to similar requests. The petitioners claim that the Fangda Group did not demonstrate a level of cooperation sufficient to ensure the reporting of accurate, complete, reliable, and verifiable toller factor data requested by the Department. Generally, in the petitioners' view, Fangda has not acted to the "best of its ability" pursuant to section 776(b) of the Act to comply with a request for information. The petitioners argue that the Fangda Group's effort to supply requested information did not rise to the standard set out by the *Nippon Steel* court, *i.e.*, one that requires a "maximum effort…to provide full and complete answers to all inquiries." [61]

The Fangda Group argues that the Department's reasoning for its application of neutral facts available in the *Preliminary Results* with respect to missing toller data is legally sound, fully supported by the administrative record, and should be followed in the final results. The Fangda Group argues that it identified all tollers used by each of the producing entities within the Fangda Group and documented, for each stage of production, the portions of output that were outsourced to each of the tollers. The Fangda Group asserts that it submitted on the record responses from uncooperative unaffiliated tollers. The Fangda Group asserts that the petitioners' analysis of the extent of the tollers' involvement is greatly overstated. The Fangda Group asserts that the petitioners' analysis does not consider certain affiliated tollers' data, for which FOPs were reported in this review by one of the Fangda Group's producing entities. Further, the Fangda Group asserts that the proper analysis of the tollers' involvement in each production stage must be done on a company-wide basis, as the Department did in the *Preliminary Results*. The Fangda Group contends that under this analysis, the Department's determination that the missing toller data accounted for a relatively small portion of the total FOPs, is supported by record evidence.

The Fangda Group asserts that the record clearly demonstrates that the unavailability of unaffiliated toller data was beyond the Fangda Group's control and that the company fully cooperated in this review. The Fangda Group asserts that there is no basis to determine that the company did not act to the best of its ability to provide data that the Department requested.

<u>Department's Position</u>: We continue to find that the application of AFA is not warranted. Section 776(a) of the Act provides that, subject to section 782(d) of the Act, we shall apply "facts otherwise available" if: (1) necessary information is not on the record, or (2) an interested

[60] *See Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From Mexico*, 77 FR 17422 (March 26, 2012) (*Refrigerators from Mexico*).
[61] *See Nippon Steel*, 337 F.3d at 1382.

party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Where we determine that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy or satisfactorily explain the deficiency within the applicable time limits, subject to section 782(e) of the Act, we may disregard all or part of the original and subsequent responses, as appropriate.

Section 776(b) of the Act further provides that we may use an adverse inference in applying 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. Such an adverse inference may include reliance on information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.

We specifically addressed this issue in the *Preliminary Results*.[62] During the POR of this review, the Fangda Group used a large number of unaffiliated tollers at certain stages of the production process for subject merchandise.[63] Given the large number of tollers, we limited our request for the FOPs of the Fangda Group's tollers to 15 companies.[64] The Fangda Group reported to us that it was unable to obtain the requested information from 12 of the companies.[65] As a result, we lack necessary FOP data and the application of "facts otherwise available" is warranted.

Pursuant to section 776(b) of the Act, we may use facts otherwise available with 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. The *Nippon Steel* court's "best of its ability" decision standard does not apply to the Fangda Group's tollers, rather it applies to the Fangda Group. The Fangda Group can only ask the tollers to provide information at a level of detail sufficient to answer our requests for information. The Fangda Group cannot compel its unaffiliated tollers to supply information because it does not control them. We do not consider toller non-compliance to be a failure to comply with a Department request for information by the Fangda Group. We do not find that the Fangda Group failed to cooperate with respect to obtaining the requested FOPs from its unaffiliated tollers and, accordingly, we are not drawing an adverse inference. The Fangda

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[62] *See Preliminary Results*, and accompanying Preliminary Decision Memorandum at 23-24; *see also* Memorandum to the File entitled, "Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Preliminary Results Analysis Memorandum for the Fangda Group," dated March 18, 2014 at 6-7 (Fangda Prelim Analysis Memo).
[63] *See* Fangda Prelim Analysis Memo at 6.
[64] *See* the Department's supplemental questionnaire, dated November 21, 2013, at 11-12.
[65] *See* Fangda Group's response, dated December 31, 2013, at 17 (SQR1) (Chengdu Rongguang reported FOP tolling supplier data for five unaffiliated companies for its graphitization process); *see also* Fangda Group's response dated, March 6, 2014, at 7 (SQR2) (Chengdu Rongguang and Fangda Carbon reported FOP tolling supplier data for their affiliate, Fushun Fangda High and New Material Co., Ltd., for the calcination of raw petroleum coke).

Group identified its tollers, in response to our request to do so and documented its unsuccessful attempts to obtain the requested toller FOPs.[66] We did not request the Fangda Group to make further attempts to obtain the tollers' data.

The fact pattern present in this review with respect to the Fangda Group and our decision to rely on neutral facts available for missing FOP data for tollers is similar to that in *Photovoltaic Cells from the PRC*.[67] There, we relied on the respondent's reported FOP data for the same processing that was performed by non-reporting tollers as neutral facts available for missing data from tollers, reasoning that "the respondent had a number of tollers, the impact of the unreported toller data was relatively small, and the respondent performed a process identical to that performed by the tollers."[68]

For the final results of this review, we continue to find that the Fangda Group cooperated and acted to the best of its ability to comply with our request for information. We find that, (i) the Fangda Group voluntarily provided FOP information from five unaffiliated tollers that performed one step in the production process for a Fangda Group producing entity (and for one affiliated toller that performed one step in the production process for two Fangda Group producing entities);[69] (ii) the FOPs of the non-reporting tollers account for relatively small portion of the total FOPs during the POR; [70] and (iii) there is usable FOP information on the record that can serve as a substitute for the missing FOP information. For these reasons, consistent with our practice in *PRC Service Valves*, *SDGEs 1*, and *SDGEs 3* we are applying neutral facts available.[71] Specifically, we are using the Fangda Group's own FOPs to value FOPs that Fangda Group unaffiliated tollers were unwilling to provide where the Fangda Group performed the remaining portions of the processes that were partially outsourced, as well as FOPs from unaffiliated and affiliated tollers that the Fangda Group submitted voluntarily for certain other production steps.

We find that it is appropriate to aggregate the toller data for the Fangda Group as a whole because we treat the individual companies[72] within the Fangda Group as a single entity pursuant to 19 CFR 351.401(f)(1).[73]

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[66] *See* SQR1, at 26-27.

[67] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part*, 77 FR 63791 (October 17, 2012) (*Photovoltaic Cells from the PRC*), and accompanying Issues and Decision Memorandum at Comment 19.

[68] *Id*.

[69] *See* footnote 16 above.

[70] *See* Fangda Prelim Analysis Memo at 6.

[71] *See, e.g., 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) (*PRC Service Valves*), and accompanying Issues and Decision Memorandum at Comment 12; *see also Electrodes 1 Final*, and accompanying Issue and Decision Memorandum at Comment 9,unchanged in *Electrodes 1 Amended Final* and *Electrodes 3*.

[72] These companies are Beijing Fangda, Chengdu Rongguang, Fangda Carbon, Fushun Carbon, and Hefei Carbon.

[73] *See* footnote 1 supra.

For these reasons, we continue to find that the necessary information is not available on the record, thus necessitating the use of the facts available. However, Fangda Group cooperated to the best of its ability and, therefore, an adverse inference is not warranted.

Comment 7: Treatment Irrecoverable Value-Added Taxes

The Fangda Group argues that the VAT methodology adopted by the Department in the *Preliminary Results*, where it reduced U.S. export price (EP) by the total irrecoverable value-added tax (VAT) , is contrary to 17 years of consistent agency practice. The Fangda Group states that between the issuance of *Russian Magnesium* and the *Methodological Change,* it was the Department's practice not to make any deductions from U.S. price to account for any export taxes imposed by NME countries upon exportation of subject merchandise to the United States.[74] Fangda Group states that in *Magnesium Corp. of America v. United States*, 166 F.3d 1364, 1370-71 (CAFC 1999) (*Magnesium Corp.*) the court found that:

> 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 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 economy principles. See {section 772(18) of the Act} (defining market economy). 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.{Fangda Group emphasis removed}

Fangda Group argues that the Department recognized this decision as controlling precedent and further that in *Silicon Metal* it subsequently determined and the Court of International Trade (CIT) upheld its finding that section 772(c)(2)(B) also did not permit the deduction from U.S. prices of VAT taxes.[75] Fangda argues that since Congress has not passed a law to overturn the CIT's and Court of Appeals for the Federal Circuit's (CAFC's) determinations in *Magnesium Corp.* and *Globe Metallurgical*, the CAFC's determination that the plain language of section 772(c)(2)(B) of the Act does not permit the Department to deduct export taxes or un-refunded VAT taxes from U.S. price remains controlling law and should be followed in the final results.

Fangda Group argues that the Department's preliminary deduction of non-refunded VAT from U.S. price is a violation of section 772(c)(2)(B) of the Act read in conjunction with section 771(18)(A) of the Act in light of *Chevron U.S.A., Inc. v. Natural Resources Defense Council,*

[74] *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) (*Methodological Change*) and *Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation*, 60 FR 16440 (March 30, 1995) (*Russian Magnesium*).

[75] *See Silicon Metal from the People's Republic of China*, 75 FR 1592 (January 12, 2010) (*Silicon Metal*) and accompanying Issues and Decision Memorandum at Comment 1 (*Silicon Metal*), which was upheld by the CIT in *Globe Metallurgical, Inc. v. United States*, 781 F. Supp. 2d 1340, 1348 (CIT 2011) (finding that *Magnesium Corp.* is still binding with respect to our practice of not applying section 772a(c)(2)(B) of the Act within AD NME proceedings) (*Globe Metallurgical*).

Inc., 467 U.S. 837 (1984) (*Chevron*).[76] Fangda Group argues that where the statutory language is clear and unambiguous, the Department has no discretion to interpret the statue in a manner contrary to its own terms, and that it has done so by reinterpreting standing agency practice and controlling judicial interpretation of section 772(c)(2)(B) of the Act under which it did not deduct export taxes, duties, and charges imposed upon the exportation of the subject merchandise from NME countries.[77] Fangda Group argues that the Department impermissibly reinterpreted section 772(c)(2)(B) of the Act to enable the deduction from U.S. price, not only export taxes that are imposed by NME countries, but also to deduct from U.S price internal VAT taxes that are not rebated by NME countries upon export. Specifically, in Fangda Group's view, considering the first prong of the *Chevron* analysis, section 772(c)(2)(B) of the Act read in conjunction with section 771(18)(A) of the Act does not permit the Department to "deduct any export taxes, duty or other charge imposed by the exporting country on the exportation of subject merchandise to the United States" in the context of an NME proceeding.[78]

Fangda Group claims that VAT is not an export tax, export duty, or other export charge and that other deductions from U.S. price are not permitted. Fangda Group explains that VAT is as an internal pass through tax paid on inputs purchased to produce subject merchandise and collected on domestic sales. In its view, the PRC government assesses VAT on sales made by a company, minus the VAT that the company paid for inputs and that VAT is not imposed by the PRC government upon the export of subject merchandise. Fangda Group states that the VAT rate for exported merchandise is zero percent because exports are exempt from VAT taxes.[79] Fangda Group argues that no VAT was added to the invoice sales price to its U.S. customers.

Fangda Group argues that, in *Methodological Change*, we stated that our new approach was to reduce U.S. price "by the amount of export taxes and similar charges, including" VAT "not rebated upon export" and that we explained away the marked differences in these two types of taxes by stating that "the un-refunded VAT or affirmatively imposed export tax only arises through the fact that there were export sales…As a result, because the liability arises as a result of export sales, this is where the payment originates."[80] Fangda Group asserts that VAT does not arise through exportation.

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[76] The CAFC describes the test based on *Chevron* in *Wind Tower Trade Coalition v. United States*, 741 F.3d 89 (CAFC 2014) ("When a court examines the lawfulness of Commerce's statutory interpretations, it employs the two-prong test established in *Chevron* at 842-5: The court first examines 'whether Congress has directly spoken to the precise question at issue' and if so, the agency and the Court must comply with Congress's clear intent. If, however, 'the statute is silent with respect to the specific issue,' a prong-two analysis is warranted, under which the court must determine 'whether the agency's answer is based upon a permissible construction of the statute…To determine whether Commerce's interpretation is permissible, the court may look to the express terms of the provision at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole.'" (citations omitted)).

[77] *See Dorbest v. United States*, 604 F.3d 1363, 1371 (CAFC 2010) ("Where the intent of Congress is clear from the language of the governing statute, neither the agency interpreting the statute nor this court may interpret the statute in such a way as to deviate from Congress's intent")

[78] Fangda argues that under the second prong of *Chevron* our reinterpretation of the statue is overly broad, *i.e.*, has impermissibly expanded the coverage of section 772(c)(2)(B) to include any internal VAT that is not rebated upon export, and contrary to the plain and unambiguous language of the statute.

[79] *See* Fangda Group third supplemental questionnaire response, dated March 10, 2014, at 1 and Exhibit 1.

[80] *See Methodological Change,* 77 FR at 36482-3.

Additionally, Fangda Group contends that the Department based its change in practice with respect to deductions from U.S. sales price on our reinterpretation of the countervailing duty (CVD) law,[81] a reinterpretation of the law which was struck down by the courts.[82] In its view, the Department only derived the authority to apply CVD law to NME countries from a change in the statute (the addition of section 777a(f) of the Act), and the statutory change did not cover deductions from U.S. price in the NME AD setting. Therefore, according to Fangda Group, *Magnesium Corp.* is still applicable and the Department should not deduct non-refunded VAT from U.S. price for the final results.

The petitioners argue that the Department should continue to deduct the un-refunded VAT from the U.S. price. The petitioners reiterate at length the Department's position in *Prestressed Wire* in which it described un-refunded VAT, as "a net VAT burden that arises solely from, and is, specific to exports" because un-refunded VAT "is a cost that arises as a result of export sales." The petitioners continue to rely on the Department's position in *Prestressed Wire* to explain that un-refunded VAT "is set forth in Chinese law and, therefore, can be considered to be 'imposed' by the exporting country on exportation of subject merchandise" and further that an adjustment for un-refunded VAT "achieves what is called for under section 772(c)(2)(B) of the Act, as it reduces the gross price charged to the customer to a net price received."[83] In the petitioners' view, the Department properly calculated an amount of un-refunded VAT in this review. Further, the petitioners point out that *Prestressed Wire* also dealt with the Fangda Group's argument that the change in the Department's practice with respect to section 772(c)(2)(B) of the Act is impermissible even after the addition of section 777a(f) of the Act.[84]

<u>Department's Position</u>: For the reasons explained below, in the final results, we continue to deduct from the reported U.S. prices an amount for the un-refunded (herein irrecoverable) VAT. As explained in the *Preliminary Results,* and accompanying Preliminary Decision Memorandum at 19, in 2012, we announced a change of methodology with respect to the calculation of the EP and constructed export price (CEP) to include adjustments of any un-refunded VAT in certain NMEs in accordance with section 772(c)(2)(B) of the Act.[85] In the 2012 announcement, we stated that when an NME government imposes an export tax, duty, or other charge on subject merchandise, or on inputs used to produce subject merchandise, from which the respondent was not exempted, the Department will reduce the respondent's EPs and CEPs accordingly by the amount of the tax, duty or charge paid, but not rebated.[86] In a typical VAT system, companies

[81] *Id*., 77 FR at 36482 ("Pursuant to its determination that subsidies from certain NME companies can be identified and measured, the Department has reconsidered its administrative practice that taxes paid by NME companies to these NME governments cannot be identified and measured.")
[82] *See GPX International Tire Corp. v. United States*, 666 F.3d 732 (CAFC 2011) (*GPX International*).
[83] *See Final Determination of Sales at Less Than Fair Value: Prestressed Concrete Steel Rail Tie Wire from the People's Republic of China*, 75 FR 25572 (May 5, 2014) (*Prestressed Wire*), and accompanying Issues and Decision Memorandum at Comment 1.
[84] *Id*. ("Given the changes in our practice with regard to the PRC and Vietnam (*i.e.*, the application of the CVD law), we are simply acknowledging that we can now apply section 772(c)(2)(B) of the Act in proceedings involving merchandise from the PRC and Vietnam to ensure tax neutrality in our dumping margin calculations" {*footnote omitted*})
[85] *See also Methodological Change.*
[86] *Id*., 77 FR at 36483; *see also Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 4875 (January 30, 2014) and accompanying Issues and Decision Memorandum at Comment 5.A.

do not incur any VAT expense for exports; upon export they receive a full rebate of the VAT which they paid on purchases of inputs used in the production of exports (input VAT), and, in the case of domestic sales, the company can credit the VAT they paid on input purchases for those sales against the VAT they collect from customers.[87] That stands in contrast to the PRC's VAT regime, where a portion, or all of, the input VAT that a company paid on purchases of inputs used in the production of exports is not refunded.[88] This amounts to a tax, duty or other charge imposed on exports that is not imposed on domestic sales. Where the irrecoverable VAT is a fixed percentage of EP, we explained that the final step in arriving at a tax neutral dumping comparison is to reduce the U.S. EP downward by this same percentage.[89]

We disagree with the Fangda Group's claims that we do not have the statutory authority to adjust for irrecoverable VAT, or that our methodology unlawfully re-interprets section 772(c)(2)(B) of the Act. Section 772(c)(2)(B) of the Act authorizes us to deduct from EP or CEP the amount, if included in the price, of any "export tax, duty, or other charge imposed by the exporting country on the exportation" of the subject merchandise. The Fangda Group argues that PRC VAT is not an export tax, duty or charge, but it misstates what is at issue. The issue is the irrecoverable VAT, not VAT *per se*. In this context, irrecoverable VAT, as defined in PRC law, is a net VAT burden that arises solely from, and is specific to, exports.[90] It is VAT paid on inputs and raw materials (used in the production of exports) that is non-refundable and, therefore, a cost. Irrecoverable VAT is, therefore, an "export tax, duty, or other charge imposed" on exportation of the subject merchandise to the United States.[91] The statute does not define the term(s) "export tax, duty, or other charge imposed" on the exportation of subject merchandise.[92] We find it reasonable to interpret these terms as encompassing irrecoverable VAT because irrecoverable VAT is a cost that arises as a result of export sales. It is set forth in PRC law as a cost of exported goods[93] and, therefore, can be considered to be "imposed" by the exporting country on exportation of subject merchandise.[94] Further, an adjustment for irrecoverable VAT achieves what is called for under section 772(c)(2)(B) of the Act, as it reduces the gross U.S. price charged to the customer to a net price received. This deduction is consistent with our longstanding policy, which is consistent with the intent of the statute, that dumping margin calculations be tax-neutral.[95]

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[87] *See, e.g., Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 26712 (May 9, 2014) (*Wood Flooring*), and accompanying Issues and Decision Memorandum at Comment 3, and *Methodological Change*, 77 FR at 36483.
[88] *See* "Notice of the Ministry of Finance and State Administration of Taxation, on the Policies of Value-added Tax and Consumption Tax Applicable to Exported Goods and Services," CAISHUI (2012) No. 39 (*Circular 39*), which is in Fangda Group's section C response dated April 24, 2013, at Exhibit S3-5.
[89] *See Methodological Change*, 77 FR at 36483.
[90] *See Diamond Sawblades and Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 35723 (June 24, 2014) (*Diamond Sawblades*), and accompanying Issues and Decision Memorandum at Comment 6.
[91] *Id.*
[92] *Id.*
[93] *See* Article 5(3) of Circular 39 that states, "(3) Where the Tax Refund Rate is lower than the applicable tax rate, the amount of tax calculated according to the difference in rates shall be included in the costs of the Exported Goods and Services."
[94] *Id.*
[95] *Id., Methodological Change*, 77 FR at 36483, and *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27369 (May 19, 1997) (citing Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-106, vol. 1, 827, reprinted in 1995 U.S.C.C.A.N. 3773, 4172).

Our deduction of product-specific irrecoverable VAT from the price of the subject merchandise is a reasonable and accurate methodology because the export tax, duty, or other charge is a product-specific expense that is directly linked with the exportation of the subject merchandise. Further, our reliance on a standard formula provided for under PRC tax law and regulation[96] and record evidence that the VAT rate applicable to the merchandise under consideration is 17 percent and the VAT refund rate is zero percent,[97] is a straightforward, consistent, and verifiable method to make this adjustment under section 772(c)(2)(B) of the Act.

We disagree with the Fangda Group's assertion that this methodology unlawfully interprets section 772(c)(2)(B) in light of *Magnesium Corp.* and *Globe Metallurgical*. As explained in *Methodological Change*, the CAFC in *Magnesium Corp.* did not find that we could not apply section 772(c)(2)(B) of the Act in an NME context.[98] It simply agreed with our stated rationale at the time for not doing so, which we applied in a context different from the economies of the present-day PRC. Given the realities of the PRC's economy today, our understanding of the phrase "if included in such price" in section 772(c)(2)(B) of the Act has evolved accordingly.[99] Thus, the change in methodology is the consequence of the inapplicability of the reasoning of *Russian Magnesium* to the PRC.

Furthermore, Fangda Group's reliance on *GPX International* is misplaced as that opinion of the CAFC never became final.[100] Moreover, the legislation referred to by Fangda Group, Public Law 112-99, which simply reflected our practice and the existing statutory intent to apply CVD law to NME countries, was in effect at the time of the *Methodological Change*.[101] In any event, the relevant point here is that the same economic changes within the PRC that made application of the CVD law possible also made a valuation of irrecoverable VAT possible. This has nothing to do with the CVD statutory provisions, and Fangda Group has done nothing to rebut this economic point. Therefore, our reliance upon these economic changes in promulgating the *Methodological Change* remains valid. To the extent that Fangda Group contends that legislation is required before we could effectuate the *Methodological Change*, that logic is mistaken. As noted above, *Magnesium Corp.* and *Globe Metallurgical* did not preclude us from making the necessary adjustment if warranted by applicable facts.

As explained earlier, the methodological change in VAT calculation is supported by long-standing Department practice and statutory intent to ensure that dumping comparisons be tax-neutral.[102] Our decision to deduct irrecoverable VAT from the Fangda Group's EP in this

[96] *See* Fangda Group's March 10, 2014 response (SQR3) at Exhibit S3-5 citing to Circular 39.
[97] *See* SQR3 at 2.
[98] *See Methodological Change,* 77 FR at 36484.
[99] *Id.,* 77 FR at 36482 ("{T}he present-day Chinese and Vietnamese economies are sufficiently dissimilar from Soviet-style economies that the Department can determine whether the Chinese or Vietnamese governments have bestowed an identifiable and measurable benefit upon a producer, and whether the benefit is specific, including certain measures related to taxation.").
[100] *See GPX International v. United States,* 678 F.3d 1308 (CAFC 2012).
[101] *See* Legislative History of Public Law No. 112-99, 158 Cong. Rec. H1166-06 (March 6, 2012) (statement of Rep. Levin)("Commerce has always had the authority to apply countervailing duties to nonmarket economies such as China…").
[102] *See Methodological Change,* 77 FR at 36483.

segment of the proceeding is consistent with our current VAT policy and our treatment of VAT in recently completed NME cases.[103]

Comment 8: Surrogate Value for Reintroduced Forming Scrap By-Product

Fangda Group explains that forming scrap is made primarily of calcined petroleum coke combined with needle coke, reintroduced forming scrap, graphite scrap, modified coal tar pitch, and stearic acid.[104] Fangda Group also explains that needle coke is a premium-quality calcined petroleum coke and that the three highest power types of SDGEs require increasingly larger ratios of needle coke to calcined petroleum coke to achieve the power performance standards of these grades of SDGEs.[105] Fangda Group argues that some of the needle coke necessary to produce the three highest power types of SDGEs can only be sourced from the United States, the United Kingdom and Japan.[106]

Fangda Group indicates that it self-produced calcined petroleum coke from raw petroleum coke (plus energy and labor) and claims that the Department properly calculated normal value using Fangda Group's reported FOPs for self-produced inputs including calcined petroleum coke.[107] Additionally, Fangda Group acknowledges that the Department properly identified its reported FOPs for forming scrap as a type of calcined petroleum coke by-product and properly valued it using the appropriate HTS 2713.12 "Petroleum Coke, Calcined." Fangda Group argues that in the previous review the Department used this HTS category to value calcined petroleum coke. Fangda Group argues that it replaces calcined petroleum coke with forming scrap in the forming stage of production. Fangda Groups argues, however, that the Department's valuation of Fangda Group's reintroduced by-product, forming scrap, in the current review is valued with an aberrationally high Ukrainian value of HTS 2713.12. In Fangda Group's view, the POR Ukrainian value of HTS 2713.12 (1820.86 USD/MT) is essentially equal to the weighted-average

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[103] *See Prestressed Wire*, and accompanying Issues and Decision Memorandum at Comment 1, *Wood Flooring* and accompanying Issues and Decision Memorandum at Comment 3, *Chlorinated Isocyanurates* and accompanying Issues and Decision Memorandum at Comment 5A, and *Diamond Sawblades* and accompanying Issues and Decision Memorandum at Comment 6.

[104] *See* SQR2 at Exhibit S2-D3 - Chengdu Rongguang forming worksheet.

[105] *Id.*, at Exhibit SD-2 - Fangda Carbon forming worksheet, and Exhibit SD-3 - Chengdu Rongguang forming worksheet.

[106] *See* Fangda Group letter entitled "Small Diameter Graphite Electrodes from China: Post-Preliminary Submission of Surrogate Value Information," dated April 14, 2013{sic} (submitted to IA ACCESS, April 14, 2014) (Fangda Group Post-Prelim SV) at Attachment 1 (stating that the United States, the United Kingdom, and Japan "dominate" oil based needle coke production. The PRC is the largest coal based needle coke producer); *see also* SQR2 at 7-8 (needle coke sourced from the PRC is also used in the production process).

[107] The inputs for producing calcined petroleum coke are raw petroleum coke, electricity, and labor. *See, e.g.*, SQR2 at Exhibit S2-D2 - calcined petroleum coke worksheet. The surrogate value for raw petroleum coke is 243.83 USD/MT. *See* Memorandum to the File entitled "Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Selection of Surrogate Values" dated March 18, 2014 (Prelim Surrogate Value Memo) at Exhibit 6.

market economy price it paid for imported premium-quality needle coke (1876.00 USD/MT).[108] Fangda Group argues that forming scrap is predominantly calcined petroleum coke and for the final results a surrogate value for forming scrap reflective of its commercial value should be substituted for Ukrainian HTS 2713.12.

Fangda Group argues that it is the Department's practice when selecting the best information available for valuing FOPs in accordance with section 773(c)(1) of the Act to select surrogate values which are product specific, representative of a broad-market average, publicly available, contemporaneous with the POR, and free of taxes and duties.[109]

Fangda Group argues that the Department and the courts have previously recognized that it is not reasonable to use a surrogate price for a by-product when the proposed surrogate price is valued greater than the surrogate value of the input.[110] In its view, for the final results, the Department should cap the surrogate value of forming scrap with the calculated buildup of the surrogate value of its self-produced calcined petroleum coke (which is produced by heating raw petroleum coke) internal to the buildup for SDGEs. Fangda Group claims: (1) that the calculated build-up for calcined petroleum coke is several times lower than the value of HTS 2713.12 used to value forming scrap in the *Preliminary Results*, and (2) because, in its view, forming scrap predominantly contains calcined petroleum coke, capping the surrogate value of forming scrap at the value of self-produced calcined petroleum coke would be product specific, rational, and reasonable.[111] In its view, continuing to use the basket category HTS 2713.12 which contains all forms of calcined coke is not product-specific, neither is it a rational nor reasonable method for valuing forming scrap, and Ukrainian HTS 2713.12 should not be relied on because there is more

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[108] *See* Prelim Surrogate Value Memo at Exhibit 1. Fangda Group argues that Ukrainian imports of HTS 2713.12 are skewed toward the value of needle coke because they include purchases from each of the three international producers of needle coke: the United States, the United Kingdom and Japan. Fangda Group holds that Ukrainian import prices of HTS 2713.12 are 2,710 USD/MT from Japan, 2,350 USD/MT from the U.K., and 24,550 USD/MT from the United States, and those purchases from these three countries amount to more than 50 percent of Ukrainian imports of HTS 2713.12. It also contends that Ukrainian imports of HTS 27131.12 from Germany, Italy, the Netherlands and Slovakia, countries which do not produce needle coke, were valued at 949 USD/MT. *See* Prelim Surrogate Value Memo at Exhibit 6 for prices from countries.

[109] *See Certain Preserved Mushrooms from the People's Republic of China: Final Results of the Antidumping Duty Administrative Review*, 77 FR 55808 (September 11, 2013) and the accompanying Issues and Decision Memorandum at Comment 3. (Additionally, decisions are not based on a hierarchy but are product- and case-specific).

[110] *See, e.g.*, *Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 47587 (August 14, 2008) (*Wire Hangers*) (in which the Department declined to use a price for a by-product which exceeded the value of the input); *see also Blue Field (Sichuan) Food Industrial Co., Ltd, v. United States*, 949 F. Supp. 2d 1311, 1327, (CIT 2013) (*Blue Field*) (in which the court found that it is not reasonable for the Department to use a price for a rice by-product that is twice as high as the price of rice).

[111] Fangda Group stresses the importance of product specificity in the surrogate value selection process citing, *e.g.*, *Longkou Haimeng Machinery Co., Ltd. v. United States*, 581 F. Supp. 2d 1344, 1363 (CIT 2008), and *Taian Ziyang Food Company Ltd. v. United States*, 783 F. Supp. 2d 1292 (CIT 2013) citing Department Policy Bulletin No. 04.1: Non-Market Economy Surrogate Country Selection Process (March 1, 2004) Policy Bulletin 04.1 ("…'product specificity' logically must be the primary consideration in determining 'best available information.' If a set of data is not sufficiently 'product specific, it is of no relevance whether or not the data satisfy the other criteria'"). Further, Fangda Group cites, *e.g.*, *Zhengzhou Harmoni Spice Company Co., Ltd. v. United States*, 617 F. Supp. 2d 1281, 1297 (CIT 2009) ("The statutory objective of calculating dumping margins as accurately as possible can be achieved only when Commerce's choice as to what constitutes the best available information evidences a rational and reasonable relationship to the factor of production it represents.")

reliable information available.[112] In Fangda Group's view, the Department properly valued imported and domestic needle coke separately. Fangda Group argues that Ukrainian HTS 2713.12 contains data reflective of both needle coke and calcined petroleum coke and is, therefore, not specific to consumption of FOPs for forming scrap, employing this valuation overstates normal value, and that the data is not reasonably representative in light of the *Jinan Yipin* court's disdain for broad basket categories where more representative surrogate data are available.[113]

In lieu of using a calculated buildup of calcined petroleum coke to value forming scrap, Fangda Group suggests that the Department find the Ukrainian value of HTS 2713.12 to be aberrational on the basis that it comprises predominately imports of needle coke[114] and instead uses data from countries not on the surrogate country list to value forming scrap. Fangda Group argues that while it is the Department's preference to use surrogate prices from countries that are at the same level of economic development as the PRC, the Department is not prohibited from considering surrogate prices from other countries because section 773b(c)(4) of the Act requires that it use surrogate prices from countries at a level of economic development comparable to the PRC only "to the extent possible."[115] Fangda Group reported price data from sources other than the Global Trade Atlas (GTA) ranging in value from 350 USD/MT to 700 USD/MT and specifically for global and country specific calcined petroleum coke EPs because, in its view, prices for calcined petroleum coke are more specific to forming scrap than Ukrainian HTS 2713.12.[116] Fangda Group argues that in other cases the Department rejected less-specific GTA data and instead selected surrogate value information placed on the record that was more specific to the import in question.[117] Finally, Fangda Group argues that, if it is the Department's preference to use a value from a country at the same level of economic development as the PRC, then it should choose a value from Colombia (1,084 USD/MT), Indonesia (605 USD/MT), the Philippines (161 USD/MT), South Africa (514 USD/MT), or Thailand (201 USD/MT).

Fangda Group also argues that the overall volume of imports into Ukraine is aberrational because at 442 MT, it is small compared to Indonesia, the Philippines and Thailand which imported

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[112] *See*, *e.g.*, *PRC CVP 23* and accompanying Issues and Decision Memorandum at Comment 3 (basket tariff provisions "were unsuitable for valuation purposes where a more representative surrogate existed") and *Freshwater Tail Meat from the People's Republic of China; Final Results of New Shipper Review*, 64 FR 27961, 27962 (May 24, 1999) ("import data from basket categories can be too broad to be reliable").
[113] *See Jinan Yipin Corporation Ltd. v. United States*, 800 F. Supp. 2d 1226, 1296 (CIT 2011) (*Jinan Yipin*) the court found it "inappropriate to rely on import statistics based on a broad, 'basket' tariff provision when more representative surrogate data are available.").
[114] *See* footnote 25 *supra*.
[115] *See Dupont Teijin Films v. United* States, 931 F. Supp. 2d 1297 (CIT 2013) (*Dupont Teijin Films*) (The statute only requires the Department to value inputs with prices from countries determined to be at a comparable level of economic development "to the extent possible") and *Blue Field* at 1330.
[116] *See* Fangda Group Post-Prelim SV at Attachment 4 (CRU Monitor - export prices and quantities of calcined petroleum coke from United States, Germany, and China to major trading partners) and Attachment 5 (Alibaba.com - calcined petroleum coke offerings from Cameroon, Romania, and India with prices).
[117] *See*, *e.g.*, *Certain Preserved Mushrooms from China; Final Results of Antidumping Administrative Review and Rescission in Part*, 76 FR 56732 (September 14, 2011), and accompanying Issues and Decision Memorandum at Comment 2 (where the exact contents of an HTS category were unknown and we opted for more specific information).

between 53,534 MT and 61,569 MT and South Africa which imported 207,682 MT{sic}.[118] Fangda Group argues that the courts have found that 1) the Department must ensure that a small quantity does not create an aberrational price,[119] 2) a very small quantity of imports triggers an obligation for the Department to explain why the data is not aberrational and why it is reliable and non-distortive,[120] 3) it is not the Department's practice to use,[121] and the court discourages using, distorted surrogate values,[122] and 4) the Department's determinations are not supported by substantial evidence if they do not reflect economic reality.[123]

The petitioners argue that the Department properly valued forming scrap. They state that there are many steps and many inputs involved in the production of an intermediate formed electrode and its by-product forming scrap.[124] The petitioners argue that, while the statute is silent on the treatment of scrap, the Department's practice is to allow offsets for scrap that is sold or reintroduced into the production process[125] and that the Department's practice of establishing the "best information available" for valuing FOPs, is to select, to the extent practicable, surrogate values which are publicly available, product-specific, representative of a broad market average, tax-exclusive, and contemporaneous with the POR.[126]

The petitioners further argue that the Department's practice is to value scrap with the HTS category most representative of the input,[127] and that it has done so in this case to value forming scrap because the category description expressly includes "petroleum coke, calcined," which arguably includes imports of calcined petroleum coke and needle coke that are necessary for the production of graphite electrodes. The petitioners acknowledge that the HTS category also likely includes certain non-anode grade and anode grade calcined petroleum coke not usable in the production of graphite electrodes, but which lower the value of the surrogate value. The petitioners argue that Fangda Group acknowledged that forming scrap is composed of calcined petroleum coke and needle coke and that these are the same materials that makeup HTS 2713.12 and therefore this HTS category is the most specific HTS category to value forming scrap.

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[118] Fangda reported that the total value of imports into South Africa for the POR were 245,682 MT in Fangda Group Post-Prelim SV at Attachment 2.
[119] *See Shanghai Foreign Trade Enterprise Co., Ltd. v. United States*, 318 F. Supp. 2d 1339, 1353 (CIT 2004).
[120] *See*, *e.g.*, *Xinjiamei Furniture (Zhangzhou) Co., Ltd v. United States*, Slip-Op 13-30 at 13 (CIT March 12, 2013).
[121] *See Antidumping Duties*, *Countervailing Duties*, 62 FR 27296, 27366 (May 19, 1997) ("aberrational surrogate input values should be disregarded").
[122] *See*, *e.g.*, *Nation Ford Chemical Company v. United States*, 166 F.3d 1373, 1378 (CAFC 1999).
[123] *See Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F. 3d 1370, 1378 (CAFC 2013).
[124] *See* Fangda Group Section D questionnaire response, dated July 11, 2013, at Exhibit D-1 (Fangda QR-D).
[125] *See Certain Preserved Mushrooms from the People's Republic of China: Preliminary Results of the Eighth New Shipper Review*, 70 FR 42034, 42037 (July 21, 2005), unchanged in *Certain Preserved Mushrooms form the People's Republic of China: Final Results of the Eight New Shipper Review*, 70 FR 60789 (October 19, 2005) (*Mushrooms 8th New Shipper Review*).
[126] *See Electrolytic Manganese Dioxide From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 48195 (August 18, 2008), and accompanying Issues and Decision Memorandum at Comment 2.
[127] *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value* 74 FR 16838 (April 13, 2009) (*Citric Acid*), and accompanying Issues and Decision Memorandum at Comment 7 (in which a high-protein corn by-product generated as a result of a step in the production of Citric Acid, included not only corn as an input, but corn enzyme, sodium carbonate, sodium hydroxide, and steam, and therefore the by-product was not capped at the value of the corn input as in *Wire Hangers*).

The petitioners agree with the Fangda Group's proposition relying on *Wire Hangers* that the Department cannot "use a surrogate price for a by-product when the proposed surrogate price is valued greater than the surrogate value for the input product" but find it misleading in this context because forming scrap consists of more than just calcined petroleum coke. The petitioners compare the situation at issue to that in *Citric Acid* where a similar argument relying on *Wire Hangers* was rejected by the Department. In *Citric Acid*, high-protein corn by-product was derived from an industrial process with several inputs (plus the inherent manufacturing overhead) and the Department determined that the surrogate value for the by-product carries the cost of these inputs and the overhead costs associated with processing them and was therefore a more "reasonable result." The petitioners argue that the same is true for the value of Fangda Group's forming scrap because it is the result of a number of production processes and inputs, which include not only calcined petroleum coke as an input, but also includes needle coke, iron oxide powder, stearic acid, coal tar pitch, and forming scrap.[128] In its view the value of forming scrap should include the value of each of these inputs, plus labor, and manufacturing overhead and that for this reason we should not rely on the value of calcined petroleum coke but rather rely on Ukrainian HTS 2713.12 to value forming scrap.

The petitioners also argue that capping the value of forming scrap at the calculated result of Fangda Group's self-produced calcined petroleum coke is flawed because, again, this price would not capture the value of the other inputs required to produce forming scrap. Further, in the petitioners' view, Fangda Group is confusing the Department's valuation of self-produced intermediate inputs (where we value the purchased inputs required to make the intermediate) with the Department's valuation methodology for by-products. In its view forming scrap is not "produced" by Fangda Group, but it is merely unintended scrap from the production process, *i.e.*, a by-product. For this reason, the petitioners argue, the Department should follow our standard practice by valuing forming scrap at a publicly available value which is: 1) an average non-export value, 2) representative of a range of prices within the POR and contemporaneous to the POR, 3) product-specific, and 4) duty and tax exclusive. In the petitioners' view, HTS 2713.12 is the best information available. It meets the standard of product-specificity for selecting surrogate value and is more appropriate than other values suggested by the Fangda Group because HTS 2713.12 includes both needle coke and calcined petroleum coke.

In the petitioners' view, HTS 2713.12 is not a basket category, but a six-digit HTS category that is sufficiently specific to value forming scrap because it contains needle coke and calcined petroleum coke, both of which are required to make forming scrap, and therefore HTS 2713.12 is representative of the forming scrap inputs.[129]

The petitioners disagree with Fangda Group's argument that the Department should use the non-GTA data Fangda Group reported to value forming scrap because 1) it is inconsistent with Department practice to do so, 2) the Department used HTS 2713.12 to value calcined petroleum

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[128] *See* Fangda QR-D at Exhibit 1.

[129] *See Certain Preserved Mushrooms From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission in Part*, 76 FR 56732 (September 14, 2011), and accompanying Issues and Decision Memorandum at Comment 2 (In which the Department did not rely on HTS 3101.00 for animal fertilizer to value cow manure because the HTS category was too broad).

coke in the past, and 3) it is not specific to this review.[130] Additionally, the petitioners argue that the *Laizhou Auto* court regarded World Trade Atlas (WTA, now GTA) data as the best information available, whatever its failings, and determined that Department findings based on it were reasonable and based on substantial evidence because it is derived from a broader and more representative data source, being drawn from all imports into the country at issue compared to data from a limited set of producers from the same country.[131]

The petitioners reject Fangda Group arguments that the Department should use import data from another country that is on the surrogate country list because four of the five countries do not produce graphite electrodes and would therefore not import needle coke[132] and the Department specifically rejected the remaining country South Africa.[133] Additionally, the petitioners reiterated the Department's practice of selecting surrogate values from a single surrogate country.[134] The petitioners argue that for these reasons there is no valid reason to look to any other country for the value of forming scrap.

The petitioners argue that the Department should conclude that Ukrainian HTS 2713.12 is product-specific, representative of a broad-market average, publicly available, contemporaneous with the POR and free of taxes and duties and for these reasons it meets the Department's criteria for selecting the best information available and it should therefore continue to value forming scrap with Ukrainian HTS 2713.12.

<u>Department's Position</u>: Section 773(c)(1) of the Act stipulates that factor valuation shall be based on the best information available. Pursuant to 19 CFR 351.408(c)(1), we normally will use publicly-available information to value FOPs. Further, when selecting possible surrogate values for use in an NME proceeding, our practice is to use, to the extent practicable, prices that are non-export averages, product-specific, net of taxes and import duties, and contemporaneous with the POR.[135] There is no hierarchy for applying these criteria.[136] With that in mind, we first attempt to find publicly-available surrogate values from the primary surrogate country that are contemporaneous and representative of the factors being valued.[137] Thus, we must weigh the available information with respect to each input value and make a product-specific and case-specific decision as to what the best surrogate value is for each input.[138]

In applying our surrogate value selection criteria, we have found in numerous NME cases that import data from WTA, later GTA[139] represent the best information available for valuation

[130] The data are not contemporaneous with the POR, they represent a limited set of data referring only to the certain U.S. and European sales, they are not based on countries with comparable levels of economic development to the PRC, *i.e.*, the U.S. and Germany, and are not product specific because they are only for calcined petroleum coke.
[131] *See Laizhou Auto Brake Equipment Company v. United States*, 32 C.I.T. 211, Slip-Op. 08-71 at 14 (CIT 2008) (*Laizhou Auto*).
[132] *See* Prelim Surrogate Value Memo at 6.
[133] *Id.*, at 7.
[134] *Id.*, at 8.
[135] *See PRC CVP 23,* and accompanying Issues and Decision Memorandum at Comment 3.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] The GTA compiles Ukrainian import statistics from the State Customs Committee, Government of Ukraine. The data are available at <u>http://www.gtis.com/wta.htm</u>.

purposes because the GTA data are publicly-available, contemporaneous with the POR, tax-exclusive, product-specific, and broad market averages.[140]

SDGE production requires needle coke and calcined petroleum coke, as well as other inputs. Some of the needle coke required to produce SDGEs is sourced internationally because certain SDGE production requires premium quality needle coke. We valued both domestically and internationally sourced needle coke introduced into the SDGE production process according to Fangda Group's market economy purchases of needle coke. Fangda Group has not disputed our valuation of needle coke. Forming scrap is a reintroduced by-product that is created after the needle coke is introduced into the SDGE production process. Because forming scrap is reintroduced into the production process of a later production run, the value of the needle coke in the forming scrap can only be accounted for by valuing forming scrap with a surrogate value that contains needle coke. For this reason, it is not appropriate to value forming scrap only using calcined petroleum coke.

Fangda Group's output from the forming stage becomes electrode, pin, or forming scrap.[141] Fangda Group mixes all forming scrap together and there is no information on the record that indicates the breakdown of needle coke to calcined petroleum coke in forming scrap (additionally, information on the record is only for merchandise under consideration not all electrode production).[142] For these reasons, we valued forming scrap with HTS 2713.12 "Petroleum Coke, Calcined" because forming scrap contains both calcined petroleum coke and needle coke and it is the most product specific HTS category available. The surrogate value for HTS 2713.12 is sourced from GTA[143] and is therefore publicly-available, contemporaneous with the POR, tax-exclusive, and represents a broad market average. Parties agree that this is the appropriate HTS category to use to value forming scrap, but Fangda Group argues that the Ukrainian value of HTS 2713.12 is aberrational.

Because Fangda Group believes that the value of Ukrainian HTS 2713.12 is aberrational, it provided a selection of alternative valuations. Fangda Group argues that we should value the by-product, forming scrap, by building up a value of its self-produced input calcined petroleum coke. Parties requesting a by-product offset have the burden of presenting to the Department not only evidence that the generated by-product is sold or re-used in the production of the subject merchandise, but also all the information necessary for the Department to incorporate such offsets into the margin calculation.[144] In this instance, Fangda Group provided evidence that

[140] *See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of the 2007-2008 Administrative Review of the Antidumping Duty Order*, 75 FR 844 (January 6, 2010), and accompanying Issues and Decision Memorandum at Comment 2; *Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 66087 (December 14, 2009), and accompanying Issues and Decision Memorandum at Comments 1 and 4; and *First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 57995 (November 10, 2009) and accompanying Issues and Decision Memorandum at Comments 3c and 3f.

[141] A finished SDGE contains an electrode and a pin. All pins require imported needle coke to produce because they are made of the same formed electrode intermediate product (forming stage output) that SDGEs of the highest power level are.

[142] *See* Fangda QR-D at Exhibit 1 (forming scrap is not broken into separate types by power level).

[143] *See* Electrodes 3 SV Memo at Exhibit 6.

[144] *See, e.g., Mushrooms 8th New Shipper Review*, 70 FR at 42037.

forming scrap was reintroduced into the SDGE production process at kneading,[145] but it did not provide a reasonable method to value forming scrap beyond choosing a surrogate value for it. For this reason we continue to use the Ukrainian value of HTS 2713.12 for these final results. In this case, Fangda Group generates forming scrap at the end of the forming stage of SDGE production, an intermediate stage of producing a finished SDGE. Raw petroleum coke (which is first processed into calcined petroleum coke), needle coke (both domestically and internationally sourced varieties), reintroduced forming scrap, graphite scrap (from a later production stage), iron oxide powder, modified coal tar pitch, and stearic acid are all consumed in forming SDGEs.[146]

Additionally, labor and manufacturing overhead are consumed at every processing step and several other material and energy inputs are consumed as well. The forming stage of production requires several processing steps including: crushing, screening, burdening, kneading, and extrusion. These steps occur after the calcining of raw petroleum coke and a few other processes required to make the direct material and energy inputs required by the SDGE production process up to the forming stage. In choosing a surrogate value for forming scrap we followed our practice described in *Citric Acid*, whereby a by-product is valued as closely as possible to the sum of its parts. This practice recognizes that the value of some by-products is greater than the value of a single input to the process that creates them. We do not find it appropriate to cap the value of forming scrap at the value of calcined petroleum coke as argued by Fangda Group when relying on *Wire Hangers* because forming scrap is much more valuable than calcined petroleum coke. In a similar vein, *Blue Field* is not instructive for our purposes because the *Blue Field* court sought reasonableness in limiting the value of a by-product derived from a single input that was not reintroduced into the production process, where, in this instance, forming scrap is derived from many inputs and is reintroduced into the production process.

There is no other HTS category that captures more inputs consumed when forming scrap is created than HTS 2713.12. No party placed on the record information which would allow us to discern the composition of needle coke versus calcined coke (or other petroleum product) under Ukrainian HTS 2713.12 or for the same HTS category of another potential surrogate country. In fact, the record shows that it is not possible to determine the similarity between those imports and the makeup of forming scrap (which itself contains an unknown ratio of needle coke and calcined petroleum coke because the forming scrap from the production of different power levels of SDGE production is not kept separate, and that production information does not contain all electrodes produced). Furthermore, Fangda Group's argument about the overall volume of imports into Ukraine being aberrational is based on facts which differ from record evidence. Ukraine imported 4,422 MT of HTS 2713.12, not 442 MT as indicated in the Fangda Group's case brief.[147] Further, Fangda Group is only able to identify the import value by metric ton and total price from each of the "dominant" needle coke producing countries - the United States, the

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[145] *See* Fangda QR-D at Exhibit 1.
[146] *Id.*
[147] Compare Fangda Group's argument in its case brief entitled, "Small Diameter Graphite Electrodes from China; Case Brief of Fangda Carbon New Material Co. Ltd.," dated April 30, 2014 (Fangda Case Brief) at 17 ("Imports from Ukraine were only 442 MT during the entire POR") to the data in Prelim Surrogate Value Memo at Exhibit 6 at l699:l740 on the GTA – Original tab (4,421,747 kg/1000 = 4,422 MT).

United Kingdom, and Japan.[148] Imports from these countries into Ukraine amount to 50 percent[149] of the Ukrainian summary quantity of HTS 2713.12 and have an average unit value of 2,703 USD/MT while the Ukrainian value of HTS 2713.12 is 1820.86 USD/MT. Also, Fangda Group attempts to quantify the makeup of Ukrainian HTS 2713.12 by comparing the ratio of import values to quantities from each of these countries to the weighted average market economy price we established for needle coke based on Fangda Group market economy purchases. Fangda Group then attempts to conclude that all imports from these countries are so valuable that they must all be needle coke. If the same logic is applied to South African imports of HTS 2713.12 we find that 52 percent of imports come from a dominant provider of needle coke, the United States,[150] and the average unit value of these imports is 557 USD/MT while the South African value of HTS 2713.12 is 510 USD/MT.[151] We find that these suppositions and related calculations are not only contradictory, but inconclusive and insufficient to warrant a finding that the Ukrainian value of HTS 2713.12 is aberrational.

HTS 2713.12 is not a basket category with respect to forming scrap because it is specific to petroleum cokes which are calcined of both anode and non-anode grades, and specifically contains the two types of anode grade calcined cokes which are used to produce SDGEs. It is the most representative surrogate data available on the record and it is appropriate for use as a surrogate value for forming scrap. The *Jinan Yipin* court was concerned with choosing basket tariff categories over more representative data available on the record to value FOPs. As explained above, we have not done so in this case because we have chosen the most specific HTS category to forming scrap and the record lacks a more precise method for valuing the by-product. Here we have kept with our practice in *Citric Acid*, where we valued a complex reintroduced by-product by relying on the specificity of the HTS category chosen as the surrogate, and have not capped the value of the by-product at the value of the inputs required to produce the by-product when there was no way to directly compare the makeup of the specific HTS category chosen as surrogate to the makeup of the scrap. In other words, as explained above, HTS 2713.12 is specific to the by-product because it includes more of the inputs contained in forming scrap. It is therefore more appropriate to use the HTS 2713.12 data than to value the by-product by another method that relies solely on the value of calcined petroleum coke.

Fangda Group cites to section 773(c)(4) of the Act and to the *Blue Field* and *Dupont Teijin Films* decisions for the proposition that we must only use surrogate prices from countries at a level of economic development comparable to the PRC only "to the extent possible." However, section

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[148] The PRC is also a large producer of lower grade needle coke but PRC imports are dropped when calculating the surrogate value. *See* Fangda Group Post-Prelim SV at Attachment 1.

[149] Fangda Group claims that this value is <u>over</u> 50 percent; however, Ukraine imported 4,422 MT of HTS 2713.12 (no drops for PRC or high inflation economy imports) and imported 2,139 MT from Japan, 63 MT from the United Kingdom, and 0.04 MT from the United States. (2,139+63+0.04)/4,442 = 49.79%. *See* Fangda Case Brief at 12. For data, *see*, Petitioners' SV Comments at Attachment 1.

[150] South Africa imported 235,182 MT of HTS 2713.12 (excluding PRC originated imports 10,501 MT) and imported 122,355 MT from the United States and had no imports from the United Kingdom or Japan. 122,355/235,181 = 52.03%. For data, *see*, Petitioners' SV Comments at Attachment 1.

[151] *See* the petitioners' letter entitled "4th Administrative Review of Small Diameter Graphite Electrodes from the People's Republic of China – South African Surrogate Values," dated September 11, 2013 (Petitioners' SV Comments) at Attachment 1. These data are exclusive of the PRC and heavily subsidized economies.

773(c)(4) of the Act also requires that we only use data from countries that are "significant producers of comparable merchandise." In the preliminary results, we determined that South Africa and Ukraine fulfilled both of these criteria. However, we selected Ukraine as the surrogate country because it offered a full complement of information necessary to establish surrogate values and also provided publicly available financial statements. Further, we have not exercised the caveat to section 773(c)(4) of the Act because the non-GTA data supplied by the Fangda Group is not specific to forming scrap. Fangda Group data are specific to calcined petroleum coke and are therefore not as specific to forming scrap as the value of HTS 2713.12 which contains both needle coke and calcined petroleum coke. Additionally, each of the non-GTA data sources supplied by the Fangda Group is not 1) an average non-export value, 2) representative of a range of prices within the POR and contemporaneous to the POR, and 3) duty and tax exclusive. For these reasons, we find that that surrogate value information supplied by Fangda Group for countries other than South Africa and Ukraine is not valid for the purposes of selecting a surrogate value for forming scrap. It is also our practice to rely on surrogate value information from a single surrogate country.[152]

As discussed above, of the countries for which we have data, South Africa is the only other significant producer of graphite electrodes.[153] This is particularly relevant in this case because a significant producer of graphite electrodes likely imports needle coke to use in SDGE production. Furthermore, forming scrap predominantly contains needle coke and calcined petroleum coke and both of these inputs are captured under HTS 2713.12.

As indicated above, we do not find that, based on quantity alone, values under Ukrainian HTS category 2713.12 are aberrational. Ukraine exported 7,195.28 MT of HTS 8545.11 "Carbon Electrodes of a kind used in furnaces" in 2013[154] and imported 4,422 MT of HTS 2713.12 during the POR.[155] These Ukrainian imports are 61 percent of the volume of electrode exports. South Africa exported 11,261.78 MT of HTS 8545.11 during 2013[156] and imported 235,182 MT of HTS 2713.12 during the POR.[157] These South African imports are 2,023 percent the volume of electrode exports. First, as established above, the quantity of imports of HTS 2713.12 into Ukraine is 10 times that argued by the Fangda Group. Second, even though Ukrainian imports of HTS 2713.12 are only 1.9 percent the volume of those of South Africa, the ratio of Ukrainian imports of HTS 2713.12 to exports of HTS 8545.11 is not aberrationally small; rather the scale of Ukrainian imports of HTS 2713.12 represents a substantial volume of electrode exports. Because there is no definitive information on the record detailing the breakdown of products imported under HTS 2713.12 into either country nor is HTS 8545.11 specific to SDGEs, it is impossible to gauge production of SDGEs with record information or to gauge the mix of items imported under HTS 2713.12 in finer detail for Ukraine.

[152] *See* Prelim Surrogate Value Memo at 8 and 19 CFR 351.408(c)(2).
[153] We used HTS 8545.11 to determine which countries were significant producers of like product. *See* Electrodes 3 SV Memo at Exhibit 1.
[154] *Id.*
[155] *Id.*, at Exhibit 6.
[156] *Id.*, at Exhibit 1.
[157] *See* Petitioners' SV Comments at Attachment 1. These data are exclusive of the PRC and heavily subsidized economies.

Further, import statistics of HTS 2713.12 do not measure internal consumption of products characterized under this category because internal production is not captured in the data and export statistics for HTS 8545.11 do not capture internal consumption of items characterized as HTS 2713.12 because internal production of items characterized as HTS 8545.11 are not included in the data. There is no data on the record which captures either of the missing data types. For these reasons, there is insufficient information on the record to undertake more complex analyses proposed by the *Shanghai* court[158]to determine whether imports of HTS 2713.12 represent commercial quantities.[159] For all of these reasons, we find that the Ukrainian level of imports is not aberrationally small in light of the *Xinjiamei* court's finding.[160]

We find that HTS category 2713.12 is not distortive because it contains both of the predominant material inputs of the by-product in question, calcined petroleum coke and needle coke.[161] Furthermore, our use of HTS 2713.12 to value forming scrap is the least distortive method available to us. The record does not contain information that would allow us to calculate the ratio of calcined petroleum coke to needle coke in Fangda Group's forming scrap because all forming scrap is mixed together. We only know the consumption of FOPs for subject merchandise. The record does not contain information about the composition of imports in HTS 2713.12 which would allow us to compare the ratio of needle coke to calcined petroleum coke in forming scrap and HTS 2713.12. For these reasons, our determination that the Ukrainian value of HTS 2713.12 is non-aberrational with respect to value and scale because it is supported by the available record evidence.[162] To the extent that Fangda Group argued "economic reality," we note that the reality of the SDGE business is that it requires needle coke, and that needle coke is only available from a few producers. We incorporated a value for forming scrap that incorporates the value of needle coke to the extent possible with the information that is available to us on the record by using an HTS category under which needle coke is categorized. We have not valued forming scrap with a value that definitely excludes needle coke as suggested by the respondent's cap or with data from countries outside the realm of economic comparability to the PRC. The fact that the average unit values for two substantial producers, South Africa and Ukraine, differ substantially is not dispositive with respect to whether the values are aberrational because record information is not specific enough to the analyze these values to an extent further than we have accomplished.

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[158] *See Shanghai Foreign Trade Enterprise Co., Ltd. v. United States*, 318 F. Supp. 2d at 1353 (CIT 2004). (The court explained that Indian imports of 0.075 percent of total domestic consumption were aberrationally small, however, this case was dismissed after the remand was ordered by the court, at the behest of the plaintiffs.)

[159] Information that would allow us to better analyze commercial reality, *e.g.*, the breakdown of products imported and those produced domestically of items identifiable as HTS 2713.12 in Ukraine and South Africa (or country-wide consumption of the same); a breakdown of HTS 8545.11 (containing SDGEs) exports from Ukraine and South Africa and domestic consumption of the same items to gauge output in the surrogate country or better yet actual country-wide production summaries for items characterized under HTS 8545.11 and a measure of the breakdown of calcined petroleum coke and needle coke required to make each item.

[160] *See Xinjiamei Furniture (Zhangzhou) Co. v. United States*, Slip-Op 2013-30, March 11, 2013, unchanged in *Xinjiamei Furniture (Zhangzhou) Co., Ltd. v. United States*, 968 F. Supp. 2d 1255.

[161] *See*, *e.g.*, *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (CAFC 1999) (finding that we should "avoid using distorted surrogate values").

[162] *See Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F. 3d 1370, 1378 (CAFC 2013) (our determinations are not supported by supported by substantial evidence if they do not reflect economic reality).

The best information available to value forming scrap is Ukrainian imports of HTS 2713.12 because 1) all of the forming scrap used by Fangda Group in the production of SDGEs contains needle coke and calcined petroleum coke; 2) HTS 2713.12 covers both products, and likely contains imports of both; and, 3) the Ukrainian import data is publicly available, contemporaneous to the POR and duty and tax exclusive. Further, we selected Ukraine as the surrogate country and there is no reason to depart from our standard practice of valuing all surrogate values in the selected surrogate country.

Recommendation

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

Agree ✓ ________ Disagree ________

Ronald K. Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

September 19, 2014
(Date)